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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2016 WAIRC 00171

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 184 OF 2014 GIVEN ON 6 JULY 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2016 WAIRC 00171
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	WEDNESDAY, 2 DECEMBER 2015
DELIVERED	:	THURSDAY, 24 MARCH 2016
FILE NO.	:	FBA 8 OF 2015
BETWEEN	:	MS EVELINE WIYENKA FOMBASON Appellant AND KIMBERLEY INDIVIDUAL AND FAMILY SUPPORT ASSOCIATION INCORPORATED Respondent

ON APPEAL FROM:

Jurisdiction	:	Western Australian Industrial Relations Commission
Coram	:	Commissioner S J Kenner
Citation	:	[2015] WAIRC 00490; (2015) 95 WAIG 1434
File No	:	U 184 of 2014

CatchWords	:	Industrial Law (WA) - Appeal against decision of Commission - Harsh, oppressive or unfair dismissal referred - Claim dismissed - Appellant claimed breach of procedural fairness - Claimant engaged in secondary employment - Implied duty of good faith considered - No error demonstrated - Turns on own facts
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 26(1)(b), s 29(1)(b)(i), s 49(2)
Result	:	Appeal dismissed
Representation:		
Appellant	:	Mr J (Shey) Fombason, as agent
Respondent	:	Mr B R Jackson (of counsel)
<i>Solicitors:</i>		
Respondent	:	DLA Piper Australia

Case(s) referred to in reasons:

Blyth Chemicals Ltd v Bushnell [1933] HCA 8; (1933) 49 CLR 66

Cementaid (NSW) Pty Ltd v Chambers (Unreported, NSWSC, Library No BC9504439, 29 March 1995)

Health Services Union of Western Australia (Union of Workers) v Director General of Health [2008] WAIRC 00215; (2008) 88 WAIG 543

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

In re Loty and Holloway v Australian Workers' Union [1971] (NSW) 95

Michael v Director General, Department of Education and Training [2009] WAIRC 01180; (2009) 89 WAIG 2266

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

R v Murphy (1985) 4 NSWLR 42 [6] (CCA)

Stead v State Government Insurance Commission [1986] HCA 54; (1986) 161 CLR 141

Subramaniam v Public Prosecutor [1956] 1 WLR 965, 969 (PC)

*Reasons for Decision***SMITH AP:****Introduction**

- 1 This appeal is instituted under s 49(2) of the *Industrial Relations Act 1979* (WA) (the Act) against a decision made by the Commission in U 184 of 2014 on 6 July 2015: [2015] WAIRC 00490; (2015) 95 WAIG 1434.
- 2 Application U 184 of 2014 was an industrial matter referred to the Commission by Ms Eveline Wiyenka Fombason under s 29(1)(b)(i) of the Act. Ms Fombason claimed she was harshly, oppressively or unfairly dismissed by the Kimberley Individual and Family Support Association Incorporated (the Association) on 29 July 2014.
- 3 After hearing the application, the Commission issued an order on 6 July 2015 dismissing the application.

Background

- 4 Ms Fombason was employed as a disability support worker for the Association from September 2011 until her employment was terminated in July 2014. Ms Fombason was engaged to provide home and out of home support for people with a disability in Broome. At all material times, Ms Fombason provided support to one client only and that was a Mr M, an adult who is blind and is autistic. Ms Fombason and her husband and Mr M live next door to each other.
- 5 Ms Fombason provided services to Mr M on a part-time basis on a 'live-in' basis from 3:00pm Friday to 3:00pm Sunday of each week. Mr M requires constant care, 24 hours per day, seven days a week. From March 2013, Ms Fombason obtained a full-time job working for Centrelink from Monday to Friday which required her to work on Friday afternoons. Consequently, from March 2013, on each Friday from 3:00pm to 4:30pm it was agreed that Mr M would be cared for by either his mother or by Ms Fombason's husband.
- 6 Initially, Ms Fombason was paid \$600 per week for the weekend work she performed for the Association. This rate of pay arose from a written agreement entered into between her and the Association in August 2012. This provided for Ms Fombason to be engaged as a 'casual' and paid in two blocks of 24 hours each, at \$300 per block. Later Ms Fombason entered into an agreement on 9 August 2013, which provided for a higher rate of pay of \$1059.98 gross per week.
- 7 During Ms Fombason's entire employment she was paid the same amount for each weekend she worked. However, it is clear from her evidence that whilst Mr M required 24-hour care there were periods of time during most weekends that he did not require care by Ms Fombason as Mr M's mother would regularly visit Mr M on a Sunday and either spend time with him or take him out. During those periods of time, Ms Fombason would carry out housework at Mr M's house.
- 8 In June 2014, the Department of Child Protection (DCP) contacted Mr and Ms Fombason and asked if they would take on the care of two children, two boys aged 13 and 16. The boys then came to live with Mr and Ms Fombason. The older boy has non-verbal autism and was known to the Association as he had been a client.
- 9 In early July 2014, a new chief executive officer (CEO), Mr Brendon Grail, commenced employment with the Association. Mr Grail called Ms Fombason into a meeting at the office of the Association on 4 July 2014. Also present at that meeting was Ms Caterina Ponzio, who was a member of the board of the Association and who at that time had relinquished her role on the board to become a consultant to the Association.
- 10 Mr Grail's evidence was that when he commenced employment as the CEO it was conveyed to him by the Disability Services Commission, who is the sole funding body of the Association, that the Association was required to ensure that funds were used optimally and only where reasonable and necessary. He also said that the Disability Services Commission also advised that being at home when a client is not at home would not be considered reasonable and necessary use of funds and therefore the Association should be looking to restructure those arrangements (ts 87). Thus, the meeting with Ms Fombason was initiated by Mr Grail as he formed the opinion that all employees who support people with disabilities should record the actual hours of start and finish times and should only record as hours of work the hours they carry supporting the person with the disability. Mr Grail understood that there might have been a prior discussion with Ms Fombason about her being allowed to stay in the house and do housework and chores when not caring for Mr M but he was of the opinion that from time to time the Association was required to revisit the funding arrangements with clients.
- 11 Consequently, Mr Grail wished to have a discussion with Ms Fombason about the accurate recording of information on timesheets. Whilst there is some dispute between the parties as to what occurred at the first meeting, it appears that Ms Ponzio

- had become aware prior to the meeting that Mr and Ms Fombason had taken on the care of the two children who were under the care of DCP.
- 12 Mr Grail's evidence of this meeting was that after being introduced to Ms Fombason by Ms Ponzio, he said to Ms Fombason that Mr M's family were appreciative of the work that she and her husband were doing and happy with their services. He then started to talk about the importance of recording information accurately in timesheets to ensure that they were paying staff correctly. Mr Grail said that Ms Fombason was resistant to engaging in the discussion about the subject, at which point Ms Ponzio said that she was aware that Ms Fombason now had the care of two children under the care of the DCP at which point Ms Fombason became extremely agitated and aggressive and stated that it was none of Ms Ponzio's business what she did in her private life. The discussion broke down at that point and Ms Fombason refused to continue any discussion. Mr Grail said the meeting lasted less than five minutes (ts 89 - 90).
 - 13 When Ms Fombason gave evidence she said when she walked into Mr Grail's office the first thing that he did was to 'shove' a tally sheet at her face and asked her to justify the number of hours. She said that he scared her that she almost cried and that it was not proper to ask her to account for the number of hours on her timesheet. She denied that she said to Ms Ponzio when the care of the children was raised that it was none of her business, but she did say that she told Ms Ponzio that she had already told her this a couple of months ago and she asked Ms Ponzio 'why are you discussing about my family again? Have you called me here to discuss about my family?' She then told them both that she was leaving the meeting and her husband would come and discuss the matter. She said the reason why she told Mr Grail that they could speak with her husband was because the children were not under her care; they were under her husband's care on a voluntary basis (ts 53 - 54). When asked in cross-examination why she did not simply answer the question, she said she could not do so because she was scared of her CEO.
 - 14 When Ms Fombason's husband, Mr Joseph Fombason, gave evidence he tendered into evidence a copy of an email that he had received from Ms Peta-Lee Cole-Manolis (an officer employed by DCP) on 26 May 2015 in which Ms Cole-Manolis stated that she had had a meeting with Ms Ponzio and Mr Josh du Boulay at the Association in April 2014 to discuss CAAPS funding for one of the boys under the care of Mr and Ms Fombason. In that email, Ms Cole-Manolis stated she:
 - (a) discussed with them that they had approached Mr and Ms Fombason to become approved carers for the boys and that they would be assessing them as 'significant other's' given their already established relationship with the boys' family;
 - (b) advised them that DCP were aware that Ms Fombason was employed with the Association caring for Mr M on weekends as respite/support care; and
 - (c) confirmed that DCP had already planned around the boys naturally being supervised/cared for by Mr Fombason when Ms Fombason was working with Mr M as any parent/carer would do when one has work.
 - 15 At the hearing Ms Cole-Manolis was not called to give evidence. However, Ms Ponzio gave evidence about this meeting. When provided with a copy of the email she said that she recalled the meeting was fairly brief and that she was told the purpose of the meeting was that DCP wanted to transfer the funding from the Association for the family (of the boys) to another service provider, Life Without Barriers. She said that at the end of the meeting the Fombasons were mentioned and in passing she was told that they (DCP) were waiting for a response from the Fombasons. She also said that:
 - (a) she was not aware that the boys were living with the Fombasons until a few weeks later or about a month later when she was informed by Mr du Boulay that he had 'bumped into them' at the Boulevard Shopping Centre (ts 114 - 115); and
 - (b) at no time after the meeting with the officers of DCP did Ms Fombason come into the office of the Association and inform her that the children were in her care (ts 117).
 - 16 On 7 July 2014, Mr du Boulay, who was at that time the client services manager, told Mr Grail that he had seen Ms Fombason at the Boulevard Shopping Centre with Mr M and the two boys and had spoken to her just to say hello and let her know he had seen her. As a result of that report, Mr Grail arranged a second meeting with Ms Fombason in his office. Ms Ponzio attended the meeting, together with Mr and Ms Fombason.
 - 17 Mr Grail said when giving evidence about the second meeting he raised with Ms Fombason his concern about the number of continuous hours she was working and he told her she had been seen at the shopping centre with the boys at which point she again became aggressive and said, 'How dare you? That's none of your business. That's private.' He then explained to her that the Association is contracted to provide one on one support and group support is not permitted. She then stood up and said, 'My husband's a lawyer so he's well able to continue this discussion. I give him authority to speak on my behalf.' Mr Grail then told her he would not engage in further discussion after she left the room as she was the employee. She then left the room and the meeting concluded (ts 90).
 - 18 When Ms Fombason was cross-examined she denied that Mr Grail put to her at the second meeting that she had been seen in public with the two children and Mr M. She also claimed that the first she had heard of the allegation that she was seen in public was when it was put to her by counsel for the Association (ts 56). Ms Fombason maintained that they discussed her timesheets and she told him that he could speak to her husband about the foster children and she left the meeting (ts 56). She also stated that she was not upset when she left the meeting (ts 57). She explained that she did not want to discuss the children because they were not under her care, they were under the care of her husband on a voluntary basis (ts 55). When giving evidence Ms Fombason denied she ever went out with both the foster children and Mr M. She said that she considered the children as her own children during the week but not during the weekend when she was working with Mr M.
 - 19 Mr Fombason's evidence about this meeting was that they were asked to come to the meeting about a timesheet. When cross-examined, it was put to Mr Fombason that Mr Grail had said to Ms Fombason that he was aware that she was working two jobs, as well as having the care of two foster children, and that working such long hours was breaching the Association's duty of care. Mr Fombason agreed that was said. It was also put to Mr Fombason that Mr Grail said to Ms Fombason that she had been seen in public looking after the foster children at the same time as she was taking care of Mr M. Mr Fombason agreed

that that was put to Ms Fombason at the meeting and said that that 'was a dishonest lie that upset his wife and caused her to leave the meeting'. It was also put to him that she had said that that was 'none of your business'. He said he did not hear that, but conceded she might have said that (ts 21).

20 After the second meeting, Ms Fombason did not speak to Mr Grail again until the termination of her employment. All communication between the Association and Ms Fombason from that point of time was in writing.

21 Mr Grail gave evidence that shortly after he first commenced employment, which was sometime in May 2014, he was briefed by Mr du Boulay and Ms Ponzio that there were a range of issues in respect of a number of employees, one of whom was Ms Fombason, that needed to be addressed. One of those issues was the proper recording of time worked in timesheet records and the issue of paying penalty rates on a Sunday when an employee was not with the client. In respect of Ms Fombason, he had been advised at some point that she had been employed by Centrelink and was effectively working two full-time jobs creating seven days per week employment. He said that the Disability Services Commission had strongly drilled into him on their duty of care to people with a disability, particularly those at the high end with significant multiple disabilities and that he considered anyone who is working in excess of 45 hours a week was putting themselves and the client at risk of harm. He then found out in addition to the Centrelink job that Mr and Ms Fombason had taken on a significant obligation which was the care of the two children, one of which has significantly high needs. He said he was never able to discuss these issues with Ms Fombason because she repeatedly refused to engage in the discussion about these matters. When asked why he could not speak to Mr Fombason, he said he was not prepared to do so because Mr Fombason was a family member and he had attended the second meeting as an advocate and a support person. His arrangement and legal obligations were with the employee. Mr Grail sent a number of emails to Ms Fombason, but he says she did not properly respond. He formed the opinion that she was evading him and this was particularly displayed by her very aggressive behaviour on both occasions that he met with her.

22 On 11 July 2014, Mr Grail sent an email to Mr Fombason's private email address stating:

Hi Joseph, I tried call your mobile and Eveline's mobile. I need to see Eveline about her timesheet. Can you please ask her to drop into the office this afternoon, but please call first on 0429 309 710 to make sure I'm not in a meeting. I need to talk to Eveline direct - it's not appropriate for me to discuss her timesheet with you.

23 Ms Fombason replied by email that afternoon and said:

Thanks for your email. Unfortunately I am too busy and would not be able to come in as requested.

Could you please write to me about the timesheet. Also, use this email as authority to discuss my work and finances at KIFSA with my husband (Joseph)

24 On the same day, Mr Grail sent another email and said:

Hi Eveline, as mentioned in my email, I will only discuss work-related matters direct with the employee (i.e. you), not a family member. It is your timesheet I need to talk with you about, not Joseph's.

Please advise a day/time next week that you're available to come in to the office to discuss.

25 On 14 July 2014, Ms Fombason responded once again by email and said:

I have been working with [Mr M] on a permanent shift during the week ends for the past three years with KIFSA.

If there is anything to discuss about my time sheet, I would appreciate, if you could please put it in writing and I would be able to response.

Also, could you please advise whether KIFSA,s fortnightly pay days have changed from the normal Wednesdays indicated in my contract.

For the past two fortnights, my wages have been withheld or delayed for about a week and a half.

26 In response to Ms Fombason's request that he put the issues in writing, Mr Grail sent an email to Ms Fombason on the morning of 14 July 2014 in which he stated as follows:

Hi Eveline, I still need to see you in person to discuss, but the issues are as follows:

- You are required to take an unpaid meal break of at least 30 minutes after 5 hours of work
- Can you please advise what your work hours are at Centrelink. As discussed with you previously, we have a duty of care to ensure that staff do not put the client (or themselves) at risk by working multiple jobs in one day that result in long uninterrupted shifts being worked.
- I have sought clarification on the subject of doing household chores while a client is not present. From now on, if [Mr M] spends time with his mother or some other family member or friend, you will need to clock off. This is due to DSC's funding guidelines, as well as the obligation we have to our clients to conserve funding for times when it is most needed. As soon as you become aware that you are no longer required to be in [Mr M's] presence during a scheduled shift, can you please contact the Broome Team Leader Dinu Thomas on 0478 079 844 to advise him. I will advise Margaret of this.

Can you please advise what times you are available this week to come into the office to meet with myself, Josh, Elaine and Dinu. After we meet with you in person, you can amend your timesheet from the last pay period and we will process it.

27 Later that day, Ms Fombason replied by email and stated:

Thanks for your email.

I refer to my previous email and would like to clarify that I have got contractual obligations with KIFSA; ongoing now for about three years; and would appreciate that we stick firmly to that agreement.

With due respect, I would highly appreciate that you do not intervene in whatever I do at my other times. I believe that my other hours are private and personal.

If there are any amendments to my time sheet, could you please scan it back to me or post it to Eveline Fombason (PO 3386, Broome WA 6725); stating specifically what needs to be amended.

In my previous email, I did seek clarification as to the reasons why my wages have been withheld or delayed, but have not got a response.

The fact that my wages are delayed without due notice and all the several phone calls I have received from KIFSA about my personal life makes me real feel uncomfortable to attend your office for any meeting.

Could you please put whatever you would like to discuss with me in writing, and I will respond.

- 28 On the following day, 15 July 2014, Mr Grail responded by email in which he stated that he had clarified the issues in writing in his prior email and he would discuss the issues further with her when they meet face-to-face. He also said in the email that he did not wish to discuss any personal issues with her, so she did not need to feel uncomfortable and asked her to telephone and make a time to meet. He also said that after they had met and she had amended her timesheet it would be paid.
- 29 When Ms Fombason gave evidence, she said that when Mr M was not at the house she carried out housework. She said she was still on duty whilst she was carrying out that work and it was in her contract that she was required to carry out that work. She said when Mr M was in the house she could not leave Mr M on his own and that she could not take a 30 minute meal break because the Association had never sent anyone out to replace her for a 30 minute period.
- 30 Ms Fombason also said when giving evidence that she was not available to go into the office of the Association during the week to meet with Mr Grail as she was employed at Centrelink. She said there would have been no difficulty if Mr Grail had come to Mr M's house whilst she was at work because when she has had meetings in the past with the CEO of the Association they always put Mr M to bed to have a 'catnap' whilst she has had a discussion with the CEO. She said it would be better to meet at Mr M's house because the office was so intimidating to her and that is why she said they should meet at the client's residence where she had previously had other meetings. She said she was so scared of the environment at work that she had been receiving the services of a psychologist because of the incident that occurred whilst employed by the Association.
- 31 The day after Mr Grail sent the email to Ms Fombason on 15 July 2014, he had a meeting with Mr M's mother, who is Mr M's guardian. The purpose of the meeting was a planning session which was held with Ms M, Mr M, the Disability Services Commission and two of his staff members at which they discussed forward planning to support Mr M with his goals into the future. At that meeting he raised with Ms M, Mr du Boulay's account that Ms Fombason had been seen supporting Mr M in the community in the presence of two boys and asked whether she was aware of that. He said that Ms M informed him that she was horrified and expressed her discontent about that. Mr Grail informed Ms M that he was in the process of having discussions with Ms Fombason about a number of matters and he hoped to meet with her in the next few days.
- 32 On 20 July 2014, Mr Grail sent a letter to Ms Fombason asking to meet with her for 30 minutes and proposed a number of alternative times to meet in the following week (AB 303).
- 33 Early in the morning of 21 July 2014, Ms Fombason sent an email to Mr Grail in which she stated (AB 304 - 305):

Thank you for your letter.

I will first clarify that I responded to your first two emails and was in the process of preparing a response to the third when I received your letter. More so there was no time frame indicated by you to respond. So there is no breach as alleged in your letter.

However as I have previously stated, I am not comfortable for a face to face meeting with you in your office following my experience of two previous meetings with you.

Can you please in writing notify myself of what you require and explain why?

Alternatively, could you please follow the arrangements about meeting with you as set up in the **Terms and Conditions of Employment Co-Residency**, as written in my contract; and I quote;

Supervision:

"Regular meetings will be arranged at the house with either the Client Services Manager or the Executive Officer, you will be provided with notice of these meetings. The purpose of the meetings are to provide you with support within your role and also for you to raise any suggestions or issues you may have so that a team decision can occur to find resolution to these"

The above arrangement suits well with **Pattern 2:** (3pm Friday afternoon through to 3pm Sunday afternoons); the only times that I provide service to KIFSA.

This arrangement has worked well with me in the past with the three previous CEOs I worked with in KIFSA. There has never been a breakdown of communication or allegation of breach of contract as stated in your letter.

Our emails have been about my time sheet. You indicated that the time sheet needed amendments. The amendments were not specified and to date I have not receive the payment.

I hope that this can be resolved in a timely manner.

- 34 On the same day, Ms M contacted Mr Grail and informed him that Ms Fombason spoke to her on Sunday and that Ms Fombason had expressed her discontent with him and the Association. Ms M explained to Mr Grail that this was causing her a great deal of stress and she thought that it was inappropriate for Ms Fombason to be talking to her about these matters.
- 35 By that time Mr Grail had come to the view that if Ms Fombason was not prepared to engage in any discussion around the issues that he wished to discuss with her and it was his opinion that there was an irrevocable breakdown in trust. He decided that he would suspend Ms Fombason on full pay and he sent her a letter dated 21 July 2014 which stated as follows:
- In response to your email which I received on Monday 21 July, I wish to advise the following:
- a. Despite my repeated lawful directives for you to attend a meeting at the KIFSA offices with your Support Person, you have instead repeatedly advised that you are unavailable to do so and now appear to be dictating to me the

circumstances where you will attend - I note that you are referring to a clause in your Contract which is totally unrelated to the requirement for the meeting which I have requested and you have failed to provide any valid reason for non attendance - particularly as independent parties will be present.

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

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

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

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

- 36 On 23 July 2014, Mr Grail received a letter from solicitors acting for Ms Fombason in which they requested 14 days to respond to the letter of 21 July 2014 and stated that Ms Fombason was still happy to continue with the current employment duties for Mr M, should she be reinstated and asked for confirmation in writing that she would not be required to provide her usual support duties to Mr M from Friday, 25 July 2014 (AB 309).
- 37 On the following day, Mr Grail wrote to Ms Fombason's solicitors and advised them that he was not prepared to wait 14 days for a response to the matters raised in the letter dated 21 July 2014. He said in the letter, however, he was prepared to extend the deadline for a response until 5:00pm on Monday, 28 July 2014. He also stated that given the serious nature of Ms Fombason's employment contract breaches, and the fact that Ms Fombason initiated additional inappropriate conversations with the client's mother on Sunday, 20 July 2014, he advised that her suspension reverted to being unpaid as at Thursday, 24 July 2014. He also advised that alternative arrangements for the care of the client had been made and Ms Fombason was instructed not to attend the client's house (AB 310).
- 38 On 25 July 2014, Ms Fombason's solicitors wrote again to Mr Grail and stated that they did not believe it was reasonable for Ms Fombason to only have seven days to obtain legal advice and respond to the allegations and advised that Ms Fombason would not be responding to the allegations by 5:00pm on Monday, 28 July 2014. They also stated that the terms and conditions of Ms Fombason's contract provided that meetings were to be arranged at the co-residency house and not at the Association's office and that they were instructed that he had not previously requested a meeting with Ms Fombason at the co-residency house.
- 39 On 28 July 2014, Mr Grail wrote to Ms Fombason's solicitors and informed them that as Ms Fombason has again failed to meet his request to respond to a number of serious issues, and following a letter that had been delivered by Ms Fombason to the chair of the Association on Friday, 25 July 2014, Ms Fombason's employment with the Association was terminated as of Tuesday, 29 July 2014.
- 40 It was put to Mr Grail in cross-examination that the main reason why he had terminated Ms Fombason's employment was because of the allegation that she was caring for Mr M and other children and that had horrified Ms M. In response, Mr Grail said that was one of a number of issues. He said there were multiple issues; there was the breach of confidentiality, aggressive behaviour towards him and another staff member and not being prepared to respond to any questions about the timesheets.
- 41 Ms M gave evidence via telephone link. Ms M said that in the middle of 2014, Mr and Ms Fombason came to her house to tell her that Ms Fombason was going to be caring for two teenage boys and one of them was autistic. Ms M asked how this would affect Mr M and Ms Fombason told her that there were various activities that had been set up for the boys and it would have no effect on Mr M's care. Ms M also told the Commission that it had been reported to her some time later that Mr M had been seen with two boys with Ms Fombason at the shopping centre. She said that as Mr M is totally blind, autistic and needs a lot of assistance she was not happy about that. She also said that Ms Fombason complained to her about Mr Grail and she told Ms Fombason that they should speak to Mr Grail and she did not wish to hear about her complaints. Ms M also stated that she subsequently informed the Association that she was not happy about this issue.
- 42 When cross-examined, Ms M conceded that until they took on extra caring she had always been very happy with Mr M's care from Mr and Ms Fombason.
- 43 When Ms Fombason gave evidence she said she spoke to Ms M about Mr Grail when she saw Ms M at church on the Sunday. She said she regularly saw Ms M at church. She agreed that she may have complained to Ms M about Mr Grail being unfair to her and said that she was discussing it on a personal basis because Ms M knows everything about her family and she knows everything about Ms M's family.

The Commissioner's findings at first instance

- 44 After considering the evidence given on behalf of the parties, the learned Commissioner pointed out that the principles that apply to whether a dismissal is harsh, oppressive or unfair:
- (a) involve an objective assessment by the Commission as to whether an employer has abused its lawful right to terminate a contract of employment; and
 - (b) the employee is entitled to 'a fair go all round': *Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 (*Undercliffe*) and *In re Loty and Holloway v Australian Workers' Union* [1971] (NSW) 95.
- 45 The learned Commissioner also pointed out that it is not for the Commission to sit in the managerial chair and to decide for itself if a decision should have been taken. Rather, the Commission's role is to objectively consider the employer's actions, and whether the employer's actions in dismissing the employee, were unfair.
- 46 After setting out those principles of law, the learned Commissioner made the following findings of fact:
- (a) As an employee of the Association, Ms Fombason was responsible for the care of the client. As an employee, she had other duties. One duty was to ensure that the policies of the organisation were complied with. A key policy of the Association is the policy to not cause a conflict of interest between any activities engaged in by an employee and the Association's obligations to its clients. Concerns about a conflict of interest plainly may involve matters such as the performance of excessive hours of work in other occupations or activities that may impact on the provision of care to clients.
 - (b) At common law, as an employee of the Association, Ms Fombason was at all times required to comply with the lawful and reasonable directions of Mr Grail as the CEO of her employer: *Sappideen et al, Macken's Law of Employment* (Lawbook, 7th ed, 2011) [5.790]. Ms Fombason was clearly in breach of her duty in this respect. She failed to respond to the several lawful and reasonable requests by Mr Grail, on behalf of the Association, her employer, to meet and to discuss the various matters raised by him in his correspondence. Mr Grail had raised a number of legitimate issues, that as Ms Fombason's employer, he was entitled to raise with her. Given the policies of the Association, Mr Grail was obliged to clarify and resolve these issues. It was simply not for Ms Fombason to dictate to the Association where and how these matters were to be progressed. Similarly, it was not for Ms Fombason to appoint her husband as her spokesperson. Mr Fombason was not an employee of the Association. He had nothing to do with the employment contract between Ms Fombason and the Association.
 - (c) As Mr Grail was not made directly aware of Ms Fombason's specific working arrangements during the week, Monday to Friday, nor the specific arrangements for the care of the two foster children, these matters were very properly able to be raised by him. There was nothing at all unreasonable about the Association, as Ms Fombason's employer, wishing to discuss these matters properly with her. Mr Grail also wished to discuss the allegation that Ms Fombason took both the client and the two foster boys on an outing together, contrary to the Association's usual practices. Mr Grail also wanted, again quite properly, to discuss with Ms Fombason the allegation that she had inappropriately raised with the client's mother her employment issues involving both Mr Grail and the Association.
 - (d) The assertion of Ms Fombason that she was bullied and intimidated by Mr Grail is not accepted. There was no cogent evidence to support such an allegation.
 - (e) On all of the evidence, Mr Grail's impression that he had formed by at least 21 July 2014, that Ms Fombason was deliberately attempting to avoid any meeting with him, was quite correct.
- 47 The learned Commissioner then found that:
- (a) Whilst Ms Fombason did inappropriately engage with Ms M about her employment matters with the Association that was a matter not by itself which would warrant termination of employment.
 - (b) The employer did have a proper ground for the termination of Ms Fombason's employment and that was the complete failure and refusal by Ms Fombason, as an employee of the Association, to properly engage with her employer on important matters in connection with her employment.
- 48 The learned Commissioner explained that Ms Fombason's unreasonable refusal to comply with the Association's requests left the Association with little option, and he did not consider Ms Fombason's requests through her solicitors of more time to respond to be reasonable. In particular, he found that Ms Fombason had ample time to consider the matters raised by Mr Grail, which were well known to her. He also found that such a request was a further attempt to delay and frustrate the Association's legitimate request to meet with its employee to discuss some important work matters. Further, he found that the suggestion of a meeting at the client's home was plainly not appropriate. The matters that Mr Grail wanted to discuss with Ms Fombason did not relate in any way to the provision of support for her in her role as a carer for the client. They were matters relating to potentially serious breaches of the Association's policies.
- 49 For these reasons, the learned Commissioner was not persuaded that the dismissal of Ms Fombason was harsh, oppressive or unfair. Accordingly, he made an order that the application be dismissed.

The grounds of appeal

- 50 The amended grounds of appeal are set out in a document which also contains some written submissions about the evidence. However, it is clear from the document that the grounds of appeal are as follows:
1. The origin of the entire case was based on hearsay. The learned Commissioner erred in his judgement in that he relied solely on hearsay evidence to take the final decision. He failed to consider any other facts especially the contract of employment of the appellant.
 2. That the appellant had not been afforded procedural fairness.

3. The learned Commissioner further erred in his judgement in that he disregarded the appellant's request for a reasonable time to respond to allegations made by the CEO of the Association.
4. On a matter of public interest an appeal should lie on grounds:
 - (a) that the appellant has worked continuously for three years with the Association and has an unblemished record; and
 - (b) that during the time of the appellant's employment with the Association her performance has never been affected or questioned at any time as a result of a second job.

51 As the appeal is against a decision to dismiss Ms Fombason's claim of unfair dismissal, it is not necessary for the Full Bench to form an opinion that in the public interest an appeal should lie. Ms Fombason has an appeal as of right against a decision to dismiss her claim. Consequently, it is not necessary to consider the fourth ground of appeal.

Application to adduce fresh evidence

52 At the hearing of the appeal, the appellant sought to tender a number of documents which had not been tendered as exhibits in the hearing before the Commission at first instance. After hearing the parties, the Full Bench received into evidence one document only and that is a document which is annexed to the appellant's written submissions as annexure AA. This document is a medical report written by Dr Lauren Turner MBBS dated 25 July 2014. It appears to be a letter of referral to a psychologist, Robyn Bradbury. In the letter, Dr Turner states:

Thank you for seeing Eveline Wiyenka and advising with regard to psychological therapies for depression.

Eveline has suffered low mood, feelings of emptiness and worthlessness [sic], poor appetite, anhedonia and poor sleep for about 6 weeks following issues in the workplace.

She has a MHCP in place. K10 score 44

53 The reason why this document was admitted is that the Full Bench accepted the submission made on behalf of Ms Fombason that at the time of the hearing of the application at first instance Dr Turner was away and consequently Ms Fombason was unable to obtain a copy of any report from her. The reason why Ms Fombason seeks to put this document before the Commission is to counter the finding made by the learned Commissioner that there was no cogent evidence before him to support an allegation made by Ms Fombason that she was bullied and intimidated by Mr Grail. Whilst the Full Bench formed the opinion that the use of this document is extremely limited, it did admit the document into evidence on the grounds that the evidence was not available at the time of the hearing and it could be adduced in support of a submission to contend that finding made by the learned Commissioner was incorrect. However, for reasons that follow in these reasons for decision, it is clear that when the document is properly analysed it does not support the contentions made on behalf of Ms Fombason.

The appellant's submissions

54 In the written submissions filed by the appellant on 9 November 2015, and those which are set out in the amended grounds of appeal, a number of submissions and matters are referred to which were not the subject of evidence before the Commission at first instance. At the hearing of the appeal, we advised Mr Fombason, who is acting on behalf of Ms Fombason, that the Full Bench would not have regard to any submission that was not the subject of evidence.

55 Consequently, in these reasons for decision I have only set out the submissions which have been made on behalf of Ms Fombason which were the subject of evidence before the Commission at first instance, together with the letter of referral from Dr Turner which is the only additional document admitted into evidence by the Full Bench.

(a) Ground 1

56 In ground 1 of the appeal, it is contended on behalf of Ms Fombason that the origin of the entire case was based on hearsay and that the learned Commissioner erred in his judgement in that he relied solely on hearsay evidence in making a decision to dismiss Ms Fombason's claim and he failed to consider other facts, in particular the contract of employment of the Ms Fombason.

57 In support of ground 1 of the appeal, the following submissions are made:

- (a) In July 2014, Ms Fombason attended two meetings with Mr Grail, the current CEO. During the first meeting, Mr Grail alleged that he had been informed by independent witnesses that Ms Fombason had been observed caring for up to three people while rostered for the Association's client only. Ms Fombason denied the allegation. However, during cross-examination, it was revealed that the allegation was made by the former acting CEO of the Association, Mr du Boulay. Yet, Mr du Boulay was not called as a witness and the motive for him making the allegation was not established. When Mr Grail was asked whether Mr du Boulay was available to substantiate the allegations, Mr Grail told the hearing that his whereabouts was unknown as he no longer worked for the Association. Ms Fombason contends that Mr du Boulay was the most important witness in this matter and yet he was not called by the Association to give evidence.
- (b) Ms Fombason also claims the learned Commissioner should have summoned the officers from DCP to give evidence who provided an email confirming that the Association were informed about the children and that they were to be looked after by Ms Fombason's husband when Ms Fombason cared for Mr M.
- (c) Ms Fombason has never refused to meet with the employer at any time. When she first met with Mr Grail she felt bullied, intimidated, embarrassed and harassed. She subsequently paid a number of visits to a clinical psychologist, Ms Bradbury, and was counselled how to deal with bullying actions of Mr Grail. During the proceedings, the learned Commissioner did not request any evidence to justify the bullying, but simply asserted that he did not believe that Ms Fombason was bullied by Mr Grail. The psychologist and Dr Turner who saw Ms Fombason during this stressful time, could provide evidence of her depression.
- (d) Ms Fombason was willing to meet with Mr Grail at Mr M's home, but Mr Grail had predetermined to terminate the employment of Ms Fombason and did not consider any of the letters or emails Ms Fombason sent to him. A

finding should have been made that Mr Grail was fully aware of Ms Fombason's working arrangements when he took over from the acting CEO, Mr du Boulay, as the evidence established that Mr Grail was advised of the working arrangements of Ms Fombason when he commenced work as the CEO of the Association.

- (e) Ms Fombason was too frightened and embarrassed to meet with Mr Grail following the first meeting. She was so frightened to the level that she gave implied and written permission to her husband to meet with Mr Grail. By Mr Grail failing to meet with Ms Fombason in the manner required by Ms Fombason's contract of employment, the Association failed in its duty as an employer.

(b) Ground 2

58 In this ground it is contended that Ms Fombason has not been afforded procedural fairness.

59 In the reasons for decision of the learned Commissioner, he found that a key policy of the Association is the policy not to cause a conflict of interest between any activities engaged in by an employee and the Association's obligations to its clients. He also found that concerns about a conflict of interest may involve matters such as the performance of excessive hours of work in other occupations or activities that may impact on the provision of care to clients. Ms Fombason challenges this finding. She points out that she gave uncontradicted evidence that prior to the policy document being put to her in cross-examination she had not seen that document.

60 It is also pointed out on behalf of Ms Fombason that her employment obligations to the Association arose only on weekends and that in the three years that she was employed by the Association on weekends to care for Mr M, no issue of performance or any breach by her was reported until the arrival of Mr Grail.

61 It is also contended that the learned Commissioner failed to have regard to the fact that:

- (a) in May 2014, Ms Fombason and her husband were contacted by DCP in Broome to care temporarily for the two boys already known to them while a decision was taken about their permanent placement. Ms Fombason immediately informed DCP about her weekend commitments with the Association and her other duties with Centrelink. Considering the urgent request and the need for the children to get a roof over their head, the Fombasons accepted on the condition that the children would be cared for by Mr Fombason on weekends;
- (b) DCP informed Centrelink and the Association that they were in desperate need for a place for the children and that the Fombasons were the only immediate family that could help. The Association was informed of this at a meeting in April 2014. The email from Ms Cole-Manolis, a case worker from DCP, verifies this evidence. The Association claimed in the proceedings that they had never been informed of the arrangement and the learned Commissioner accepted the Association's evidence in this regard which is contrary to the evidence given in the proceedings;
- (c) during the proceedings, Mr M's mother confirmed that Ms Fombason attended her home to advise her of the boys coming into her care and that Ms M had no problem about that until Mr Grail revealed to her about the two boys being cared for simultaneously with Mr M. Thus, all concerned parties were advised about the boys. But this evidence was ignored. Further, during cross-examination Ms M explained that she had never had any issues with Ms Fombason for over three years until Mr Grail called and reported this matter to her. It is contended, however, that Ms M confirmed that she would always recommend the Fombasons as carers;
- (d) Ms Fombason was denied an opportunity to present her own side of the story or to return to work at the Association as all of her responses to the Association were not considered;
- (e) although it is conceded that after church on 13 July 2014, Ms M asked Ms Fombason how work was going and Ms Fombason is alleged to have explained that the work was good, but she was having some difficulties working with the new CEO, the learned Commissioner ignored the evidence that during the three years of service Ms M has built a friendship with the Fombasons. Thus, the idea of an inappropriate approach to Ms M by Ms Fombason as stated by Mr Grail in his letter was a fabrication by Mr Grail to support the unlawful dismissal as for over three years Mr M, his mother and Ms Fombason had built a personal attachment to each other;
- (f) the issues relied upon by Mr Grail were never put in writing;
- (g) in 2013, Mr du Boulay gave Ms Fombason a copy of the last page of a nine page document to sign which she says she signed, but she did not sign the contract of employment tendered into evidence as she only received one page of the document (AB 54, ts 40);
- (h) Ms Fombason was not a foster carer and she did not have the care of the children on the weekends. It is conceded, however, on her behalf that if one applies 'the Clapham omnibus test' that an ordinary man would not be able to look after two children and a blind man at the same time;
- (i) Ms Fombason was still determined to continue her job and Mr Grail was asked if he could please come to Mr M's house as other CEOs have done as Ms Fombason's work was weekend work. Thus, the requirement of weekend meetings were not only in her contract of employment, but the Association was well aware that she worked full-time for Centrelink during the week and was not available for meetings during the working week.

(c) Ground 3

62 In ground 3 of the appeal, it is contended that the learned Commissioner erred by disregarding Ms Fombason's request for reasonable time to respond to the allegations.

63 In support of this submission, it is pointed out that although Ms Fombason's lawyer wrote to Mr Grail requesting for 14 days to respond, this request was ignored and the termination proceeded without a reasonable period of time to respond. This is because Ms Fombason's solicitors were unable to respond within a period of seven days. The refusal to allow further time was unreasonable in circumstances where Ms Fombason had false allegations levied against her, threats of termination and bullying.

- 64 In these circumstances, it is contended that the learned Commissioner did not consider the gravity of Mr Grail's actions on a conscientious employee who had worked for the same employer for three years and was sacked in less than a month without just cause.

Conclusion

- 65 The learned Commissioner was required to consider whether the Association exercised its right to terminate the employment of Ms Fombason so harshly, oppressively or unfairly so as to amount to an abuse of that right: *Undercliffe* (386) (Brinsden J). A determination of whether the dismissal of Ms Fombason was harsh, oppressive or unfair turned on an assessment of not only the oral evidence given by witnesses, but also of the documents tendered into evidence. An evaluation of the evidence, resulting in the finding by the learned Commissioner that he was not persuaded that the dismissal was harsh, oppressive or unfair, involves an exercise of discretion.

- 66 The Full Bench is only empowered to set aside a discretionary decision in limited circumstances. A discretionary decision cannot be set aside because members of the Full Bench would have exercised the discretion in a different way. In *House v The King* [1936] HCA 40; (1936) 55 CLR 499, Dixon, Evatt and McTiernan JJ observed (504 - 505):

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

- 67 A Full Bench is required to accord an evaluative decision made by a Commissioner that a dismissal was, or was not, harsh, oppressive or unfair with significant deference: *Michael v Director General, Department of Education and Training* [2009] WAIRC 01180; (2009) 89 WAIG 2266 [139]. In *Michael*, Ritter AP observed [143]:

These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519. There, his Honour explained that although 'error in the proper weight to be given to particular matters may justify reversal on appeal, ... disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge'. This is because, in considering an appeal against a discretionary decision it is 'well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion', and that when 'no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight'. (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]).

- 68 Underlying the submissions made on behalf of Ms Fombason in respect of grounds 1 and 2 of the grounds of appeal is an assumption that the learned Commissioner accepted that Ms Fombason had taken Mr M shopping with the two boys and had been seen by Mr du Boulay. However, the learned Commissioner did not make such a finding. He found that after Mr Grail received a report from Mr du Boulay, Mr Grail on behalf of the Association was entitled to discuss this allegation with Ms Fombason. This finding is not founded in hearsay. Although, pursuant to s 26(1)(b) of the Act, the Commission is not bound by the rules of evidence and may inform itself on any matter in such a way as it thinks fit, even if the rules of evidence were applied in respect of this particular issue, the evidence given by Mr Grail that he received such a report from Mr du Boulay would be admissible. This is because it is a rule of evidence, that evidence of a statement made to a witness (Mr Grail) by a person who is not called as a witness (Mr du Boulay), is received into evidence not to establish the truth of the statement but to establish the fact that the statement was made, is not hearsay and is admissible: *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 969 (PC); *R v Murphy* (1985) 4 NSWLR 42 [6] (CCA).

- 69 Thus, it was open to the learned Commissioner to accept the evidence given by Mr Grail that Mr du Boulay told him that he had seen Ms Fombason at the Boulevard Shopping Centre with Mr M and the boys. It was also open to the learned Commissioner to find that it was not unreasonable for Mr Grail to discuss the allegation that Ms Fombason took Mr M and the boys on an outing together and the specific arrangements for the care of the boys.

- 70 The contents of the email written by Ms Cole-Manolis about a meeting she and another officer of DCP had with Ms Ponzio does not assist Ms Fombason's case. The contents of the email is not inconsistent with the direct evidence given by Ms Ponzio that in April 2014 she was informed that the Fombasons were considering whether to take on the care of the boys. If Ms Fombason wished to call Ms Cole-Manolis to give evidence about this meeting at the hearing at first instance that was a matter for Ms Fombason to arrange through her agent, Mr Fombason. A hearing of an application referred pursuant to s 29(1)(b)(i) of the Act is not inquisitorial. It is up to each party to determine who they wish to call to give evidence, not the Commission.

- 71 The submission that Ms Fombason never refused to meet with Mr Grail at any time is partially correct. After meeting Mr Grail twice at the office she refused to meet again at the office of the Association she informed Mr Grail whilst she was not comfortable with meeting him face to face, a meeting could be arranged during the hours she worked for Mr M at his house: email to Mr Grail from Ms Fombason of 21 July 2014 (AB 304 - 305). Ms Fombason submitted that this arrangement for meetings was in accordance with the express terms of her contract of employment.

- 72 The provision of the contract of employment relied upon by Ms Fombason is in a document signed by her on 26 June 2012. Under the heading 'Supervision' on page 3 of the contract it is stated (AB 43):

Regular meetings will be arranged at the house with either the Client Services Manager or the Executive Officer, you will be provided with notice of these meetings. The purpose of the meetings are to provide you with support within your role and also for you to raise any suggestions or issues you may have so that a team decision can occur to find resolution to these.

- 73 However, it appears that at the time of the termination of Ms Fombason's employment that provision had no effect. On 9 August 2013, Ms Fombason signed a new contract containing brief terms in two pages that made no reference to where meetings should be held which expressly replaced the previous contract (AB 44 - 45).
- 74 The Association contended that the 9 August 2013 contract was subsequently replaced by a contract signed by Ms Fombason in 2013. Whilst that document contains no clause about where meetings are to take place, cl 16 of the document provides (AB 51):

Policies and Procedures

- a) You must comply with all of our policies and procedures as published and amended from time to time.
 - b) A breach of our policies and/or procedures may result in disciplinary action including the termination of your employment.
- 75 The document contains comprehensive terms which are not otherwise relevant to the disposition of this appeal set out in nine pages and was signed by Ms Anne Jennings on 13 September 2013 on behalf of the Association (AB 54). The document also bears an undated signature by Ms Fombason. However, Ms Fombason denies 'she signed that document' and claimed when giving evidence that she had not previously seen that document, although she conceded she had signed page 9 of the document (the signature page) (ts 40). Although her evidence on this point is not entirely clear, I gather her contention is that she was only provided with one page of the nine pages of the document.
- 76 The learned Commissioner, however, made no finding as to whether Ms Fombason had signed the document or whether cl 16 of the document formed part of the terms of Ms Fombason's contract of employment.
- 77 The learned Commissioner found, however, that it was not appropriate to meet at the client's home to discuss the matters that Mr Grail wished to discuss with her as they were not matters contemplated by the terms of the contract which expressly stated that such meetings were for the purpose of providing support to Ms Fombason.
- 78 In any event, it is apparent when all of the evidence is considered, including the emails Ms Fombason sent to Mr Grail, that Ms Fombason had formed the opinion that the matters Mr Grail wished to raise with her were matters the Association was not entitled to raise with her. These matters were:
- (a) her hours of work whilst employed by Centrelink;
 - (b) the care arrangements for the boys;
 - (c) the allegation raised by Mr du Boulay that she had been seen to be caring for the boys whilst providing care to Mr M; and
 - (d) working arrangements during her rostered shift when Mr M was in the care of his mother, other family member or friend.

In respect of the first three issues, Ms Fombason, in an email sent to Mr Grail on 14 July 2014, stated that 'I would highly appreciate that you do not intervene in whatever I do at my other times. I believe that my other hours are private and personal' (AB 298). As to the fourth issue, Mr Grail raised this matter squarely with her in his email to her earlier that day and informed her that she needed to clock off when she was not required to be present with Mr M during a scheduled shift. In response, Ms Fombason stated that 'I have got contractual obligations with KIFSA; ongoing now for about three years; and would appreciate that we stick firmly to that agreement' (AB 298). She also stated in her email that if there were any amendments to her timesheet, could they please scan it back to her or post it, stating what was to be amended.

- 79 It was open to the learned Commissioner to find that it was not unreasonable for Mr Grail to discuss with Ms Fombason her working arrangements during the week (with Centrelink). Irrespective of whether Mr Grail had been told by Mr du Boulay that Ms Fombason was working for Centrelink, it was open to the learned Commissioner to find Mr Grail was entitled to raise these matters directly with Ms Fombason.
- 80 When the responses by Ms Fombason are considered, it is clear that it was open to the learned Commissioner to make the finding that the Association did have a proper ground for the termination of Ms Fombason's employment as Ms Fombason completely failed and refused to engage with her employer on important matters in connection with her employment.
- 81 The submission that it should have been found in effect that Ms Fombason was too frightened and embarrassed to meet with Mr Grail after the first meeting, which resulted in Ms Fombason being bullied, is a submission that has little strength when regard is had to the evidence. It is pleaded in the application that at the two meetings Ms Fombason had with Mr Grail she felt intimidated, embarrassed, humiliated and bullied. Ms Fombason gave evidence that at the first meeting Mr Grail scared her to the point that she almost cried (ts 52). However, when she gave evidence about the second meeting she said she was not upset when she left the meeting (ts 57). Further, the tone of Ms Fombason's emails could be described as assertive and she made no complaint about being scared other than to say discussion about her personal life made her feel uncomfortable.
- 82 In these circumstances, when regard is had to the fact that Mr Grail was legitimately seeking to raise with Ms Fombason a number of workplace issues, it was open to the learned Commissioner to reject the assertion of Ms Fombason that she was bullied and intimidated by Mr Grail. The medical report, in my opinion, does not assist Ms Fombason. Whilst the report was written five days before her employment was terminated, the report indicates that Ms Fombason had been exhibiting symptoms for about six weeks, which, if correct, is evidence of symptoms that pre-date Ms Fombason's first meeting with Mr Grail on 4 July 2014. Whilst it appears clear that Ms Fombason suffered depression the report by Dr Turner does not state that Ms Fombason's symptoms were caused by bullying or intimidation by Mr Grail. All the report says is Ms Fombason's symptoms arose following 'issues in the workplace'. The report does not say what the issues are that caused the symptoms and

it is open from the matters stated in the report to infer the symptoms first arose prior to the first time Ms Fombason met Mr Grail.

83 Ms Fombason also contends that prior to the hearing she had not seen the Association policies and procedures manual. Thus, it is argued that she was denied procedural fairness as the learned Commissioner relied upon one of the key policies in the manual and that is the 'Policy on Human Resources Conflict of Interest' (AB 200 - 202), which is a document that she had not previously seen.

84 Even if this argument is accepted, and a breach of procedural fairness could be made out, not every breach of procedural fairness will necessarily lead to a decision being set aside. In *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141, 145 - 146, the High Court found:

The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Parker L.J.J.) in *Jones v. National Coal Board* ([1957] 2 Q.B. 55, at p. 67), in these terms:

'There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge.... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.'

That general principle is, however, subject to an important qualification which Bollen J. plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.

For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.

Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. True it is that an appeal to the Full Court from a judgment or order of a judge is by way of rehearing and that on hearing such an appeal the Full Court has all the powers and duties of the primary judge, including the power to draw inferences of fact: Supreme Court Rules, O. 58, rr. 6 and 14. However, when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial.

85 In *Health Services Union of Western Australia (Union of Workers) v Director General of Health* [2008] WAIRC 00215; (2008) 88 WAIG 543 [187] - [188], Ritter AP said:

The broader principle which may be extracted from *Stead* is encapsulated by their Honour's question '*would further information possibly have made any difference?*' (145) and that all '*the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome*' (147).

Gleeson CJ in *N AIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [10] said: '*In a case of failure to give a hearing when a hearing is required, the person complaining of denial procedural fairness does not have to demonstrate that, if heard, he or she would have been believed. The loss of an opportunity is what makes the case of unfairness*'. Similarly, Kirby J in *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at [86] referred to the High Court in *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82 as affirming the '*strong principle earlier stated in Stead*'. This principle was a '*could not possibly have produced a different result*' test.

86 If the learned Commissioner did not have regard to the policy, it cannot be said that Ms Fombason was denied the possibility of a different outcome. Firstly, the fact of the policy was only relevant to Mr Grail's obligation to commence a discussion with Ms Fombason about whether her hours of work with Centrelink and whether the care arrangements of the boys impacted upon her obligations to the Association.

87 Secondly, at common law, whilst there is no general rule that employees cannot engage in other employment in their spare time, an employee may be in breach of the implied duty of good faith if their other employment results in an incompatibility, or conflict, or the destruction of confidence with their first employer: *Blyth Chemicals Ltd v Bushnell* [1933] HCA 8; (1933) 49 CLR 66, 81 - 82 (Dixon and McTiernan JJ). In *Cementaid (NSW) Pty Ltd v Chambers* (Unreported, NSWSC, Library No BC9504439, 29 March 1995) Spender AJ suggested it is relevant to address four questions when determining whether a second job conflicts with the duty to the first employer. At (5) his Honour said:

[G]enerally there can be no reason why one should not hold down two different jobs. Many people do: from choice, or from financial necessity. This is sometimes called 'moonlighting', working at a job in addition to one's regular, full time employment: Macquarie Dictionary.

The touchstone for determination of cases such as the present one is to be found in the passage I have quoted from the judgment of Dixon J (as he then was) and McTiernan J in *Blyth*. It may be put in questions: 1. Is the second activity incompatible with the fulfilment of the employee's duty to his other employer? 2. Does it involve an opposition or conflict between his interest and his duty to his employer? 3. Does it impede the faithful performance of his obligations to his other employer? 4. Is it destructive of the necessary confidence between employer and employee? In all cases an actual repugnance between the employee's acts and his relationship with his employer must be found.

- 88 Consequently, at common law, Mr Grail was entitled, if not obliged, to make enquiries on behalf of the Association of Ms Fombason to ascertain whether her hours of work with Centrelink resulted in excessive hours being worked which could impact on her ability to provide 24-hour care to Mr M on weekends. The same considerations applied to the care of the boys. Mr Grail as the CEO of the Association was obliged to ascertain whether Ms Fombason's care of and activities with the boys impacted on her ability to provide 24-hour care to Mr M on weekends.
- 89 The fact that Ms M knew that the Fombasons had taken on the care of the boys is immaterial and that until Mr Grail sought to raise with Ms Fombason issues that directly related to the proper care of Mr M, Ms Fombason had a good relationship with Ms M is also irrelevant.
- 90 For these reasons, I am not persuaded that ground 1 or ground 2 of the grounds of appeal have been made out as I am not persuaded that any error in the reasoning of the learned Commissioner for dismissing Ms Fombason's claim has been demonstrated.
- 91 I am also not persuaded that ground 3 of the grounds of appeal has any merit. Ms Fombason had seven days to respond to the allegations put in writing to her on 21 July 2014. In circumstances where Ms Fombason's attitude to enquiries Mr Grail wished to make of her remained unchanged, in that she maintained that any questions about her hours of work with Centrelink and the care of the boys were not matters the Association was entitled to raise with her, I am not satisfied that the learned Commissioner erred in finding that the matters Mr Grail wished to raise with her were well known to her and that she had ample time to consider the matters raised by Mr Grail.
- 92 For these reasons, I am of the opinion that the appeal should be dismissed.

BEECH CC

- 93 I have had the advantage of reading in draft form the reasons for decision of her Honour the Acting President. I agree with those reasons, and the order to issue, and have nothing to add.

SCOTT ASC

- 94 I have had the advantage of reading in draft form the reasons of her Honour, the Acting President. I agree with those reasons and have nothing further to add.

2016 WAIRC 00170

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MS EVELINE WIYENKA FOMBASON	APPELLANT
	-and-	
	KIMBERLEY INDIVIDUAL AND FAMILY SUPPORT ASSOCIATION INCORPORATED	RESPONDENT
CORAM	FULL BENCH	
	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
	CHIEF COMMISSIONER A R BEECH	
	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	THURSDAY, 24 MARCH 2016	
FILE NO.	FBA 8 OF 2015	
CITATION NO.	2016 WAIRC 00170	

Result	Appeal dismissed
Appearances	
Appellant	Mr J (Shey) Fombason, as agent
Respondent	Mr B R Jackson (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 2 December 2015, and having heard Mr J (Shey) Fombason, as agent on behalf of the appellant, and Mr B R Jackson (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 24 March 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.

[L.S.]

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

2016 WAIRC 00172

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)	APPELLANT
	-and- THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT	RESPONDENT
DATE	TUESDAY, 29 MARCH 2016	
FILE NO.	FBA 12 OF 2015	
CITATION NO.	2016 WAIRC 00172	

Result	Appeal discontinued
Appearances	
Appellant	Mr M Amati
Respondent	Mr D J Matthews (of counsel)

Order

HAVING heard Mr M Amati on behalf of the appellant and Mr D J Matthews (of counsel) on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby discontinued by leave.

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

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2016 WAIRC 00152

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PAUL RALPH KENDALL	APPELLANT
	-and- GOVERNMENT OF WESTERN AUSTRALIA DEPARTMENT OF EDUCATION	
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER	RESPONDENT
DATE	THURSDAY, 17 MARCH 2016	
FILE NO.	FBA 14 OF 2015	
CITATION NO.	2016 WAIRC 00152	

Result	Order issued
Appearances	
Appellant	In person
Respondent	Mr A L Mason (of counsel), by leave

Order

This appeal having come on for a directions hearing before the Full Bench on 16 March 2016, and having heard Mr P R Kendall on his own behalf as appellant and Mr A L Mason (of counsel), by leave, on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, by consent, hereby orders that —

1. The respondent file and serve written submissions by Friday, 15 April 2016.
2. The appellant file and serve written submissions by Friday, 29 April 2016.
3. The appeal be listed for hearing for two days in May 2016 on dates to be fixed.

[L.S.]

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

2016 WAIRC 00127

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JASON ZHOU	APPELLANT
	-and-	
	CURTIN UNIVERSITY	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 4 MARCH 2016	
FILE NO.	FBA 17 OF 2015	
CITATION NO.	2016 WAIRC 00127	

Result	Order issued
Appearances	
Appellant	In person
Respondent	Ms S Maddern (of counsel) and with her Ms C Russo (of counsel), by leave

Order

This appeal having come on for a directions hearing before the Full Bench on 4 March 2016, and having heard Mr J Zhou on his own behalf as appellant and Ms S Maddern (of counsel) and with her Ms C Russo (of counsel), by leave, on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, by consent, hereby orders that —

1. By 18 March 2016, Jason Zhou file and serve submissions addressing:
 - (a) the particulars he relies upon to demonstrate that the decision of Commissioner J L Harrison (citation 2005 WAIRC 01065) is against the evidence and the weight of the evidence; and
 - (b) the specific reasons why he alleges the decision to be wrong in law.
2. By 1 April 2016, Curtin University file and serve any submissions in response.
3. If the Commission determines the appeal should proceed, the matter be listed for hearing not before 4 April 2016.

[L.S.]

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

2016 WAIRC 00151

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 JASON ZHOU
APPELLANT

-and-
 CURTIN UNIVERSITY
RESPONDENT

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

DATE WEDNESDAY, 16 MARCH 2016

FILE NO. FBA 17 OF 2015

CITATION NO. 2016 WAIRC 00151

Result Order issued

Appearances

Appellant In person

Respondent Ms S Maddern (of counsel) and with her Ms C Russo (of counsel), by leave

Order

This appeal having come on for a directions hearing before the Full Bench on 4 March 2016, and having heard Mr J Zhou on his own behalf as appellant and Ms S Maddern (of counsel) and with her Ms C Russo (of counsel), by leave, on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The time for compliance with order [2016] WAIRC 00127 be extended by:

- (a) amending the time for compliance for order (1) to Friday, 1 April 2016;
- (b) amending the time for compliance for order (2) to Friday, 15 April 2016;
- (c) amending the time in order (3) to Monday, 18 April 2016.

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

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2016 WAIRC 00159

THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA, UNION OF WORKERS
 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES PETER FRANCIS O'KEEFFE
APPLICANT

-and-
 THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA UNION OF WORKERS
RESPONDENT

CORAM THE HONOURABLE J H SMITH, ACTING PRESIDENT

DATE MONDAY, 21 MARCH 2016

FILE NO. PRES 1 OF 2016

CITATION NO. 2016 WAIRC 00159

Result	Order issued
Appearances	
Applicant	In person
Respondent	Mr P F O'Keeffe

Order

This matter having come on for hearing before me on 18 March 2016, and having heard Mr P F O'Keeffe on his own behalf as applicant, and Mr P F O'Keeffe on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. Rule 6 of the rules of the respondent (the rules of the Union) is varied in that an Interim Committee of Management is established, constituted as follows:
 - (a) President Bishir Ahmed
 - (b) Senior Vice President Ibrahim Taha
 - (c) Junior Vice President Cylynn Criddle
 - (d) Secretary Peter O'Keeffe
 - (e) Treasurer Adnan Alsudani
 - (f) Trustees Alene Ayanaw
Dusan Dragosavic
Phe Ta
 - (g) Committee Members Sarah-Emily Enuwa
2. The Interim Committee of Management is to remain in place until elections for office are conducted in accordance with the rules as varied by orders 3 and 4 of this order.
3. Rule 11 of the rules is varied in that an Annual General Meeting of the Union is to be held in accordance with the terms of rule 11 in the month of May 2016.
4. Rule 21(1) of the rules is varied in that the notice for nominations for office for elections to be conducted in accordance with order 3 of this order and the rules, are required to be displayed in the manner required by the Interim Committee of Management on a date not earlier than 24 March 2016.
5. Rule 7(1) of the rules is varied in that following the election for each office conducted in accordance with orders 3 and 4 of this order and the rules, each member of the Committee of Management (other than the Secretary) shall hold office for a period of approximately eighteen (18) months, namely from the conclusion of the Annual General Meeting conducted in May 2016 at which he or she is declared duly elected to the conclusion of the next Annual General Meeting in November 2017, when he or she shall retire from office but shall be eligible for re-election.
6. The Interim Committee of Management shall have the authority to exercise all of the powers, duties and functions of the Committee of Management and each of the members of the Interim Committee of Management shall have the authority to exercise all of the powers, duties and functions of the office held by each of them.
7. Unless this order is revoked or varied, this order shall cease to have effect at the commencement of the Annual General Meeting held in the month of November 2017.
8. There be liberty to the parties to apply to vary the terms of this order

[L.S.]

(Sgd.) J H SMITH,
Acting President.

NOTICES—Application for General Order—

2016 WAIRC 00208

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

111 St Georges Terrace, Perth

Submissions for the 2016

WA Minimum Wage

The WAIRC is required to set the minimum wage to apply to employers and employees covered by the WA industrial relations system. It must do this before 1 July each year. The current minimum wage for an adult employee of \$679.90 per week was set in June 2015 to apply from 1 July 2015.

The WAIRC invites interested persons or organisations to make a submission to the Commission on what minimum wage should be set in 2016. The Commission will hear oral submissions on Tuesday, 24 and Wednesday 25 May 2016. The proceedings are open to

the public and will be webcast. Any person who wishes to make an oral submission at that time should notify the Registrar of the Commission stating the basis of their interest. This must be done by Tuesday, 10 May 2016.

Written submissions are welcomed. Any person or organisation who wishes to make a written submission should do so in writing or by email by Tuesday, 10 May 2016. Please note that copies of written submissions may be made available to other persons appearing and may be displayed on the Commission's website.

Further particulars may be obtained from the Registry of the WAIRC and from the Commission's website at www.wairc.wa.gov.au.

All correspondence should be addressed to the Registrar at the above address or by email to registrar@wairc.wa.gov.au quoting Matter number 1 of 2016.

DATED at Perth this 6th day of April 2016.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

INDUSTRIAL MAGISTRATE—Claims before—

2016 WAIRC 00196

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2016 WAIRC 00196
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 10 FEBRUARY 2016, THURSDAY, 11 FEBRUARY 2016,
 THURSDAY, 17 MARCH 2016
DELIVERED : WEDNESDAY 6 APRIL 2016
FILE NO. : M 83 OF 2015
BETWEEN : MICHELLE ANN DYER

CLAIMANT

AND

ROGERSTAR PTY LTD AS THE TRUSTEE FOR THE ROGERSTAR FAMILY TRUST

RESPONDENT

Catchwords : Alleged contravention of the Fast Food Industry Award 2010 [MA000003] by failing to pay the correct rate of pay, failing to pay penalties, failing to pay public holiday entitlements, failing to attribute the correct award classification to the employee – Whether the employer was entitled to make deductions for breaks taken – Whether the employer was authorised to make other deductions.

Legislation : *Fair Work Act 2009*
Minimum Conditions of Employment Act 1993
Industrial Magistrates Courts (General Jurisdiction) Regulations 2005

Instruments : Fast Food Industry Award 2010 [MA000003]
 Restaurant, Tearoom and Catering Workers' Award (WA)

Result : Claim proven in part

Case(s) referred to in reasons : *Miller v Minister of Pensions*
 [1947] 2 All ER 372

Representation:

Claimant : In Person

Respondent : Mrs C Rogers (director)

REASONS FOR DECISION

Background

- 1 At all material times Rogerstar Pty Ltd as The Trustee for the Rogerstar Family Trust (the respondent) owned and operated the Beachfront Deli (the Deli) on Safety Bay Road in Safety Bay. The Deli was purchased in 2005. At that time it was a successful business but for variety of reasons its viability declined and ultimately it ceased to trade in 2015.
- 2 The Deli was run by various members of the Rogers family. The respondent's sole director, Mrs Christine Rogers (Mrs Rogers), was responsible for the Deli's financial and regulatory affairs. She managed the payroll and was largely responsible for rostering staff. Mrs Rogers' husband, Mr Andrew Rogers (Mr Rogers), and their daughter, Ms Melissa Rogers (Ms Rogers), variously managed the Deli. From time to time other managers were also employed.

- 3 The Deli operated seven days per week, including public holidays. During the material period, its opening hours varied. It opened as early as 5.00 am and closed as late as 9.00 pm. Initially it was open from 5.00 am to 9.00 pm but later from 6.00 am to 8.00 pm. As business declined its opening hours reduced and it traded from 6.00 am to 6.00 pm or 4.00 pm dependant on the day of the week.
- 4 The Deli sold newspapers, drinks, cigarettes, grocery items and various types of fast food items such as sandwiches, rolls, hamburgers and hotdogs. Its busiest periods were in the mornings and at lunch time. It, save for a couple of hours at the start of the day and a couple of hours at the end of the day, operated with at least two staff members working at the same time. At times the Deli operated without a manager in attendance.
- 5 Ms Michelle Dyer (the claimant) obtained employment with the respondent in December 2010 after having answered the respondent's advertisement seeking the services of a 'shop assistant'. When interviewed for the position by Mr Rogers she was told that her duties would include cooking, cleaning, stocking shelves and serving customers. There was no discussion about her pay. The claimant was told that she was to work on a casual basis and that her shifts would be rostered by Mrs Rogers. The rosters were to be kept and displayed at the Deli.
- 6 She worked shifts of varying duration but in the main the claimant's shifts were between six and eight hours. She usually worked with another person and sometimes worked with a junior employee who had limited responsibilities. Juniors were not permitted to cook. The claimant assumed a supervisory role when working alone with a junior employee. At times she worked the early shift which necessitated her opening the Deli and at other times she worked the late shift which necessitated her closing the Deli. Her work days varied. She worked weekdays, weekends and public holidays. She was paid a flat hourly rate of pay irrespective of the day of the week that she worked. She was not paid penalty rates excepting Christmas day. On occasions she worked a three hour shift on Christmas day for which she was paid at double time. She was paid for the entirety of any shift worked and did not receive an unpaid lunch break.
- 7 The claimant's employment with the respondent ended in March 2015.

Award

- 8 Mrs Rogers was unaware that the Fast Food Industry Award 2010 [MA000003] (the Award) governed the claimant's employment. During the claimant's employment the respondent mistakenly paid her in accordance with the requirements of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) which had no application. Mrs Rogers only became aware of the existence of the Award after the claimant and another staff member complained about their pay in early March 2015.
- 9 The respondent accepts that the Award had application throughout the claimant's employment.

Claim and Response

- 10 The claimant alleges that the respondent underpaid her \$33,475.94. She alleges that she was paid at the incorrect rate and not paid applicable penalty rates. She asserts that during her employment she should have been paid the rate applicable to a Fast Food Employee Level 3 or alternatively, a Fast Food Employee Level 2 as defined in Schedule B of the Award.
- 11 The respondent denies that the claimant was a Fast Food Employee Level 3 or Fast Food Employee Level 2 and says that, at all material times, the claimant was a Fast Food Employee Level 1.
- 12 In any event, the respondent contends that the claimant is not owed anything because the claimant was overpaid. The respondent says that the claimant took rest and meal breaks amounting to at least 60 minutes in duration each shift, which were mistakenly paid but which should not have been. It seeks to set off those overpayments as against any underpayment due.
- 13 In addition to the underpayment claimed the claimant asserts that she is entitled to \$154.70 unlawfully deducted from her pay. In that regard, the respondent admits deductions to the extent of \$145.60, but says that the deductions were made with the express consent and authorisation of the claimant.
- 14 In addition to the amounts claimed the claimant also seeks interest thereon. Further, she asks that the court penalise the respondent for its contraventions of s 45 of the *Fair Work Act 2009* (FW Act) (failure to pay the correct rates) and its contravention of s 323(1) of the FW Act (unauthorised deductions).
- 15 For the sake of completeness it is necessary to say something about what the claimant has done in bringing this claim.
- 16 She lodged her originating claim on 15 June 2015. In the statement of claim which was attached to it she named the respondent as the first respondent, Mrs Rogers as second respondent and Mr Rogers as third respondent. Where the respondent's name appears on the originating claim form it refers to the attached Form 28. A Form 28 is used to list additional respondents. Despite indicating that a Form 28 was attached to the originating claim form there was no such form attached.
- 17 After its lodgement the originating claim was only ever served upon the respondent. There has never been any attempt made to serve Mrs Rogers and/or Mr Rogers with a copy of it. It follows that although Mr and Mrs Rogers were nominated as parties in the statement of claim, they have never in fact been parties in this proceeding.
- 18 At the commencement of the trial, I raised this difficulty with the claimant. She informed me that although she no longer wishes to pursue a claim against Mr Rogers she maintains that Mrs Rogers is, pursuant to s 550 of the FW Act, liable for the respondent's contraventions. She accordingly sought an adjournment of the trial to join Mrs Rogers as a party. Her application was refused because of the cost and delay involved. If her application had been granted it would have resulted in the vacation of the two day trial which had long been listed and would not have been in keeping with what is required by reg 5 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005*.

Burden of Proof and Standard of Proof

- 19 The claimant carries the legal burden of proof for her claim whilst the respondent carries the legal burden of proving those things which it asserts.

20 The standard of proof required to discharge the respective burdens of proof is the balance of probabilities. This standard was explained by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 374 as follows:

That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.

21 Accordingly, where in these reasons I say that 'I am satisfied' of a fact or matter or otherwise make a finding as to a fact or matter, I am saying 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

Issues

22 The issues to be determined in this matter are:

1. the claimant's correct classification under the Award;
2. whether, during the period of the claimant's employment, the respondent contravened s 45 of the FW Act by
 - i. paying the claimant less than the applicable minimum wage under the Award;
 - ii. failing to pay the claimant penalty rates required by the Award; and
 - iii. failing to pay the claimant public holiday rates required by the Award;
3. whether the claimant was overpaid by reason of having been mistakenly paid for breaks taken;
4. whether overpayments, if any, are to be set off against any underpayment; and
5. whether deductions made from the claimant's pay were lawful.

Classification

23 The claimant asserts that she was a Fast Food Employee Level 3, or in the alternative, a Fast Food Employee Level 2. The respondent contends that the claimant was a Fast Food Employee Level 1.

24 Schedule B – Classifications of the Award provides:

B.1 Fast Food Employee Level 1

B1.1 An employee engaged in the preparation, the receipt of orders, cooking, sale, serving or delivery of meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres.

B1.2 A Fast Food Employee Level 1 will undertake duties as directed within the limits of their competence, skills and training including incidental cleaning and cleaning of toilets.

B.2 Fast Food Employee Level 2

An employee who has the major responsibility on a day to day basis for supervising Fast Food employees Level 1 and/or training new employees or an employee required to exercise trade skills.

B.3 Fast Food Employee Level 3

An employee appointed by the employer to be in charge of a shop, food outlet, or delivery outlet.

25 The claimant relies on her own testimony and that of her co-worker, Ms Karen Morris (Ms Morris), to prove that whilst working for the respondent, she performed the duties of a Fast Food Employee Level 3, or alternatively a Fast Food Employee Level 2.

26 Her assertion that she was a Fast Food Employee Level 3 was, in part, predicated on the fact that her duties included opening or closing of the Deli as the case required. She was entrusted with the Deli's keys for that very purpose. Further, she asserts that she was responsible for the payment of deliveries and had the responsibility of ensuring that all of the necessary stock was available. She contends that it was her task to ensure the efficient running of the Deli, which included the ring-off of sales at the end of the day, the safe storage of cash and the creation of a float for the next day's operations. When rostered alone with juniors as young as 13 years old, she had to supervise them and instruct them.

27 Mrs Rogers testified that the claimant was never appointed to be in charge of the Deli. Mrs Rogers, Mr Rogers, Ms Rogers and Ms Vanessa Kelly (Ms Kelly), a former manager of the Deli, all testified that the claimant worked under the direction of a manager in attendance and if a manager was not in attendance, the claimant worked in accordance with a list of duties that the respondent had given her. It was their evidence that if any difficulties or issues arose at the Deli whilst a manager was not present, that Mrs Rogers, Mr Rogers, or Ms Rogers were readily contactable by phone for the purpose of instruction and/or direction. Mrs Rogers' evidence is that the claimant was not given any administrative responsibility and did not have any authority to do anything associated with the management of the Deli.

28 In determining the issue of classification, one thing is clear and that is that the claimant was never 'appointed' to be in charge of the Deli. The claimant does not assert such appointment. That alone defeats her contention that she was a Fast Food Employee Level 3. One cannot assume a responsibility to be in charge which has not been conferred. I am satisfied that the claimant was always subservient to the Deli's manager who was either present or on-call. All the things that she did were at the direction of a manager.

29 In the alternative, the claimant asserts that she was a Fast Food Employee Level 2. To fall within that classification, the claimant has to prove that she had, on a day-to-day basis, the major responsibility for supervising Fast Food Employees at Level 1 and/or training new employees. In that regard, I am satisfied based on the evidence given by Mr and Mrs Rogers, and indeed on the claimant's own evidence, that she was never given the responsibility to supervise other employees. She may

have, on an ad-hoc basis, assumed some form of responsibility with respect to juniors working with her. It is clear from the claimant's own testimony that any supervision or training conducted was not her major responsibility and in any event did not occur on a day-to-day basis.

- 30 I am satisfied that the claimant was at all material times a Fast Food Employee Level 1. Her own testimony establishes that she carried out the type of duties described in cl B.1 of Schedule B of the Award. I find that she was engaged in food preparation, the receipt of orders, cooking, selling, serving or the delivery of meals, snacks and/or beverages that were sold by the Deli to the public to take away. She also undertook other duties as directed, within the limits of her competence, which included cleaning, opening the store, closing the store, creating floats and securing takings. Such other directed duties fall within that which is contemplated by cl B1.1 of Schedule B of the Award.

Was the Claimant Paid Correctly?

- 31 It is self-evident that the respondent did not pay the claimant in accordance with that required by the Award because Mrs Rogers did not know of its existence. Consequently all payments received by the claimant were calculated on a flat hourly rate irrespective of whether the work was done on weekdays, Saturdays, Sundays or public holidays (Christmas day being the exception). The respondent does not contend otherwise.
- 32 The flat hourly rate used by the respondent in paying the claimant for hours worked was, with respect to each pay period, lower than the applicable hourly rate for ordinary time worked. It follows that it was also lower than the applicable Saturday, Sunday and public holiday rate.
- 33 There can be no doubt that the claimant was, throughout her employment, paid at an hourly rate which was lower than that required by the Award.

Was the Claimant Underpaid?

- 34 The respondent asserts that it erroneously overpaid the claimant and therefore does not owe her anything.
- 35 It argues that cl 27 of the Award provides that breaks taken by an employee during each shift worked are not payable. It says that it paid the claimant for the breaks that she took during each shift worked because it believed that was required by the MCE Act. Had it known that the Award applied it would not have paid the claimant for all of the breaks that she took. As a consequence of its mistake of law the respondent overpaid the claimant. It accordingly seeks to set off any underpayment resulting from the application of the incorrect industrial instrument against the overpayments it says it made to the claimant.
- 36 Mrs Rogers contends that the accumulation of all the breaks taken by the claimant each shift, including the time to eat lunch, would have amounted to at least 60 minutes in duration. In addition she asserts that the claimant had a coffee at the commencement of each shift and therefore attributes a further 15 minute break for that purpose. Consequently the respondent maintains that it overpaid the claimant the value attributable to 75 minutes of each shift worked.
- 37 Much of the evidence at trial concerned the extent of the breaks taken by the claimant and whether or not she was given an uninterrupted lunch break during each shift that she worked consisting of six hours or more.
- 38 The respondent called a number of witnesses to establish that the business at the Deli was very slow, particularly in the couple of years prior to the claimant's employment ceasing. It contends that such evidence establishes that the claimant had ample time to take numerous breaks and to eat lunch each shift.
- 39 The claimant and Ms Morris testified that the Deli was relatively busy and even when it was not there were other duties to perform. Consequently the number and duration of the breaks that could be taken was limited. Notwithstanding that, they readily concede that breaks were taken at opportune times to smoke, eat, or do other things. Such breaks were taken in periods of down time when business was slow.
- 40 Mrs Rogers, Mr Rogers and Ms Rogers all testified that during each shift, the claimant had ample opportunity to take an uninterrupted lunch break. The claimant and Ms Morris, on the other hand, testified that they were not given a dedicated lunch break and that they ate on the run in between serving customers. Their evidence in that regard is supported by Ms Kelly who worked with the claimant and at one time, was the manager of the Deli. Ms Kelly said under cross-examination that employees at the Deli were not allowed to take a lunch break and that staff ate their lunch between serving customers.
- 41 I am satisfied based on the evidence given by the claimant, Ms Morris, and Ms Kelly that the respondent did not make provision for the claimant to take a dedicated lunch break. Had it done so the respondent would not have paid for the lunch breaks taken. As Ms Kelly said, the respondent did not permit the taking of a lunch break. The respondent's conduct in paying the claimant for the entire duration of the shift contradicts any suggestion of an unpaid lunch break. It is clear to me that the respondent was, in respect of each shift worked of five hours or more, in breach of cl 27(1)(f) of the Award by denying the claimant a meal break. That is not to say that the claimant was not afforded an opportunity to have a meal, but rather she was not given a meaningful break of at least 30 minutes during which she could leave the workplace if desired.
- 42 As to the other breaks taken, I am satisfied, given that there is no real dispute about the issue, that on any given shift the claimant took several breaks. I am satisfied that those breaks taken were with the consent of the respondent through its managers. Mr Rogers admitted that. Indeed, there was never any complaint made when they were taken. There was never any complaint about the number of breaks taken or the duration of those breaks. The claimant was never threatened with disciplinary action or advised by the respondent that it would make deductions from her pay for having taken the breaks. During the claimant's employment, the taking of breaks was never an issue. The respondent raises it now as a convenient way to defeat the claim.
- 43 Even if there was some legitimacy in the respondent's contention concerning the breaks taken, the respondent has failed to prove that which it asserts, that is, that the claimant accumulated breaks during each shift which amounted to at least 60 minutes. It is axiomatic that no record was kept of the number of breaks that the claimant took or the duration of those breaks.

- 44 Given that the respondent asserts that the claimant took breaks totalling at least 60 minutes each shift worked it will be for the respondent to prove that on the balance of probabilities. That it has failed to do because the evidence that it has called in that regard is lacking in detail. The evidence given by all witnesses called by the respondent is anecdotal in nature. Their evidence on the issue is based on hearsay, supposition and conjecture. It does not permit the court to conclude that with respect to each shift worked the claimant took breaks amounting to at least 60 minutes.
- 45 In any event the respondent's contention with respect to breaks taken is fundamentally flawed. It is predicated on a misunderstanding of what cl 27 of the Award says. Clause 27 of the Award provides:

27. Breaks

[Varied by [PR539921](#)]

27.1 Breaks during work periods

(a) Breaks will be given as follows:

Hours worked	Rest break	Meal break
Less than 4 hours	No rest break	No meal break
4 hours but less than 5 hours	One 10 minute rest break	No meal break
5 hours but less than 9 hours	One 10 minute rest break	One meal break of at least 30 minutes but not more than 60 minutes
9 hours or more	One or two 10 minute rest breaks, with one taken in the first half of the work hours and the second taken in the second half of the work hours, two rest breaks will be given unless a second meal break is provided	One or two meal breaks of at least 30 minutes but not more than 60 minutes

- (b) The timing of the taking of a rest break or meal break is intended to provide a meaningful break for the employee during work hours.
- (c) An employee cannot be required to take a rest break or meal break within one hour of commencing or ceasing work. An employee cannot be required to take a rest break(s) combined with a meal break.
- (d) The time of taking rest and meal breaks and the duration of meal breaks form part of the roster and are subject to the roster provisions of this award.

[27.1(e) varied by [PR539921](#) ppc 01Oct13]

- (e) Rest breaks are paid breaks and meal breaks are unpaid breaks.
- (f) An employee cannot work more than five hours without a meal break.

- 46 Clause 27 of the Award facilitates the taking of rest and meal breaks. In the claimant's case it facilitated the taking of one unpaid meal break of between 30 minutes and 60 minutes and at least one paid rest break of 10 minutes duration. Clause 27 of the Award does not prevent an employee having more than one authorised paid rest break. Clause 27.1(c) of the Award provides that an employer cannot force an employee to take a meal or rest break within an hour of commencing or finishing. It does not provide an employer with the power to make a deduction of pay for a rest break taken during that time which was taken with the consent of the employer.
- 47 Nothing in cl 27 of the Award empowers an employer to accumulate all time taken off as a break and then deduct the value of that time from an employee's entitlement. A plain reading of the provision indicates that the respondent's contention that it is permitted to reduce the claimant's entitlement by deducting money for breaks taken is quite disingenuous. It appears that the respondent is attempting to obfuscate the plain meaning of cl 27 of the Award in order to achieve its end of defeating the claim. The respondent's argument concerning breaks is wholly unmeritorious.
- 48 I find that the respondent did not overpay the claimant. Accordingly, there is nothing to set off against any entitlements due to the claimant.

Underpayment

- 49 I am satisfied based on the documentary evidence before me that the claimant has been underpaid. The only issue to be determined in that regard is the quantum of underpayment.
- 50 The claimant has produced a number of documents by which she seeks to prove the quantum of underpayment. Once such document (exhibit 3) contains spread sheets of calculations made based on information derived from rosters and payslips which have also been produced to the court.
- 51 The respondent contends that the claimant's calculations cannot be relied upon because her source information (the rosters) does not represent the actuality of the shifts worked. Mrs Rogers testified that employees used to change shifts between them and the rosters do not represent the shifts actually worked. Indeed, the claimant conceded that shifts were sometimes swapped but contends that such does not impact upon her calculations. Clearly the claimant's contention is wrong because it will be of significance if a weekday shift was swapped for a weekend or public holiday shift and vice-versa. Penalty rates are applicable to shifts worked on weekends and public holidays.

- 52 The respondent says that its time and wages records (exhibit 15), which were used at the end of each pay period to calculate payments made to the claimant, are a more accurate record and should be used for the purpose of determining the shifts completed and hours worked. I accept that.
- 53 Consequently I have carefully cross-checked exhibits 3 and 15 and find that there is no variation between the two documents as to the shifts worked. Indeed they correlate in their entirety in that regard. There are however, some minor variations with respect to the hours worked on certain shifts. Those variations are also borne out by the pay slips (exhibit 1). The variations are noted in the following table.

Week Ending	Hours Claimed (Exhibit 3)	Hours Worked (Exhibit 15)	Difference (Hours)
09/08/2011	25 (ordinary)	24 (ordinary)	-1
16/08/2011	19 (ordinary)	18 (ordinary)	-1
23/08/2011	11 (ordinary)	12 (ordinary)	+1
21/12/2012	7.5 (ordinary)	13 (ordinary)	+5.5
08/01/2013	13 (ordinary)	12.5 (ordinary)	-0.5
03/06/2014	10 (ordinary)	12 (ordinary)	+2
03/06/2014	8 (Sunday)	4 (Sunday)	-4
15/07/2014	26 (ordinary)	24 (ordinary)	-2
02/12/2014	8 (Saturday)	6 (Saturday)	-2
30/12/2014	10 (Public Holiday)	11 (Public Holiday)	+1
17/02/2015	20 (ordinary)	32 (ordinary)	+12
17/02/2015	6 (Saturday)	0 (Saturday)	-6
17/02/2015	6 (Sunday)	0 (Sunday)	-6

- 54 The claimant's claim was expressed in the alternative in the event of a finding that she was not a Fast Food Employee Level 2 or 3. She has produced calculations in exhibit 3 in so far as they relate to a Fast Food Employee Level 1. However, I find that she has not used the applicable pay rates. The correct rates are those produced by the transitional provisions contained in Schedule A of the Award taking into account that the Restaurant, Tearoom and Catering Workers' Award (WA) that applied to the respondent prior to the commencement of the Award.
- 55 There accordingly needs to be an adjustment made to the amount claimed to apply the correct pay rates. The amount payable on the hours claimed to have been worked using the correct rate is set out in the table that follows.

Type of Hours	Hours Worked	Rate (\$)	Amount Payable	Amount Paid	Difference (\$)
2010-2011					
Ordinary	296.5	20.21	5,992.27	5,485.25	507.02
Saturday	61.5	24.26	1,491.99	1,137.75	354.24
Sunday	83.5	25.06	2,092.51	1,544.75	547.76
Public Holidays	23.5	38.00	893.00	434.75	458.35
				Total	1,867.37
2011-2012					
Ordinary	634.5	21.01	13,691.15	12,169.71	1,521.44
Saturday	142	25.21	3,579.82	2,723.56	856.26
Sunday	252.5	26.89	6,789.73	4,842.95	1,946.78
Public Holidays	28.5	41.18	1,173.63	546.63	627.00
				Total	4,951.48
2012-2013					
Ordinary	735.25	21.72	15,969.63	14,586.48	1,383.15
Saturday	221.5	26.07	5,774.51	4,362.00	1,412.51
Sunday	182	28.67	5,217.94	3,592.05	1,625.89
Public Holidays	28.5	44.31	1,262.84	631.92	630.92
				Total	5,052.47

Type of Hours	Hours Worked	Rate (\$)	Amount Payable	Amount Paid	Difference (\$)
2013-2014					
Ordinary	689	22.39	15,426.71	13,998.00	1,428.71
Saturday	178	26.86	4,781.08	3,624.00	1,157.02
Sunday	155	30.44	4,718.20	3154.80	1,563.40
Public Holidays	25	47.46	1,186.50	510.00	676.50
				Total	4,825.63
2014-2015					
Ordinary	687	23.15	15,904.05	14,336.79	1,567.76
Saturday	124	27.78	3,444.72	2,607.72	837.00
Sunday	138.5	32.41	4,488.79	2,912.66	1,576.13
Public Holidays	18	50.93	916.74	378.54	538.20
				Total	4,549.09
				Grand Total	21,246.04

56 An adjustment must also be made to take into account the variation in hours previously noted. The adjustment is as follows:

Week Ending	Hours Claimed (Exhibit 3)	Hours Worked (Exhibit 15)	Difference in Hours	Monetary Value
09/08/2011	25 (ordinary)	24 (ordinary)	-1 @ \$21.01	-\$ 21.01
16/08/2011	19 (ordinary)	18 (ordinary)	-1 @ \$21.01	-\$ 21.01
23/08/2011	11 (ordinary)	12 (ordinary)	+1 @ \$21.01	+\$ 21.01
21/12/2012	7.5 (ordinary)	13 (ordinary)	+5.5 @ \$21.72	+\$ 119.46
08/01/2013	13 (ordinary)	12.5 (ordinary)	-0.5 @ \$21.72	-\$ 10.86
03/06/2014	10 (ordinary)	12 (ordinary)	+2 @ \$22.39	+\$ 44.78
03/06/2014	8 (Sunday)	4 (Sunday)	-4 @ \$30.44	-\$ 121.76
15/07/2014	26 (ordinary)	24 (ordinary)	-2 @ \$23.15	-\$ 46.30
02/12/2014	8 (Saturday)	6 (Saturday)	-2 @ \$27.78	-\$ 55.60
30/12/2014	10 (Public Holiday)	11 (Public Holiday)	+1 @ \$50.93	+\$ 50.03
17/02/2015	20 (ordinary)	32 (ordinary)	+12 @ \$23.15	+\$ 277.80
17/02/2015	6 (Saturday)	0 (Saturday)	-6 @ \$27.78	-\$ 166.68
17/02/2015	6 (Sunday)	0 (Sunday)	-6 @ \$32.41	-\$ 194.46
			Nett Difference	-\$ 244.06

57 It follows that \$244.06 must be deducted from \$21,246.04 to take into account the variation in hours worked, resulting in a nett underpayment of \$21,001.98.

58 I find that the respondent has underpaid the claimant \$21,001.98. It will be appropriate for an order to be made that the respondent pay the claimant that sum plus interest thereon at the rate of 6% per annum calculated from 1 April 2015 (first day after last pay period) until judgement fixed in the sum of \$1,280.76.

Deductions

59 There is no dispute about the fact that the Respondent deducted \$0.70 from the claimant's pay each pay period worked. The respondent deducted \$0.70 as a contribution towards the sponsorship of a child through World Vision. It appears that the respondent did the same thing with respect to other employees.

60 The claimant says that she did not authorise such deduction and only realised that the deduction was made after receiving her first pay slip. The respondent on the other hand maintains that the claimant voluntarily participated in the sponsorship after having been told about it at the interview.

61 In determining the issue I prefer the claimant's evidence. I found her to be a credible witness. Her evidence in that regard is consistent with what Ms Morris said about her circumstances concerning the same issue. On the other hand the evidence called by the respondent on the issue of express authorisation is somewhat nebulous. In his evidence in chief Mr Rogers testified that when he interviewed the claimant he told her about the voluntary sponsorship arrangement. However, when cross-examined about that he said he knew that he told her about the sponsorship because he routinely did that with all new employees. I cannot therefore be satisfied that he has an actual recollection of a discussion with the claimant about that. Although Mr Rogers believes that he had that discussion I cannot be satisfied that he did. Rather, I am satisfied that there was no such

discussion and that by the time the claimant realised the deduction regime was in place it had become a fait accompli. She then reluctantly accepted it.

- 62 Whether or not oral authorisation was given for such deduction is moot in any event. That is because s 323(1) of the FW Act requires that an employee be paid in full for all work performed unless authorisation to make deductions is given by one of the ways set out in s 324(1) of the FW Act. Section 324(1) enables an employer to make deductions from an amount payable to an employee only if the deduction is authorised in writing by the employee and is principally for the employee's benefit, or is otherwise authorised under an enterprise agreement, a modern award, by or under a law or an order of a court. None of those things applied. What is clear is that reliance on an oral authorisation to enable deductions from pay is impermissible.
- 63 It suffices to say that the claimant never gave the respondent written authorisation to make the deductions it made. It follows that the respondent acted unlawfully in making the deductions. The claimant is entitled to recover the amounts deducted. The claimant claims \$154.70 in that regard. The respondent denies that amount was deducted and has produced a pay roll activity statement derived from its computer data base showing that between 1 July 2010 and 30 June 2015 the amount \$145.60 was deducted (exhibit 14).
- 64 The time and wages records (exhibit 15) produce a different result. Using those records I find that from 16 December 2010 (the claimant's first day of work) until 26 March 2015 (the claimant's last day of work) she worked 211 pay periods. \$0.70 was deducted each pay period. A total of \$147.70 was deducted. She is entitled to recover that amount plus interest thereon calculated as previously indicated fixed at \$9.01.

Amount Payable

- 65 The respondent will be ordered to pay to the claimant \$22,439.45 comprised as follows:
- o \$21,001.98 in entitlements owed;
 - o \$1,280.76 in interest on the entitlements owed;
 - o \$147.70 in repayment of unauthorised deductions; and
 - o \$9.01 in interest on the sum of unauthorised deductions.

Penalties and Other Orders

- 66 I will now hear from the parties concerning the issue of penalties and any other orders that need to be made.

G. CICCHINI

INDUSTRIAL MAGISTRATE

2016 WAIRC 00198

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2016 WAIRC 00198
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 3 FEBRUARY 2016
DELIVERED : WEDNESDAY, 6 APRIL 2016
FILE NO. : M 82 OF 2015
BETWEEN : KAREN MORRIS

CLAIMANT

AND

ROGERSTAR PTY LTD AS TRUSTEE FOR THE ROGERSTAR FAMILY TRUST

FIRST RESPONDENT

MRS CHRISTINE ROGERS

SECOND RESPONDENT

Catchwords : Small claim – Alleged contravention of the Fast Food Industry Award 2010 [MA000003] – Alleged failure by first respondent to pay correct rate of pay – Whether employer is entitled to make deductions with respect to breaks taken – Whether the second respondent aided, abetted or procured contraventions of the *Fair Work Act 2009* – Accessorial liability of Director – Section 550 of the *Fair Work Act 2009*.

Legislation : *Fair Work Act 2009*
Minimum Conditions of Employment Act 1993

Instruments : Fast Food Industry Award 2010 [MA000003]
 Restaurant, Tearoom and Catering Workers' Award (WA)

Result : Claim against the first respondent is proven in part; Claim against the second respondent is not proven.

Case(s) referred to

- in Reasons** :
- Miller v Minister of Pensions*
[1947] 2 All ER 372
 - Yorke v Lucas*
[1985] HCA 65
 - Fair Work Ombudsman v Bird (No.2)*
[2012] FMCA 312
 - Fair Work Ombudsman v Aussie Junk Pty Ltd (In Liquidation) & Anor*
[2011] FMCA 391
 - Guirguis v Ten Twelve Pty Ltd & Anor*
[2012] FMCA 307
 - Potter v Fair Work Ombudsman*
[2014] FCA 187
 - Abigroup Contractors Pty Ltd v CFMEU & Ors*
[2012] FMCA 820 (No.2)

Representation

- Claimant : In Person
 First Respondent : Mrs C Rogers (Director)
 Second Respondent : In Person

REASONS FOR DECISION**Introduction**

- 1 At all material times Rogerstar Pty Ltd as trustee for the Rogerstar Family Trust (first respondent) owned the Beachfront Deli (the Deli) at Safety Bay.
- 2 The first respondent purchased the Deli in about 2005. At that time it was a successful business but its viability progressively declined to the point where it ceased to operate in 2015.
- 3 Mrs Christine Rogers (the second respondent) is the director of the first respondent. The second respondent and her husband, Mr Andrew Rogers (Mr Rogers), were responsible for the operations at the Deli. Their daughter, Ms Melissa Rogers (Ms Rogers), was its manager.
- 4 During the material period the Deli opened at 6.00 am and closed variously either at 4.00 pm or 6.00 pm. It operated seven days per week, including public holidays, selling newspapers, drinks, grocery items, and cigarettes. It also prepared and sold a variety of fast food items including sandwiches, rolls, hamburgers and hotdogs. The Deli catered to the public and particularly to tradesmen working in the immediate vicinity. Its busiest periods were in the mornings and at lunch time. It was usually staffed each day by two casual employees. One would commence early in the morning and the other would commence later, resulting in at least two casual staff being available during its busiest periods. The rosters were usually prepared by the second respondent but sometimes by Mr Rogers or Ms Rogers.
- 5 Ms Karen Morris (the claimant) was employed by the first respondent at the Deli from 27 July 2013. Her duties included the preparation of food, cooking, serving customers, cleaning and procuring stock. The claimant usually worked four or five shifts per week. Each shift was usually for six hours but sometimes more.
- 6 The claimant usually worked the afternoon shift and was responsible for closing the Deli. At times she worked the morning shift. The claimant was rostered to work on Saturdays, Sundays and public holidays, as well as ordinary weekdays.

Award

- 7 There is no dispute between the parties that the Fast Food Industry Award 2010 [MA000003] (the Award) applied to the claimant's employment. Further, it is not in dispute that at all material times the claimant was employed on a casual basis as a Fast Food Employee Level 1, as defined in cl B1 of Schedule B of the Award. The only issue between the parties is whether the claimant was paid her correct entitlements as required by the Award.
- 8 At the time that the claimant was employed, the second respondent, who ran the first respondent's financial and administrative affairs, including the payroll, was not aware of the Award. She believed that the claimant's pay and other entitlements were governed by the provisions of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act). As a result, the claimant was paid in accordance with the requirements of the MCE Act.
- 9 It was not until March 2015 when the claimant raised issues concerning her pay that the second respondent became aware that the Award covered the claimant's employment. When the claimant first raised her concerns, the second respondent immediately investigated the situation and was advised that the Restaurant, Tearoom and Catering Workers' Award (WA) covered the claimant's employment, however she soon realised that the Award had application by reason of the fact that the first respondent was a national system employer (see s 14 of the *Fair Work Act 2009* (FW Act)).
- 10 After having raised concerns about her pay, the claimant was no longer rostered to work for the first respondent. She ceased working at the Deli on 28 March 2015.

Issues

- 11 The claimant alleges that she has been underpaid \$10,642.10. She seeks to recover that sum plus pre-judgement interest thereon. She also seeks the imposition of penalties by reason of the first respondent's contravention of s 45 of the FW Act. In

addition, the claimant alleges that because the second respondent aided, abetted or procured the contraventions, she is personally liable for any payments due and/or penalties imposed.

- 12 The first respondent and second respondent (the respondents) contend that the claimant is not entitled to the amount claimed because the first respondent has overpaid the claimant. The respondents say that the claimant took rest and meal breaks amounting to at least 60 minutes in duration each shift which were paid but should not have been. They seek to set off such overpayments against any underpayment due.
- 13 The issues to be determined in this matter are:
 1. whether, during the period of the claimant's employment, the first respondent contravened s 45 of the FW Act
 - i. by paying the claimant less than the applicable minimum wage under the Award,
 - ii. by failing to pay the claimant the penalty rates as required by the Award, and
 - iii. by failing to pay her public holiday rates as required by the Award; and
 2. whether the claimant was overpaid by reasons of being mistakenly paid for breaks taken; and
 3. whether the second respondent is personally liable to pay the claimant the total sum of the alleged underpayment plus penalties.

Burden of Proof and Standard of Proof

- 14 The claimant carries the legal burden of proof for her claim whilst the respondent carries the legal burden of proving those things which it asserts.
- 15 The standard of proof required to discharge the respective burdens of proof is the balance of probabilities. This standard was explained by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372, 374 as follows:

That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.

- 16 Accordingly, where in these reasons I say that 'I am satisfied' of a fact or matter or otherwise make a finding as to a fact or matter, I am saying 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

Did the First Respondent Comply With s 45 of the FW Act?

- 17 The respondents readily concede that at all material times the first respondent failed to pay the claimant the applicable minimum wage, penalty rates and public holiday rates as required by the Award. They say that failure occurred because the first respondent mistakenly believed that the applicable rates were those provided by the MCE Act.

Was the Claimant Overpaid?

- 18 The respondents contend that breaks taken by the claimant during each shift worked were not payable. They cite cl 27 of the Award in support of that.
- 19 The respondents say that the MCE Act under which the first respondent mistakenly operated prevented deductions being made for breaks taken. Consequently the claimant was paid for breaks taken despite them not being payable under the Award.
- 20 Much of the evidence at trial concerned whether or not the claimant had taken breaks and if so, the extent of such breaks. The evidence sits in two camps, being that of the claimant and a co-worker, Ms Michelle Dyer (Ms Dyer), (who also has a claim against the first respondent) in one and that of the second respondent and her family together with the first respondent's former employee, Ms Jacqueline Bruce (Ms Bruce), in the other.
- 21 The respondents assert that the evidence given by witnesses called by them enables a conclusion to be drawn that business was very slow and that breaks were taken by the claimant for the purpose of smoking (every half hour), to eat lunch, to have coffee, to chat with her family members and/or her boyfriend, to read magazines, to play games, to access her phone and to gossip. Those breaks accumulated to at least 60 minutes each shift. Their evidence was supported by Ms Bruce who attended the Deli quite regularly, as a customer after ceasing her employment with the first respondent. Ms Bruce testified that she often saw the claimant not working. Ms Bruce said that she would often have a cigarette with the claimant.
- 22 The claimant and Ms Dyer testified that the Deli was reasonably busy with little time for breaks. They each conceded however that breaks were taken at opportune times, to smoke cigarettes, to eat and to relax during down times.
- 23 The second respondent, Mr Rogers and Ms Rogers testified that during each shift the claimant had ample opportunity to eat her lunch without interruption. The claimant says (supported by Ms Dyer) that she was not given a dedicated lunch break and that she ate her lunch on the run between serving customers.
- 24 The fact that the claimant took numerous breaks to smoke cigarettes during each shift is quite apparent. It is clear that she did so with the knowledge and consent of the Rogers family members running the Deli. Indeed she was joined by the Rogers family members whilst smoking. The fact that she took breaks for various purposes was known about and consented to by the first respondent. Her taking the breaks was never the subject of complaint and/or disciplinary action. She was never told that she could not take breaks or that her pay would be docked for having taken such breaks.
- 25 Although it is easy to conclude that the claimant took several breaks during each shift, the precise quantification of the period of each break taken is difficult to achieve. No record was kept in that regard. There are inherent biases that attach to the evidence of each witness who gave evidence on that point. The only independent witness is Ms Bruce. However her evidence is unhelpful with respect to quantification. Ms Bruce's evidence establishes only that the claimant had smoking sessions with her at certain times and that is something the claimant concedes in any event. Neither Ms Bruce nor any of the other witnesses

called by the respondents can, with any degree of accuracy, attest to the amount of time that the claimant took in breaks each shift. The evidence as it stands does not enable the court to find that the claimant had at least a 60 minute break each shift worked.

26 However, there is in any event, a fundamental flaw which completely undermines the respondents' argument with respect to deductions for breaks taken.

27 Clause 27 of the Award provides:

27. Breaks

[Varied by [PR539921](#)]

27.1 Breaks during work periods

(a) Breaks will be given as follows:

Hours worked	Rest break	Meal break
Less than 4 hours	No rest break	No meal break
4 hours but less than 5 hours	One 10 minute rest break	No meal break
5 hours but less than 9 hours	One 10 minute rest break	One meal break of at least 30 minutes but not more than 60 minutes
9 hours or more	One or two 10 minute rest breaks, with one taken in the first half of the work hours and the second taken in the second half of the work hours, two rest breaks will be given unless a second meal break is provided	One or two meal breaks of at least 30 minutes but not more than 60 minutes

(b) The timing of the taking of a rest break or meal break is intended to provide a meaningful break for the employee during work hours.

(c) An employee cannot be required to take a rest break or meal break within one hour of commencing or ceasing work. An employee cannot be required to take a rest break(s) combined with a meal break.

(d) The time of taking rest and meal breaks and the duration of meal breaks form part of the roster and are subject to the roster provisions of this award.

[27.1(e) varied by [PR539921](#) ppc 01Oct13]

(e) Rest breaks are paid breaks and meal breaks are unpaid breaks.

(f) An employee cannot work more than five hours without a meal break.

28 The respondents' denial of the claim is at least in part founded on misunderstanding of the meaning of cl 27.1 of the Award.

29 Clause 27 facilitates the taking of rest and meal breaks. It enables the taking of one unpaid meal break of between 30 minutes and 60 minutes and one paid rest break of 10 minutes duration. It does not prevent an employee from having more than one authorised paid rest break. Nothing in cl 27 empowers an employer to accumulate all time taken off as a break and then deduct the value of that time from an employee's entitlements. Whether or not the claimant took an unpaid lunch break is a question of fact to be resolved on the evidence.

30 The first respondent permitted the claimant to take more than one paid rest break. Such is apparent by its conduct as evidenced by the claimant and witnesses called by the respondents including Mr Rogers. The first respondent cannot retrospectively retract its consent to the taking of multiple rest breaks and contend that the claimant should not have been paid for those breaks.

31 In any event, even if the respondents were correct in their contention (which they are not) it will be for the first respondent to prove the amount of time taken by the claimant each break on each shift. The first respondent is required to prove the exact quantum of time taken by the claimant with respect to each break taken and satisfy the court that with respect to each shift worked that time accumulated to at least 60 minutes. It has failed to do that. Indeed the respondents' assertion that the claimant's breaks accumulated 60 minutes is not based on empirical evidence but rather on supposition and speculation about how much break time she had.

32 The respondents' contentions concerning the first respondent's entitlement to make deductions for breaks taken by the claimant are not supported by the law, or the evidence, and must therefore fail.

Lunch Breaks

33 The respondents argue that the claimant took at least a 30 minute lunch break during each shift.

34 Clause 27.1 of the Award provides that the taking of a meal break is intended to provide a meaningful break for the employee during work hours. There is no requirement for the employee to remain at the work place during the meal break.

35 The claimant testified that upon commencement of her employment with the first respondent, she was told that she would not be given a lunch break and that she would be required to eat her lunch on the run between duties. The claimant testified that she was not permitted to leave the Deli during her shift. Ms Dyer's evidence was that neither she nor the claimant took a dedicated lunch break.

- 36 The second respondent testified that the claimant had sufficient time to take a dedicated lunch break but conceded that a dedicated lunch break was neither rostered, nor instructed to be taken. She suggested that given that there were two employees rostered to work at any given time, those employees could and should have organised between themselves the taking of an uninterrupted meal break of at least 30 minutes.
- 37 It is obvious from the evidence given that there was no provision for the taking of a dedicated lunch break of at least 30 minutes. If there was, payment would have not been made for the lunch breaks that were in fact taken. Indeed, the evidence overwhelmingly dictates that the first respondent was in breach of cl 27.1(f) of the Award by denying the claimant a meal break. That is not to say she was denied the opportunity to have a meal, but rather she was not given a meaningful meal break of 30 minutes during which she could leave the work premises if desired.
- 38 Indeed, the claimant's contention about being told upon commencement that she would not be entitled to a lunch break was conceded by Ms Rogers when cross-examined. Ms Rogers also conceded that the claimant was not, during her shifts, permitted to leave the Deli.
- 39 I accept the claimant's evidence that she was told that she would not be given an unpaid lunch break and that she was expected to eat her lunch as the opportunity arose. Such is consistent with Ms Rogers' evidence and the conduct of the first respondent in paying the claimant for the entire shift without deduction for a lunch break.

Underpayment

- 40 As indicated earlier, the respondents concede that the claimant was not paid in accordance with the Award. Indeed, the evidence overwhelmingly shows that the claimant was paid a flat rate throughout whether she worked weekends or public holidays. There can be no doubt that the first respondent has contravened s 45 of the FW Act by failing to pay the claimant her correct minimum wage, penalty rates and public holiday rates.
- 41 The claimant seeks to prove the quantum of her claim by reference to spreadsheets (exhibits 3, 5, 6, 8 and 9) which she has produced. The information in those spreadsheets has been sourced from work rosters, payslips and group certificates. They correlate to the time and wage records produced by the first respondent (exhibit 15).
- 42 I am satisfied that the claimant's calculations as expressed in the summary (exhibit 9) are correct as to method.
- 43 There is no dispute about the correctness of the pay rates the claimant has used in her calculations with respect to the 2014-2015 financial year, however, there is an issue between the parties as to whether the claimant has used the correct rates in her calculations with respect to 2013-2014 financial year.
- 44 The respondents contend that the claimant has, in calculating her claim with respect to the 2013-2014 financial year, failed to take into account the transitional provisions contained in Schedule A of the Award. I accept that submission. I find that the claimant has not used the correct rate and accept that the correct rate is that suggested by the respondents (see exhibit 14). The applicable hourly rates during the 2013-2014 financial year are slightly lower in the first respondent's favour.
- 45 A recalculation of the claimant's entitlement using the lower rates results in her entitlement being reduced by \$713.81. I find therefore that the first respondent has, during the period of the claimant's employment, underpaid her \$9,928.29.
- 46 The first respondent will be ordered to pay to the claimant \$9,928.29 plus interest thereon calculated at the rate of 6% per annum from 1 April 2015 (first pay date after the claimant's last work day) until judgement fixed in the sum of \$605.48.

Accessorial Liability of the Second Respondent

- 47 Liability for contravening any of the civil remedy provisions of the FW Act can attach to the director of a corporate employer or anyone else involved in a contravention. A person who is involved in the contravention is subject to the same civil penalties as the contravener.
- 48 Section 550 of the FW Act provides:

550 Involvement in contravention treated in same way as actual contravention

- (1) *A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.*
- (2) *A person is involved in a contravention of a civil remedy provision if, and only if, the person:*
- (a) *has aided, abetted, counselled or procured the contravention; or*
 - (b) *has induced the contravention, whether by threats or promises or otherwise; or*
 - (c) *has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
 - (d) *has conspired with others to effect the contravention.*
- 49 The intent of an accessory is found in their knowledge or belief that they are assisting or encouraging a primary offender to do something, which goes to make up the facts which constitute the relevant contravention.
- 50 Directors and others who are directly involved in the day to day management of the company may be personally liable for any breach of the FW Act committed by the corporation. In most instances liability attaches because such a person will have been found to have been knowingly concerned in the contravention.
- 51 In *Fair Work Ombudsman v Bird (No.2)* [2012] FMCA 312 [6] Smith FM said that it was significant to the question of accessorial liability that Mr Bird was the sole director and secretary of the company which was liable for primary contraventions under the FW Act. Mr Bird was held to be a person 'involved in' all of the employer's contraventions, including the underpayment of wages, because he had day-to-day control and supervision over the relevant company's affairs and finances.

- 52 In *Fair Work Ombudsman v Aussie Junk Pty Ltd (In Liquidation) & Anor* [2011] FMCA 391 a sole director was ordered to pay a civil penalty of \$72,000 for being involved in the company's breaches by failing to pay employees their entitlements. His Honour Neville FM found the director to be liable because:
1. he had knowledge of the facts and matters constituting the contravention by virtue of his position as a sole director and company secretary of the employer;
 2. he was the person solely responsible for determining and setting wage rates and conditions for the employees;
 3. he did not take any steps to increase pay rates for employees at all during the course of the Fair Work Ombudsman's investigation;
 4. he was aware, before the commencement of the proceedings, that the employees entitlements were outstanding to the relevant employees;
 5. he had control of the company's finances; and
 6. he was the person with the authority to direct payment of outstanding entitlements.
- 53 The fact that one is the sole director does not however necessarily mean that he or she is personally liable for the company's contravention of the FW Act. The level of control and management of the particular director in question will be a significant consideration (see *Guirguis v Ten Twelve Pty Ltd & Anor* [2012] FMCA 307).
- 54 In *Potter v Fair Work Ombudsman* [2014] FCA 187 a company director, Mrs Potter, was partially successful in appealing against a finding that she was an accessory in the company's failure to pay correct wages to staff. The case concerned a call centre that failed to pay correct wages to its employees. Mrs Potter was aware that the company's employees were likely to be covered by an award or enterprise agreement but wrongly decided that no award applied and caused the company to pay its employees under a defective workplace agreement.
- 55 The Federal Circuit Court imposed penalties against Mrs Potter on the basis that she was 'knowingly concerned' in the company's underpayments even if she did not know that the employees were being paid less than what was required. She was found personally liable as an accessory to the company's contraventions of the FW Act because she was responsible for deciding each employee's wages.
- 56 On appeal, the Federal Court noted that to be 'knowingly concerned' in the company's contraventions of the FW Act, the alleged accessory must have actual knowledge of the essential facts that constituted the contravention. Mere ignorance of the law may not be sufficient to attract personal liability. The Court held that Mrs Potter could only be personally liable for the company's underpayment if she had known the correct award that applied to the employees. As that was not the case throughout the employment, Mrs Potter's appeal against the contraventions was partially successful. However, she was still held liable for underpayments made after she received professional advice that the award did apply.
- 57 The decision in *Potter* departs from previous authorities where company directors with control over staff wages have been held to be personally responsible for underpayments regardless of whether they knew that a particular award or enterprise agreement applied to staff or that particular staff were being underpaid.
- 58 In the present matter I accept the second respondent's evidence that she was ignorant about the existence of the Award. In the circumstances she did not wilfully contravene the Award. I find that she was not wilfully blind to the existence of the Award because she enquired about which industrial instrument covered the first respondents' employees and was told by a government instrumentality that it was the MCE Act. Given the circumstances it cannot be found that she was reckless in her conduct with respect to employees' entitlements. The second respondent's conduct arose as a result of a mistake.
- 59 Consequently had it been contended that the second respondent was knowingly concerned in the contraventions, the claim against her could not have succeeded. However, that is not what has been alleged in this case. What is alleged is that she has 'aided, abetted, or procured' such contraventions because she had organised the claimant's pays. The claimant bears the onus of proving her contention.
- 60 In *Yorke v Lucas* [1985] HCA 65 the High Court of Australia considered the meaning of 'aided, abetted and procured'. It held that 'aiding and abetting' in the context of criminal proceedings refers to a person who is present at the time of the commission of an offence whereas 'procuring' refers to a person who, although not present at the commission of the offence, is an accessory before the fact.
- 61 In *Jarrett FM in Abigroup Contractors Pty Ltd v CFMEU & Ors* [2012] FMCA 820 (No.2) the court referred to the Macquarie dictionary to define 'aid'. It defines aid as 'to afford support or relief to, to provide support'. 'Abet' is defined to mean 'to urge on, to incite, instigate, to encourage'. In *Guirguis* the court observed that one 'procures a contravention if he or she causes it to be committed, persuades the principal to commit it, or brings about its commission'. The second respondent's conduct in merely organising the claimant's pay cannot be said to provide support to the contraventions. She in no way urged, incited, instigated or encouraged the contraventions.
- 62 Having regard to what was said in *Potter*, I conclude that the necessary intent of an accessory is found in their knowledge or belief that they are assisting, encouraging or causing a primary offender to do something which goes to make up the relevant contraventions. Such participation must be intentional and aimed at the commission of a contravention, albeit not the specific contravention.
- 63 As indicated earlier I have accepted the second respondent's evidence that her actions which resulted in the first respondent's contravention of the Award, arose by mistake. There was never any intent on her part that the first respondent pay the claimant anything other than her correct entitlements. For those reasons I cannot be satisfied that the second respondent has aided, abetted or procured the contraventions committed by the first respondent.

64 The claim as against the second respondent is not proven.

Penalties and Other Orders

65 I will now hear from the parties concerning the issue of penalties and other orders.

G. CICCHINI

INDUSTRIAL MAGISTRATE

2016 WAIRC 00210

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2016 WAIRC 00210
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 16 MARCH 2016
DELIVERED : WEDNESDAY, 13 APRIL 2016
FILE NO. : M 117 OF 2015
BETWEEN : MARTIN VENIER

CLAIMANT

AND

BAKER HUGHES AUSTRALIA PTY LTD (ABN 20 004 752 050)

RESPONDENT

Catchwords : Long service leave – Preliminary issue - Whether claimant’s prior employment with related bodies corporate and his employment with the respondent is ‘continuous employment with one and the same employer’ for the purpose of calculating long service leave entitlements under s 8(1) of the *Long Service Leave Act 1958* (WA).

Legislation : *Long Service Leave Act 1958*
Industrial Magistrates Courts (General Jurisdiction) Regulations 2005
Corporations Act 2001 (Cth)
Interpretation Act 1984
Tobacco Products Control Act 2006
Long Service Leave Amendment Act 1973
Industrial Arbitration Act 1912
Labour Relations Legislation Amendment Bill 2006
Companies Act 1961

Case(s) referred to in reasons : *R v Young*
[1999] NSWCCA 166
Taylor v Owners – Strata Plan No 11564 and Ors
[2014] HCA 9
The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd (No 2)
[2014] WASC 345
Marshall v Watson
[1972] HCA 27
Van Heerden v Hawkins
[2016] WASCA 42
The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd
[2016] WASCA 36

Result : Preliminary issue resolved

Representation:

Claimant : Mr M Cox (counsel) as instructed by MDC Legal

Respondent : Mr A Sharpe (counsel) as instructed by K & L Gates

REASONS FOR DECISION

Preliminary Issue

1 The parties have asked that a preliminary issue be determined as is permitted by reg 7(1) of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005. In that regard they seek the answer to the following question:

Is the applicant's (claimant's) prior employment with related body corporates (as that term is defined in section 50 of the Corporations Act (Cth)) of the respondent, and his subsequent employment with the respondent, 'continuous employment with one and the same employer' for the purposes of calculating long service leave entitlements under section 8(1) of the Long Service Leave Act 1958 (WA)?

Background

- 2 Before setting out the facts which have been agreed for the purpose of determining the preliminary issue it will be useful to consider other background information.
- 3 Mr Martin Venier (the claimant) asserts that he was employed by "Baker Hughes" or its related body corporates from 28 November 1988 until 16 July 2015.
- 4 He says that on 28 November 1988 whilst in the United Kingdom, he began employment with Teleco Oilfield Services. In 1992 Teleco Oilfield Services became a division of Baker Hughes but that did not interrupt the continuity of his service. In December 1996, the claimant was promoted to a position within INTEQ Drilling Services, a division of Baker Hughes. Then on 29 July 2005 he assumed a different role within a Baker Hughes' related body corporate, namely International Professional Resources, S, de R.L. (IPRS). Subsequently, on 7 May 2006 the claimant was promoted within IPRS and relocated to China. On 30 July 2008 he was transferred in his employment to Baker Hughes Australia Pty Ltd (the respondent).
- 5 The claimant entered into a written employment agreement with the respondent prior to commencing with it. Clause 12 of that employment agreement provided that he was entitled to long service leave in accordance with the legislation that was applicable in Western Australia.
- 6 Sections 8(1) and 8(2) of the *Long Service Leave Act 1958 (WA)* (LSL Act) provide an entitlement to 8 2/3 weeks of long service leave after 10 years' continuous employment with one and the same employer, and 4 1/3 weeks of long service leave for each five years' continuous service completed thereafter. Section 8(3) of the LSL Act provides that an employee who has, since commencement, completed at least seven years of continuous employment, and whose employment is terminated by reason other than death or serious misconduct, is entitled to a proportionate amount of long service leave on the basis of 8 2/3 weeks for 10 years of such continuous employment.
- 7 The claimant says that he is entitled to 23.01 weeks' long service leave, not taken or paid out, on the basis of 26.64 years' continuous service with the respondent and/or its related body corporates.
- 8 The respondent denies that the claimant is entitled to long service leave and says that he has not met the threshold requirement of seven years of continuous service with the respondent. It says that the claimant's previous service with various Baker Hughes entities prior to 30 July 2008 cannot be considered for the purposes of calculating long service leave entitlements.

Agreed Facts for the Purpose of Determining the Preliminary Issue

- 9 For the purpose of determining the preliminary issue, the parties are agreed on the following facts:
 1. The claimant entered into an employment agreement with the respondent on 30 July 2008 and had commenced employment by or about 2 November 2008.
 2. The termination of the claimant's employment with the respondent was effected on 16 July 2015.
 3. The claimant's employment with the respondent was for a term of less than seven years.
 4. The respondent is a related body corporate (as defined in s 50 of the *Corporations Act 2001 (Cth)* (Corporations Act) of Baker Hughes Incorporated, a company incorporated in the United States of America.

Construction of Section 8(1) of the LSL Act

- 10 The determination of the preliminary issue will turn on the meaning given to the phrase *one and the same employer* in s 8(1) of the LSL Act.
- 11 Section 8(1) of the LSL Act provides:

An employee is entitled in accordance with, and subject to, the provisions of this Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer, or with a person who, being a transmittee is deemed pursuant to section 6(4) to be one and the same employer.
- 12 The claimant contends that a *related body corporate* (as defined in s 50 of the Corporations Act) of an employer comes within the meaning of one and the same employer in s 8(1) of the LSL Act. The respondent maintains that the suggested construction is untenable.

Claimant's Contention

- 13 The phrase *one and the same employer* is not defined in the LSL Act.
- 14 'One' is defined in the Macquarie Dictionary as 'being a single unit or individual rather than two or more'. 'Same' is defined as 'being one or identical, though having different names, aspects, etc.' As a matter of ordinary language the phrase 'one and the same' read together contemplates more than the singular but requires commonality. This construction is evidently intended in the LSL Act given that 'employer' is defined in s 4 of the LSL Act to include the plurals "*persons, firms, companies and corporations*".
- 15 The definition is framed in the plural which is consistent with a construction of the phrase 'one and the same employer' that contemplates employment with related entities.
- 16 Even if a literal construction of the phrase *one and the same employer* per se does not mean employment with related entities, literalism no longer rules the day because a purposive approach to interpretation prevails.

17 A construction of the LSL Act that promotes its purpose or object is to be preferred to the construction that does not.

18 In *R v Young* [1999] NSWCCA 166 Spigelman CJ said at [15]:

If a court can construe the words actually used by the Parliament to carry into effect the Parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the Court confines itself to the range of possible meanings or of operation of the text – using consequences to determine which meaning should be selected – then the process remains one of construction.

19 The court should give the phrase *one and the same employer* an ambulatory operation so that it includes employment with related entities, in fulfilment of Parliament's intent and purpose in creating and amending the LSL Act. Doing so requires neither an unreasonable nor an unnatural interpretation of the phrase.

20 The LSL Act is beneficial legislation which permits a liberal interpretation, particularly having regard to the purpose of the LSL Act, and in light of remedial amendments made to it in 2006 which had the effect of extending benefits.

Respondent's Position

21 The phrase *one and the same employer* is emphatic statutory language. The use of either 'one employer' or the 'same employer' would have achieved the purpose of conveying that terms of employment with different employers could not be aggregated for the purpose of calculating long service leave entitlements. When a statute employs words of emphasis to impose a limit on the scope of an expression, then the words of emphasis should be given effect.

22 The use of such emphatic language tells very strongly against an interpretation of this phrase in which employment by different legal entities is to be recognised as being *one and the same employer*. The emphatic limitation in the expression *one and the same employer* is inconsistent with the claimant's contention that employment by a related body corporate is to be included in calculating long service leave entitlements.

23 Section 8(1) of the LSL Act, by reference to s 6(4) of that Act, already identifies the circumstance in which employment by more than one employer is deemed to be employment by one and the same employer; that is in the case of the transmission of a business. The plurality in the definition of employer in s 4 of the LSL Act can relate to that circumstance only and not the wider scenario advanced by the claimant.

24 The claimant's construction of the LSL Act requires words to be read into that Act which are not there.

25 Section 4 of the LSL Act defines an employer as follows:

employer includes-

- (a) *persons, firms, companies and corporations; and*
- (b) *the Crown and any Minister of the Crown, or any public authority, employing one or more employees.*

26 The claimant is either seeking to read words into the definition of 'employer', as defined by s 4 of the LSL Act, or to read words into s 8 of the LSL Act so that the concept of employment of 'a related body corporate' of that employer as defined in s 50 of the Corporations Act becomes part of the LSL Act.

27 In *Taylor v Owners – Strata Plan No 11564 and Ors* [2014] HCA 9 the majority judgment of French CJ, Crennan and Bell JJ stated:

The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

28 As Edelman J observed in reviewing that judgment in *The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd (No 2)* [2014] WASC 345 [143]:

...the more substantial the words to be implied the more difficult it will be to reach the conclusion that the words used by Parliament manifest an intention to include the words omitted.

29 The majority's quotation of 'gaps disclosed in legislation' was taken from the following passage of Stephen J (with whom Menzies J agreed) in *Marshall v Watson* [1972] HCA 27:

Granted that there may seem to be lacking in the legislation powers which it might be thought the Legislature would have done well to include, it is no power of the judicial function to fill gaps disclosed in legislation...

30 Even if it was thought to be an oversight on the part of Parliament to not include employment by a related body corporate in the calculation of long service leave entitlements (which is not conceded), it is not the role of the courts to correct such oversights.

31 Although long service leave legislation in other states and territories provide that employment by a related body corporate is to be specifically included in the calculation of long service leave entitlements, there is no consistency. Queensland and the Northern Territory incorporate the definition of 'related body corporate' from s 50 of the Corporations Act whereas the Victorian and South Australian Acts adopt a broader definition.

32 Even if the absence of a reference to related bodies corporate in the LSL Act was an oversight, it is not possible to determine the alternative or additional words the Western Australian Parliament would have used. In the circumstances, it is not appropriate to imply words concerning related bodies corporate into the LSL Act.

- 33 Further, the definition of ‘employer’ not only includes companies and corporations, but also persons, firms and public authorities. The interpretation advanced by the claimant only applies to employers who are corporations but does not explain how the phrase is to be interpreted when the employer is not a corporation. There is no justification evident in the legislation which gives an extended meaning to ‘employer’ when the employer is a corporation.
- 34 The claimant’s construction requires an irregular interpretation of the legislation because he seeks to interpret the phrase *one and the same employer* in the LSL Act by reference to the definition of the term ‘related body corporate’ in an Act of the Commonwealth Parliament. The LSL Act makes no reference to the Corporations Act.
- 35 Further, as well as ‘related body corporate’, the Corporations Act also defines the term ‘associated entity’ which includes entities which are associated in other ways, such as by control. The text of the LSL Act provides no assistance in choosing between the definitions. In the circumstances, choosing one definition over another would amount to an arbitrary approach to the interpretation of s 8 of the LSL Act.
- 36 Additionally, although the LSL Act is beneficial legislation which attracts a liberal interpretation, it must nevertheless be restrained within the confines of the actual language used. A court should not give a provision a construction which is unreasonable or unnatural.
- 37 In the LSL Act the Parliament of Western Australia determined that long service leave was to be paid to employees for continuous employment of a specified length with *one and the same employer*. Those words were chosen by the Parliament to limit when an entitlement arises. Those words should be interpreted according to their terms. Even though the LSL Act is beneficial in nature, the construction of *one and the same employer* should not be such as to override or ignore the limitation expressed in those words.
- 38 The task of statutory construction begins and ends with the text (see *Van Heerden v Hawkins* [2016] WASCA 42 [93], [173]). Section 18 of the *Interpretation Act 1984* (Interpretation Act) requires a court to construe a written law and not to rewrite it by reference to its purpose or objects (see *Van Heerden* [100], [181]).
- 39 The phrase *one and the same employer* is unambiguous. Even if the term ‘employer’ is defined by reference to plurals it does not mean that the phrase *one and the same employer* can be read as meaning multiple employers. The word ‘one’ cannot mean more than one.
- 40 Given that the text is clear and unambiguous it is not permissible to use extrinsic materials to alter the meaning of the LSL Act to bring it into line with other states and territories. If the law is to change, it must be by a parliamentary amendment.
- 41 Reading words into a statute is permissible ‘in the case of a simple grammatical drafting error’ but not to fill ‘gaps disclosed in legislation’ or to make an insertion which is ‘too big or too much at variance’ with the language in fact used by the legislature (see *The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd* [2016] WASCA 36 [127]).
- 42 It would be inconsistent with the principle to read into the LSL Act the concept of a ‘related body corporate’ to extend the scope of the phrase *one and the same employer*.

Determination

- 43 The basic principles of statutory construction are that:

- 1) statutory construction must begin with a consideration of the statutory text;
- 2) context and purpose are also important as surer guides to meaning; and
- 3) the modern approach to statutory interpretation uses ‘context’ in its widest sense.

- 44 The statutory text is the starting point.

- 45 Section 8(1) of the LSL Act provides:

An employee is entitled...to long service leave on ordinary pay in respect of continuous employment with one and the same employer, or with a person who, being a transmittee, is deemed pursuant to section 6(4) to be one and the same employer.

- 46 Sections 6(4) and 6(5) of the LSL Act provide:

(4) *Where a business has,...been transmitted from an employer (herein called **the transmittor**) to another employer (herein called **the transmittee**) and an employee who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee- the period of the continuous employment which the employee has had with the transmittor (including any such employment with any prior transmittor) shall be deemed to be employment of the employee with the transmittee.*

- (5) *In subsection (4)-*

*transmission includes transfer, conveyance, assignment or succession, whether voluntary or by agreement or by operation of law, and **transmitted** has a corresponding meaning.*

- 47 The LSL Act does not define *one and the same employer*, but it does, in s 4, define ‘employer’ to include:

(a) persons, firms, companies, and corporations.

- 48 It is of considerable significance that the definition of employer is framed in plurals. It could quite easily have been framed in the singular but was not. That is because it contemplates more than one. There is no other viable explanation.

- 49 The respondent says that the plurality in the definition of employer in s 4 of the LSL Act can only relate to the circumstance of transmission and not to the wider situation advanced by the claimant.

- 50 I observe however, that sections 6(4) and 6(5) of the LSL Act are couched in the singular. The employer in those provisions includes any number of previous employers in the chain of transmission. That being the case, there would have been no need for the term employer to have been defined as it has. The circumstance of transmission does not require plurality in the definition of employer.
- 51 It follows that the phrase *one and same employer* is not as clear and unambiguous as is suggested. What is meant by it having regard to the definition of employer is obscure and requires construction. Further, the phrase is not so definitive as to import the limitations which the respondent asserts.
- 52 It will be necessary to construe the term having regard to context and purpose. The objects of the LSL Act must be considered and resort may be had to its historical context in order to achieve that end.
- 53 A liberal construction is necessary to give the words used an ambulatory operation. That process is neither unreasonable nor unnatural given that the LSL Act is beneficial legislation. In that regard, such legislation is to be distinguished from the *Tobacco Products Control Act 2006* considered in *Van Heerden*.
- 54 Resort may be had to extrinsic material which assists in the construction process. Such is permitted by s 19 of the Interpretation Act. The phrase *one and the same employer* must be construed according to its true specific intent and meaning (s 8 of the Interpretation Act).
- 55 The LSL Act commenced operation on 24 December 1958. Section 8(1) of the LSL Act has, other than for a stylistic change, remained unchanged since then. However, the current meaning of employer is different to the meaning given to that term when the LSL Act was first enacted.
- 56 In 1973, s 8A (now repealed) was inserted into the LSL Act by the *Long Service Leave Amendment Act 1973* (LSLA Act). It provided:
- 8A. Notwithstanding any other provision in this Act in the event of an agreement between the Western Australian Employers' Federation (Incorporated) and the Trades and Labor Council of Western Australia or a determination of the Commission in Court Session varying from time to time any of the provisions for qualifications or entitlement to long service leave as contained in volume fifty-two of the Western Australian Industrial Gazette at pages sixteen to twenty-one, both inclusive, for the majority of awards which those provisions have been incorporated in and form part of, the qualifications and entitlement of employees to long service leave shall forthwith thereafter be varied accordingly.*
- 57 On 15 December 1977, the Commission in Court in Session of the Western Australian Industrial Commission (as it was then known), under s 94A of the (now repealed) *Industrial Arbitration Act 1912* (WA), made the Long Service Leave General Order (1978) 58 WAIG 120 (General Order) varying awards and industrial agreements to incorporate new long service leave provisions.
- 58 The General Order expressly stated an intention that service with related entities be considered as service with *one and the same employer*. Order 4 of the General Order states:
- Where, over a continuous period, a worker has been employed by two or more companies each of which is a related company within the meaning of Section 6 of the Companies Act 1961 the period of the continuous service which the worker has had with each of those companies shall be deemed to be service of the worker with the company by whom he is last employed.*
- 59 Section 6 of the *Companies Act 1961* (WA) (Companies Act) defined when a corporation was deemed to be a subsidiary of another and when corporations were deemed to be related. That definition was adopted for the purpose of order 4 of the General Order.
- 60 During the whole period of the operation of the General Order from 1977 to 2006, at which time order 4 applied, the original phrase in s 8 of the LSL Act of *one and the same employer* was constant. An employee's service with related entities was deemed continuous service with *one and the same employer*.
- 61 Section 8A of the LSL Act was repealed in 2006 and the General Order ceased to have effect. The stated intention of the repeal was to consolidate and incorporate all long service leave entitlements under the LSL Act, without loss of any entitlements to employees.
- 62 In the Explanatory Memorandum to its repealing legislation it was said, at cl 247:
- It is important that, with the abolition of the LSL General Order, employees are not disadvantaged if their LSL entitlement becomes governed by the LSL Act rather than the LSL General Order.*
- 63 Parliament's intention in repealing the General Order was to remove the duplication of long service leave entitlements in various instruments and consolidate them and the General Order into the LSL Act. The Explanatory Memorandum states at cl 271:
- The LSL Act and the LSL General Order do not differ substantially in the entitlements that they offer. However, the minor differences can be confusing for employers and employees alike. This duplication of LSL instruments is unnecessary and cumbersome. An independent review of Western Australian industrial relations legislation recommended that the LSL Act and the LSL General Order be consolidated to remedy this duplication of instruments.*
- 64 As the terms of the General Order were to be incorporated into the LSL Act, Parliament considered the continued operation of s 8A of the LSLA Act to be unnecessary.
- 65 The fact that Parliament did not amend the LSL Act to expressly incorporate order 4 of the General Order is attributable to the term *one and the same employer* including related companies. Otherwise, the effect of the amendment would have left some

employees worse off. Such an outcome is inconsistent with Parliament's intention, reflected in the second reading of the *Labour Relations Legislation Amendment Bill 2006*, where on 24 May 2006 it was stated:

The bill will amend the Long Service Leave Act 1958 and the Construction Industry Portable Long Service Leave Act 1985 to improve long service leave entitlements. Private sector long service leave entitlements in Western Australia lag behind those in all other states and territories.

- 66 I accept that in consolidating long service leave entitlements and incorporating the General Order into the LSL Act, Parliament had the intention that service with related entities be considered service with *one and the same employer* under the LSL Act, just as it did in the General Order.
- 67 Denying long service leave to long serving employees of related entities is inconsistent with the historical application of the LSL Act and is inconsistent with the stated purpose of the amending legislation.
- 68 In any event, even if it is the case that the LSL Act lacks the words required to give effect to the claimant's contentions, such is an inadvertent oversight. The fact that it is an oversight is explicable by the following:
1. the General Order provided coverage of service with related entities from 1977 until 2006; and
 2. Parliament's intention in 2006 was to consolidate all long service leave entitlements without disadvantaging employees whose long service leave entitlements had been governed by the General Order; and
 3. the lack of transitional provisions dealing with the loss of entitlement for those who had accumulated continuous service working for related entities.
- 69 In the circumstances, it will be permissible to read in the words that the Parliament would have used to overcome the omission, provided that there is certainty about the words.
- 70 In that regard it is possible to state with certainty the words Parliament would have used. In order to overcome the inadvertent omission Parliament would have used the words 'related company', as expressed in the General Order
- 71 The reference in the General Order to the Companies Act is deemed to include a reference to that law as amended (see s 16 of the Interpretation Act). The Companies Act was repealed and superseded by the Corporations Act. Although the Companies Act was not amended but rather replaced by a Commonwealth Act, the same principle applies. Therefore, defining 'related body corporate' by reference to s 50 of the Corporations Act is entirely appropriate.
- 72 The reference in the General Order to related company within the meaning of s 6 of the Companies Act restricts the definition to the narrower 'related body corporate' in s 50 of Corporations Act as opposed to the much wider term 'associated entity' contained in s 50AAD of the same Act.
- 73 The language of s 4 and s 8 of the LSL Act, having regard to the history and purpose of the LSL Act, requires the phrase *one and the same employer* to be construed to contemplate employment with related body corporates. Such is not inconsistent with the definition of employer in the LSL Act because persons, firms and public authorities remain within the definition unaffected.

Answer

- 74 The claimant's prior employment with related bodies corporate of the respondent (as that term is defined in section 50 of the Corporations Act), and his subsequent employment with the respondent was continuous employment with *one and the same employer* for the purposes of calculating long service leave entitlements under section 8(1) of the LSL Act.

G. CICCHINI

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2016 WAIRC 00124

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2016 WAIRC 00124
CORAM	:	COMMISSIONER S J KENNER
HEARD	:	MONDAY, 21 DECEMBER 2015
DELIVERED	:	THURSDAY, 3 MARCH 2016
FILE NO.	:	B 169 OF 2015
BETWEEN	:	MR. KASHLYN BRENNAN
		Applicant
		AND
		DOCUMENT MANAGEMENT EXPERTS PTY LTD
		Respondent

Catchwords	:	<i>Industrial law (WA) - Contractual benefits claim - Whether Commission has jurisdiction - Whether employee or independent contractor - Principles applied - Applicant found to be an employee - Whether attempt by respondent to pervert the course of justice - Issue referred to the Western Australian Police for further consideration</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA)</i> <i>Criminal Code Act Compilation Act 1913 (WA)</i>
Result	:	Declaration issued
Representation:		
Applicant	:	Mr C Sharpe as agent
Respondent	:	Ms J Beeson as agent

Case(s) referred to in reasons:*AMP v Chaplin* (1978) 52 ALJR 407*Digney v The Black Cockatoo Preservation Society of Australia* (2014) 95 WAIG 562*Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2010] FCAFC 52*Re Shine; Ex parte Shine* [1892] 1 QB 522*Massey v Crown Life Insurance Co* [1978] 2 All ER 576*BWIU v Odco Pty Ltd* (1991) 99 ALR 735*Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215*Gallotti v Argyle Diamond Mines Pty Ltd* [2003] WASCA 166*Hotcopper Australia Ltd v David Saab* (2002) 82 WAIG 2020**Case(s) also cited:***Gascoyne v Marvelle Tiling Pty Ltd T/A Marvelle Tiling* [2014] FWC 8398 *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16*The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd trading as Florida Exclusive Pools* (1996) 77 WAIG 4*Christopher Lawrence Peters v James Turner Roofing Pty Ltd* (2001) 81 WAIG 3093*James Turner Roofing Pty Ltd v Christopher Lawrence Peters* (2003) 83 WAIG 427*Hollis v Vabu Pty Ltd* [2001] 207 CLR 21*Mr Paul Ernest Dallaston v Canon Foods* [2004] WAIRC 13246*Personnel Contracting Pty Ltd T/AS Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* (2005) 85 WAIG 5*Reasons for Decision*

- 1 The applicant Mr Brennan maintained that he was employed by the respondent Document Management Experts Pty Ltd as a Sales Cadet from 13 April 2015 to 13 July 2015. In this position Mr Brennan was responsible for selling office equipment, through canvassing potential new customers for new business. Mr Brennan said that while he was employed by DME, his employment was located at the premises of Fuji Xerox Australia Pty Limited in Belmont, Perth.
- 2 Mr Brennan further maintained that he was engaged on a contract of employment for a minimum period of six months at a guaranteed remuneration of \$3,000 per month. As DME terminated the contract after three months, Mr Brennan now claims the balance of what, in effect, he contended was a fixed term contract for at least six months, in the sum of \$9,000 as a denied contractual benefit.
- 3 DME resisted Mr Brennan's claim on the basis that it contended that Mr Brennan was engaged not as an employee, but as a self-employed sole trader. Accordingly, a question of jurisdiction arises that must be decided by the Commission.

Factual background

- 4 The facts are relatively straight forward and are as follows. Mr Brennan testified that in early March 2015 he responded to an advertisement for a job with DME. Mr Brennan had two interviews with the Director of DME, Mr Cummings. Both interviews were held in the office of Fuji Xerox in Belmont. As a result of the interviews, Mr Brennan said that he was offered the position of a Sales Cadet by DME by letter of 20 March 2015. The letter of offer, was annexed to Mr Brennan's affidavit and formal parts omitted, was in the following terms:

Letter of offer.

I am pleased to be able to offer you the role of Sales Cadet with Document Management Experts Pty Ltd. Kashlyn, I would also like to confirm that you are a self employed sales agent and you need to invoice Document Management

Experts Pty Ltd each month the commission or Guarantee that is due. Based on a statement that I will provide you at the beginning of each month for the prior month. DME will usually get a commission statement in the second week of the month, issue statements to you as soon as practical after that and payment is made around the 19th or 20th of each month. You will need to have an ABN number in order to be paid. This can be done online in a day.

The first 6 months will be paid as a guarantee of \$3000.00 per month ex GST and will be paid in the middle of the month of commencement as a starting point. I will work through the pay plan with you on commencement, however if you have any questions then feel free to ask.

Kashlyn, I am excited in having you join our team. With your background and friendly manner I have no doubt you will achieve the highest possible levels of success. This of course will be based on your level of commitment to the role, some hard work and a structured and organised approach.

If you have any questions at all then please don't hesitate to give me a call.

Your start date will be 13th of April.

If you could please sign below as an indication of your acceptance of the role and email back to me.

[sic]

- 5 Mr Brennan testified that he accepted the offer from DME on the understanding that he would be paid \$3,000 per month for the six months of the Sales Cadetship which would run until 12 October 2015. Mr Brennan said that he understood that thereafter, he would be paid on a commission only basis. As a young man with little experience in the office machinery industry prior to starting with DME, apart from about three months' general retail sales experience, Mr Brennan testified that he was attracted to the position because as a Sales Cadet, he would receive training to help him achieve his career goals.
- 6 Mr Brennan understood from the offer from DME that he was to be responsible for his own tax and superannuation arrangements and he was required, as requested by Mr Cummings, to obtain an Australian Business Number. The ABN details, attached to DME's notice of answer, referred to Mr Brennan as an "Individual/Sole Trader". Also, as was required by DME, Mr Brennan invoiced DME for his monthly payments, a copy of one of which was exhibit A2. Mr Brennan was also given a business card in the name of Fuji Xerox, which described under his name, the words "Integrated Sales and Marketing". At the bottom of the business card was reference to "Authorised Sales Agent Document Management Experts".
- 7 In terms of the work required to be performed, Mr Brennan said that his work required him to "cold call" prospective customers either by telephone or in person, to sell the Fuji office equipment products. Part of the job also required assisting clients with document management and copying solutions. The work involved working with others in the sales team in the Fuji office where the DME representatives worked. All customer leads and details were to be recorded in a database, as required by Mr Cummings.
- 8 Mr Brennan testified that although he was a Sales Cadet, he received no training until the end of June 2015, when he had assistance from a "mentor", Mr Martin. This involved sales training and coaching once per week via a "webcam" for about one hour. Apart from this, Mr Brennan said he had some informal help from another sales agent. Additionally, Mr Cummings gave Mr Brennan some guidance on how to plan his time, in scheduling meetings with customers and some sales techniques. Mr Brennan testified that he felt he had to comply with Mr Cummings' requirements as DME were paying him a guaranteed income of \$3,000 per month.
- 9 As to his working arrangements, Mr Brennan said he would normally attend the Fuji office each day at 8:30am. He said other sales staff would be there too, along with Mr Cummings. Mr Brennan said he had allocated desk space in the office. Whilst the position was to involve selling to customers, Mr Brennan said he regarded himself as having working hours of 8:30am to 5:00pm each day on a Monday to Friday basis. He said he understood his commitment to DME was a full time one and that he had no ability or time, to undertake work for anyone else.
- 10 In terms of responsibility for the work he was required to perform, Mr Brennan testified that he never considered it open to him to ask someone else to do any of his work as required by DME.
- 11 Whilst there was some dispute about the matter, Mr Brennan said he was allocated a sales area primarily in the Osborne Park industrial district. Mr Cummings denied this and said it was open for Mr Brennan to pursue opportunities both north and south of the river, although he suggested Osborne Park because of the concentration of businesses in this area.
- 12 In terms of work methods, Mr Brennan said he was required to follow work procedures prescribed by DME and to install software on his laptop computer at the request of Mr Cummings. There were regular sales meetings held each fortnight or thereabouts, at the Fuji Office, that Mr Brennan was expected to and did attend, along with other sales staff. Mr Cummings testified that these meetings were for the purposes of sales agents updating themselves on sales information and also hints and tips on sales performance.
- 13 In terms of how he was represented to customers, Mr Brennan testified that his business card, office location, co-worker relationships, training sessions and the use of technology and equipment, all demonstrated his integration into the business relationship between DME and Fuji Xerox. In this context, Mr Cummings said that DME has an agency agreement with Fuji to sell its products in Western Australia and DME is paid by Fuji, based on commissions on sales.
- 14 In the three months that Mr Brennan was with DME, he said he had very little support and feedback from Mr Cummings as to his performance. That which he did receive, he thought was encouraging. However, all of this changed when on 13 July 2015, after a regular fortnightly sales meeting, Mr Brennan said that Mr Cummings requested to have a discussion with him. Mr Cummings informed Mr Brennan that after considering his performance over the last three months, he had decided to "let him go". Mr Brennan said that he was shocked and distressed by this and in all the circumstances, considered that he had been summarily dismissed.

- 15 Whilst not disputing much of what Mr Brennan said, Mr Cummings' evidence was that he took Mr Brennan on as a sole trader and he was to be responsible as he put it to "run his own show". Mr Brennan's role in the early days would be to obtain business leads and to build up a database of contacts from which sales may eventually flow. The idea of a guaranteed commission of \$3,000 per month for the first six months, was payable in recognition that Mr Brennan was learning the role and he needed to have income to cover his expenses. Mr Cummings described Mr Brennan as a "Sales Cadet", as occupying an entry level sales position.
- 16 As to the issue of hours of work, Mr Cummings took issue with the contention by Mr Brennan that he worked the hours as alleged, they being generally 8:30am to 5:00pm Monday to Friday. According to Mr Cummings, sometimes Mr Brennan was not contactable and DME did not hear from him. Mr Cummings also disputed that Mr Brennan was in the Fuji office as often as he maintained. In this respect, exhibit R1, tendered by DME, was a record of access by Mr Brennan to the Fuji office through its secure entry, which showed no access to the premises on a number of days in the period 14 April 2015 to 29 June 2015. I pause to note however that on this issue, Mr Brennan testified that sometimes the door to the Fuji office was open and it was not necessary for him to use his security key to gain entry. As to him not being contactable, Mr Brennan denied this and said he was in the field to get leads to sell machines, as he was required to do.
- 17 Mr Brennan further said that at all times he regarded Mr Cummings as his "boss".
- 18 As the question of jurisdiction has been raised, the Commission will deal with it as a preliminary issue.

Employee or independent contractor?

- 19 It is trite to observe that the label assigned to a relationship between two persons in a workplace, for the performance of work, cannot alter the substance of it: *AMP v Chaplin* (1978) 52 ALJR 407. As to the legal tests for determining whether a person is an employee or an independent contractor, in *Digney v The Black Cockatoo Preservation Society of Australia* (2014) 95 WAIG 562 I observed at 565 as follows:
- 23 The relevant principles as to whether a person should, as a matter of fact and law, be regarded as an employee or an independent contractor, have been dealt with by the Industrial Appeal Court. In *Personnel Contracting Pty Ltd v/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* (2004) 85 WAIG 5, Steyler J dealt with this issue at pars 20-28, EM Heenan J at pars 50-52 and Simmonds J dealt with the issue at pars 98-100. In particular, Simmonds J said at pars 95-101 as follows:
- 95 The common law test for distinguishing a relationship of employer/employee, on the one hand, and principal/independent contractor, on the other, has recently been reviewed in some detail in the judgment of Hasluck J of this Court in *Birighitti* (*supra*), at [57] to [67]. The other members of the Court (Anderson J, who dissented on the jurisdictional issue in the case, and Scott J) did not find it necessary to enter into the question in as much detail because of the case's particular facts.
- 96 In this case, where it seems to me the matter is rather more evenly balanced than in *Birighitti*, I consider it is necessary to review the matter again, particularly as it was contended in this case that there had been a shift in the law not entered into in *Birighitti*. I review the matter again without meaning to depart from the view of Hasluck J there in any way, but to emphasise matters of first principle particularly relevant to this case.
- 97 The most recent High Court authority in point, for the purposes of vicarious liability for the negligence of a bicycle courier, is *Hollis v Vabu Pty Ltd* (*supra*). There was a clear majority on the issue of the application of the test, that of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, with McHugh J dissenting, and Callinan J not expressing a concluded view on the matter. As to the test itself, however, I see no clear difference between all of the members of the Court who expressed a concluded view.
- 98 The test set out in *Vabu* by the majority is expressed in terms of the difference between a person (an employee) whose work serves another, and is done **in that other's business**, on the one hand, and a person whose work is likewise for the benefit of another's business, but is done in the course of the carrying on of a **trade or business of the person doing the work**, on the other. The majority referred (*Vabu*, at 39) for this purpose to *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, at 48, per Dixon J, and to *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, at 217 per Windeyer J, where language of this sort is used. The *Vabu* majority also referred to *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, at 366 per McHugh J, where the distinction is expressed in terms of the independent contractor as a person who does the work not as "the representative of the employer".
- 99 For the application of the test, and particularly for the relevance of the matter of "control" of the work done, the *Vabu* majority refer to the dicta in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, at 29 per Mason J. There, his Honour acknowledges the historical significance of the "control test" and the difficulties in using it in the historical ways in modern working conditions, where he says
- "The common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': *Zuijs v Wirth Brothers* [(1955) 93 CLR 461, at 571]. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered."
- 100 What his Honour meant by the reference to the factors, including but not limited to control, subsumed by the "totality of the relationship" is indicated by an earlier passage in his judgment in *Stevens* (*supra*), which is not referred to in *Vabu*, but which is a passage quoted in *Odco* as setting out the law on this point ((*supra*) at 754):

"The approach of this court has been to regard it [control] merely as one of a number of indicia which must be considered in the determination of the question: *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539 at 552; *Zuijs' case* [supra]; *FCT v Barrett* (1973) 129 CLR at 401; 2 ALR 65; *Marshall* [supra] at 218. Other relevant factors include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

- 101 As these dicta tend to indicate, the application of the test is a matter of some difficulty, as this case illustrates. I need to consider that question separately.
- 24 His Honour then went on to apply the test set out in the various decisions of the High Court referred to, and took into account a number of factors including control, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax, the delegation of work, indicia of a separate business, integration in the organisation, and the language of the parties' written contract: see pars 108-150 inclusive.
- 25 The "multi factor" test referred to and applied by Simmonds J, as set out above, was referred to and applied by the High Court in *Hollis v Vabu Pty Limited* (2001) 207 CLR 21.
- 20 I adopt and apply these principles in this matter. A summary of the "multi factor" test for whether a person is an employee or a contractor, is set out by the learned authors Sappideen C, O'Grady P, Warburton G and Eastman K, *Macken's Law of Employment* (6th ed, 2009), pars 2.105 to 2.170. I set out my findings, based on the evidence, against these factors as follows. This consideration will inform my ultimate assessment as to whether Mr Brennan was a self-employed person conducting his own business, or was an employee of DME.
- 21 Firstly, as to the question of control, the test is not just actual control on a day to day basis, but the right to exercise control. Some types of employment exhibit very high degrees of autonomy. In this case, Mr Brennan was engaged by DME as a Sales Cadet. As such, and as he had very little experience in the work to be undertaken, Mr Brennan was required to work in accordance with the systems and procedures of DME, as embedded in the Fuji business. While there was some dispute about it, I am satisfied that Mr Brennan did have regular hours of work and that DME expected Mr Brennan to meet them. Mr Brennan was required to and did attend the Fuji office as directed, if not every day then very regularly, and also for the purposes of training and product information sessions, as required.
- 22 I also accept that Mr Brennan was required to adopt a work method and recording system that Mr Cummings and those on his behalf, required. It was a clear expectation of Mr Cummings that Mr Brennan would generate a "pipeline" of customer leads and that they be generated, collated and recorded in the DME database as required and in the manner determined by Mr Cummings.
- 23 Further, I have no doubt on the evidence, that Mr Brennan felt obliged to comply with Mr Cummings' requests and directions, because as he himself put it, he was being paid a guaranteed income of \$3,000 per month.
- 24 As to the element of working for others, an ability to do so points to independence. In this case, there was no evidence that Mr Brennan did or had the capacity to do so. I have no doubt also, based on the evidence, that because Mr Brennan was being paid a guaranteed income of \$3,000 per month, Mr Cummings fully expected Mr Brennan to devote his full time and attention to the requirements of DME. This was certainly the understanding of Mr Brennan on the evidence.
- 25 As to the place of work and advertising for services, this may be a relevant factor. In this case, the evidence suggested that Mr Brennan did have some office obligations and did attend the office of Fuji, on behalf of DME, regularly. Given the nature of the work involved, being out canvassing for customers, this factor is however, of lesser weight in this case.
- 26 There was little by way of tools and equipment required by Mr Brennan to perform the work for DME. He did use his own phone and laptop computer, although he also said he accessed IT services from the Fuji office. The provision of his own car, from which no doubt expenses were paid from the \$3,000 guaranteed payment per month, is not decisive either way: *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2010] FCAFC 52. There was no evidence of any significant capital investment by Mr Brennan in this case.
- 27 A further factor is the capacity to delegate work. The presence of a right of delegation is an indicator of independence. In this case there was no suggestion of any capacity for Mr Brennan to delegate his performance of work for DME to any other person. In this case I have no doubt that Mr Cummings expected Mr Brennan to perform the services required by DME personally.
- 28 Whether a person is paid by way of a salary or wage, or by completion of a project, or for the completion of a specified service, is also a relevant consideration. Payment of a wage or salary, as a fixed payment computed by time, is an indicator of employment.
- 29 In this case Mr Brennan was paid a guaranteed sum of \$3,000 per month, irrespective of sales results or work performed. This was to recur for the first six months of the engagement. Thereafter, Mr Brennan was to be remunerated solely by commission.
- 30 The fact of a regular payment each month to be made by DME to Mr Brennan, at least in the first six months of the engagement, had the characteristics of a regular wage or salary, despite its description as a "guarantee": *Re Shine; Ex parte Shine* [1892] 1 QB 522 per Bowen LJ at 529. Even a commission only payment is not determinative of an independent contractor relationship, as a number of employee occupations may be remunerated by results, such as piecework rates, whilst still being classified as employees: *Roy Morgan Research* at par 47. In this case, I consider that the remuneration method tends to point to employment.

- 31 In general terms, the possession of an ABN, and a person being responsible for their income tax deductions, can be relevant but may also be a neutral factor. This is so because income tax legislation imposes a somewhat different test to the common law test as to whether a person is an employee or independent contractor. Furthermore, where these requirements are imposed by a putative employer as a condition of an offer of engagement, the strength of this factor is lessened. Overall in the present circumstances, I regard this factor as neutral.
- 32 In relation to the question of integration, it was the case on the evidence that Mr Brennan was integrated into the business of DME and Fuji Xerox and was represented to others dealing with him accordingly. This was clear from Mr Brennan's business card and the fact that he participated in activities including sales training, mentoring and regular sales meetings, in the Fuji office. In all respects it would have been difficult for an outsider to tell that Mr Brennan was an independent operator.
- 33 As to a right of suspension or dismissal, the presence of such will indicate an employment relationship. There was no express contractual right in this case and even though Mr Cummings ceased the engagement between DME and Mr Brennan, I regard this factor as neutral in the assessment.
- 34 As to the express declaration of intent, this can be a factor to tip the scales, all other things being equal. However, as noted at the outset, a label attached to a relationship cannot alter its essential substance, if in all other respects it does not reflect the true nature of the relationship between the parties. In this case, Mr Brennan's letter of offer, set out above, referred to him as a "self employed sales agent". On the face of it if all other factors were evenly balanced, this may tip the scales in favour of independence, particularly in the case of overall ambiguity in a relationship: *Massey v Crown Life Insurance Co* [1978] 2 All ER 576 at 579. In some circumstances, it may be an important factor: *BWU v Odco Pty Ltd* (1991) 99 ALR 735.
- 35 Taking all of these factors into consideration, I cannot come to the conclusion that Mr Brennan was performing work for DME in the performance of his own business in its own right. Apart from the factors to which I have referred, is the engagement of Mr Brennan by DME as a "Sales Cadet". In ordinary parlance, a cadetship is a period of training and instruction, during which the individual "learns the ropes" of the particular trade, occupation or calling, in much the same way as does an apprentice or trainee. In my opinion, this notion of a cadetship is, of itself, wholly inconsistent with the notion of such a person conducting their own business. On the contrary, in this case, all of the evidence pointed to Mr Brennan's integration into and part of the DME/Fuji operations. Viewed in a practical sense, in my opinion, it is difficult to come to any other conclusion on the basis of the evidence before the Commission: *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215.
- 36 Accordingly on balance, I consider that for the time of his engagement, Mr Brennan was an employee of DME. Therefore, the Commission has jurisdiction to hear and determine Mr Brennan's contractual benefits claim. The matter will now be re-listed for hearing on the merits.

Threat

- 37 A final matter requires some consideration.
- 38 Before these proceedings were listed for hearing, and whilst the matter was in the Chambers of another Commissioner, a letter was received by the Registrar from Mr Sharpe, the agent for the applicant, which was dated 19 October 2015. The letter referred to the claim brought by Mr Brennan in these proceedings. It referred to a telephone call made by Mr Cummings of DME at approximately 4:20pm on Friday 16 October 2015 to Mr Sharpe's home telephone. The letter explained that Mr Sharpe's partner, Ms Wells, answered the telephone and spoke to Mr Cummings. Ms Wells is Mr Brennan's mother. According to the letter, the telephone conversation lasted approximately 10 minutes.
- 39 Mr Sharpe referred to Mr Cummings being upset with Ms Wells on the telephone and angry about Mr Brennan having commenced these proceedings. According to the report of the conversation with Ms Wells, Mr Cummings told Ms Wells words to the effect that "Kashlyn would not get any money from him and issued a threat towards Kashlyn to the effect that he would make sure Kashlyn would not get a job anywhere unless he withdrew the claim." It was reported that Mr Cummings further told Ms Wells that Mr Brennan had not performed well, and the decision by Mr Cummings to terminate Mr Brennan's engagement was justified. The letter further stated that Ms Wells was left in no doubt that she was under pressure by Mr Cummings to have Mr Brennan's application to this Commission withdrawn. Mr Sharpe wrote that Ms Wells felt that "Mr Cummings was hectoring and bullying her to this end".
- 40 This matter was raised in the cross-examination of Mr Cummings by Mr Sharpe in these proceedings. Mr Sharpe asked Mr Cummings about the telephone call to Mr Brennan's mother at 61T. Mr Cummings testified that he wanted to ask her whether she was aware that Mr Brennan had made the present claim. He referred to a previous conversation about three weeks prior, where Mr Cummings informed Ms Wells that Mr Brennan "wasn't making the grade" and that his time with DME "was on thin ice". When asked initially about whether he had issued threats concerning Mr Brennan proceeding with his claim, Mr Cummings said that he did not, but that he did not think pursuing the claim was a good idea: 62T. After a question from the Commission and a few further questions from Mr Sharpe the following exchange took place in cross examination at 62-63T:

So did you say I'm to – to Kashlyn's mother when you – when she answered the phone did you say, "I am in shock about receiving this claim from Kashlyn" or words to that effect?---Yes.

Did you say, "Was this your idea"?---No. I don't think so.

Did you say, "I'm telling you to withdraw it, as I would rather pay \$10,000 to lawyers to fight it than give Kashlyn a cent of my money"?---Yes.

Did you say, "You'd better withdraw it and I'm going to make sure that Kashlyn never ever works in this industry again. He won't get a job anywhere"?---No.

You didn't say that?---No.

“He didn’t respond to phone calls and missed meetings”, did you say that?---Ah, are we talking about in this conversation with his mother?

Yes?---Yes.

Did you say, “With all his cold calling he didn’t get one lead”?---Yes.

Did you say, “I cannot take it seriously. I want you to tell him to withdraw it, as it won’t be heard” - - -?---No.

- - - presumably in relation to the application. You didn’t say that?---I wouldn’t say it wouldn’t be heard. It’s not up to me to hear it.

No. Did you say, “I can’t take it seriously and want you to tell him to withdraw it, as it won’t be heard”?---I said the first bit, didn’t say the second bit.

Right. So, “I cannot take it seriously and I want you to tell him to withdraw”?---No. No. No.

Is that what you said?---I said, “I can’t believe he’s doing it. I would suggest you tell him to withdraw”. I mean, at the end of the day of course I want him to withdraw, why wouldn’t I want him to withdraw it?

But it’s the manner – well, so – but you agree that you made the call to his mother and - - -?---Well, I - - -

- - - said these things?--- - - think I agreed that a long time ago.

Right. Fair enough.

Did you say Kashlyn was on probation and he was not owed notice of termination?---No. I don’t think so. I don’t – I don’t recall saying that at all.

Right.

Did you say, “This is a waste of my time and will not go anywhere”?---Don’t recall saying that at all.

Right.

Commissioner, this has been the subject of some correspondence to the Commission shortly after it happened, being a letter from myself to the Registrar dated 19 October.

- 41 Later in the cross-examination, in response to a further question from the Commission, Mr Cummings denied that the purpose of the telephone call to Mr Brennan’s mother was to get Mr Brennan to discontinue the proceeding. However, Mr Cummings confirmed that at the time he made the call he was very upset and flabbergasted that the claim had been made.
- 42 Subsequent to the Commission reserving its decision in these proceedings, Mr Cummings wrote to my Chambers on 13 January 2016. In the letter, Mr Cummings did say that he suggested to Ms Wells that she convince Mr Brennan to withdraw his claim as he “absolutely believed that he had no claim”. Mr Cummings denied that he made a threat to Mr Brennan through Ms Wells, that Mr Brennan would not get a job anywhere unless he discontinued the proceedings. Mr Cummings further said that he informed Ms Wells that the reference to Mr Brennan not working in the industry again was based on a prior conversation between Mr Cummings and Mr Brennan, where he encouraged Mr Brennan to get further sales experience after which he may be given another opportunity.
- 43 Subsequently by letter of 29 January 2016 Mr Sharpe wrote to my Chambers responding to Mr Cummings letter of 13 January 2016. In it, Mr Sharpe referred to his original letter to the Registrar of 19 October 2015. He further referred to that letter being raised in conciliation proceedings before Harrison C on 4 November 2015 and Mr Cummings not making any comment about it at that time. Mr Sharpe referred to the evidence before the Commission given by Mr Cummings on 21 December 2015 and that Ms Wells stood by her recollection of the conversation she had with Mr Cummings on 16 October 2015. Whilst the letter did confirm a prior contact by Mr Cummings to Ms Wells before 16 October 2015, her recollection of the subject matter of that telephone discussion was different to Mr Cummings.
- 44 Given the nature of the issues raised in both the correspondence to the Registrar and the subsequent correspondence to the Commission, despite an amount of it being hearsay, and the evidence given in these proceedings, an issue arises as to whether the conduct of Mr Cummings may constitute an offence relating to the administration of justice for the purposes of Chapter XVI of The Criminal Code of Western Australia. Under s 143 of the Code, any person who attempts to obstruct, prevent, pervert or defeat the course of justice is guilty of a crime.
- 45 I make no further comment on the evidence and the issues arising before the Commission in this respect. However, given that these matters were raised in open court I consider it only proper that I refer the issue to the Western Australian Police for their further consideration as they may see fit. A copy of these reasons for decision, relevant pages of the transcript of proceedings and the correspondence referred to above, will accompany the referral.

Conclusion

- 46 For the foregoing reasons, a declaration will be made that Mr Brennan was at all material times an employee of DME.

2016 WAIRC 00132

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	MR. KASHLYN BRENNAN	
	-v-	
	DOCUMENT MANAGEMENT EXPERTS PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 9 MARCH 2016	
FILE NO/S	B 169 OF 2015	
CITATION NO.	2016 WAIRC 00132	

Result	Declaration issued
Representation	
Applicant	Mr C Sharpe as agent
Respondent	Ms J Beeson as agent

Declaration

HAVING heard Mr C Sharpe as agent on behalf of the applicant and Ms J Beeson as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby declares –

THAT at all material times the applicant was an employee of the respondent.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2016 WAIRC 00149

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	SYLVIA SAU WAH CHEUNG	
	-v-	
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS:	
	(I) THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES;	
	(II) THE PEEL HEALTH SERVICES BOARD; AND	
	(II) THE WA COUNTRY HEALTH SERVICE	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	TUESDAY, 15 MARCH 2016	
FILE NO/S	U 7 OF 2016	
CITATION NO.	2016 WAIRC 00149	

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 2 March 2016 the Commission convened a conference for the purpose of conciliating between the parties; and
 WHEREAS at the conclusion of that conference the applicant sought time to consider her position; and
 WHEREAS on 8 March 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 00969

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
KELLY LOUISE FRAGOMENI;
SUZANNE MAREE WALLEY

APPLICANTS

-v-

NGUNYTJU TJITJI PIRNI (ABN: 89 716 158 382)

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE TUESDAY, 27 OCTOBER 2015
FILE NO/S U 127 OF 2015, U 128 OF 2015
CITATION NO. 2015 WAIRC 00969

Result Order issued
Representation
Applicants Mr M Fitzgerald as agent
Respondent No appearance

Order

HAVING heard Mr M Fitzgerald as agent on behalf of the applicant and there being no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders -

THAT applications U 127 of 2015 and U 128 of 2015 be and are hereby joined and heard and determined together.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 01056

CITATION : 2015 WAIRC 01056
CORAM : COMMISSIONER S J KENNER
HEARD : TUESDAY, 27 OCTOBER 2015, MONDAY, 30 NOVEMBER 2015
DELIVERED : MONDAY, 30 NOVEMBER 2015
FILE NO. : U 127 OF 2015, U 128 OF 2015
BETWEEN : KELLY LOUISE FRAGOMENI;
SUZANNE MAREE WALLEY
Applicants
AND
NGUNYTJU TJITJI PIRNI (ABN: 89 716 158 382)
Respondent

Catchwords : *Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal - Application to re-open unfair dismissal applications - Exceptional circumstances - Application granted - Respondent to compensate applicants for the costs and expenses of applicants' agent*

Legislation : *Industrial Relations Act 1979 (WA)*

Result : *Reasons for decision issued*

Representation:

Counsel:

Applicants : Mr M Fitzgerald as agent

Respondent : Mr J Lilleyman of counsel

Case(s) referred to in reasons:

Case(s) also cited:

R v Kelly (Edward) [2000] 1 QB 198 at 208

Reasons for Decision

Ex Tempore

- 1 I have considered this application that has been made by the respondent for leave to re-open the substantive applications. I have considered carefully the evidence Ms Skelly filed along with the application for leave to reopen, which is now the subject of evidence before the Commission as exhibit R1. Ms Skelly has been and is a director of the respondent organisation.
- 2 Having considered that evidence I accept the thrust of it that at or around the time of the respondent's funding being withdrawn and at that time the dismissal, not only of the applicants, but it seems all of the staff of the respondent in the period late July and early August 2015, the respondent itself was in somewhat of a shambles. Also on the evidence before me Ms Logan, who shortly thereafter seemingly on the evidence assumed the role of chair of the respondent, regrettably and sadly suffered a major personal issue which precluded her from effectively conducting the matters as presently before me, on behalf of the respondent. Also is the evidence of Ms Skelly, uncontradicted, that there was a degree of tension and disagreement amongst the board members themselves in relation to no doubt a range of matters.
- 3 The Commission has a broad discretion in matters such as these and wide powers under s 27(1) of the Act. The relevant principles in relation to the seeking of leave to reopen generally in civil proceedings, which I adopt and apply as a guide for present purposes, are set out by the learned author in Bernard Cairns 10th edition of *Australian Civil Procedure* at paragraph 16.240.
- 4 Ultimately the issue is the attainment of justice and what that might require and of course, material prejudice to the other party is a relevant consideration. In light of everything that has been before me I have had regard to the case put by the respondent and the reasons which have accompanied the application and consider in the circumstances, there are exceptional circumstances. I therefore propose to grant leave to the respondent to reopen the case to enable it to put its case in reply to the applicants' unfair dismissal claims before the Commission. However there will be some cost to the respondent. The respondent will be required to compensate the applicants for the costs and expenses of the applicants' agent in his appearance today in the leave to reopen application. Apart from of course, professional services costs which are precluded under the Act from being the subject of an order. Those costs are to be agreed or as determined by the Commission.

2015 WAIRC 01057

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KELLY LOUISE FRAGOMENI;
SUZANNE MAREE WALLEY

APPLICANT

-v-

NGUNYTJU TJITJI PIRNI (ABN: 89 716 158 382)

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE MONDAY, 30 NOVEMBER 2015
FILE NO/S U 127 OF 2015, U 128 OF 2015
CITATION NO. 2015 WAIRC 01057

Result	Order and direction issued
Representation	
Applicant	Mr M Fitzgerald as agent
Respondent	Mr J Lilleyman of counsel

Order and Direction

HAVING heard Mr M Fitzgerald as agent on behalf of the applicant and Mr J Lilleyman as counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

- (1) ORDERS that the respondent be and is hereby granted leave to reopen the proceedings before the Commission to put its case in reply to the applicants' case.
- (2) ORDERS that the respondent be required to and hereby pay the applicants' representative's costs and expenses of today's proceedings either as agreed or as determined by the Commission.
- (3) DIRECTS that the respondents' representative be provided, on payment of the appropriate fee to the Registrar, with a copy of the notices of applications; the notices of answer; the transcript of the proceedings on 27 October 2015 and a copy of the exhibits tendered by the applicants.
- (4) DIRECTS that the respondent file and serve on the applicants any witness statements upon which it intends to rely, with copies of documents referred to in the statements to be annexed, by 31 December 2015.
- (5) DIRECTS that the applications will be relisted for hearing for one day on a date to be fixed by the Commission.
- (6) DIRECTS that there be liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2016 WAIRC 00150

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
KELLY LOUISE FRAGOMENI;
SUZANNE MAREE WALLEY

APPLICANTS

-v-

NGUNYTJU TJITJI PIRNI (ABN: 89 716 158 382)

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE TUESDAY, 15 MARCH 2016
FILE NO/S U 127 OF 2015, U 128 OF 2015
CITATION NO. 2016 WAIRC 00150

Result	Order issued
Representation	
Applicant	Mr M Fitzgerald as agent
Respondent	Mr J Lilleyman of counsel

Order

HAVING heard Mr M Fitzgerald as agent on behalf of the applicants and Mr J Lilleyman 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 herein applications be and are hereby adjourned and the hearing dates of 21-23 March 2016 be and are hereby vacated.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2016 WAIRC 00160

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 KELLY LOUISE FRAGOMENI;
 SUZANNE MAREE WALLEY

APPLICANTS**-v-**

NGUNYTJU TJITJI PIRNI (ABN: 89 716 158 382);

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE MONDAY, 21 MARCH 2016
FILE NO/S U 127 OF 2015, U 128 OF 2015
CITATION NO. 2016 WAIRC 00160

Result Discontinued by leave
Representation
Applicant Mr M Fitzgerald as agent
Respondent Mr J Lilleyman of counsel

Order

WHEREAS the applicants sought and were granted leave to discontinue the applications, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the applications be and are hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2015 WAIRC 01050**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 MICHAEL GARDINER

APPLICANT**-v-**

NEXT RESIDENTIAL PTY LTD T/AS NEXT RESIDENTIAL

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 26 NOVEMBER 2015
FILE NO/S B 154 OF 2015
CITATION NO. 2015 WAIRC 01050

Result Order issued
Representation
Applicant Mr P Mullally as agent
Respondent Ms J Beeson as agent

Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Ms J Beeson 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 adjourned sine die.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2016 WAIRC 00183

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MICHAEL GARDINER

APPLICANT

-v-

NEXT RESIDENTIAL PTY LTD T/AS NEXT RESIDENTIAL

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE FRIDAY, 1 APRIL 2016
FILE NO/S B 154 OF 2015
CITATION NO. 2016 WAIRC 00183

Result Discontinued by leave
Representation
Applicant Mr P Mullally as agent
Respondent Ms E Hartley of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2016 WAIRC 00217

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JOHN GIBSON

APPLICANT

-v-

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

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE FRIDAY, 15 APRIL 2016
FILE NO/S U 17 OF 2016
CITATION NO. 2016 WAIRC 00217

Result Application dismissed
Representation
Applicant Ms R Weideman as agent
Respondent Mr M Golesworthy

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
WHEREAS on 29 February 2016 the Commission convened a conference for the purpose of conciliating between the parties; and
WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and
WHEREAS on 11 April 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.

2016 WAIRC 00179

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2016 WAIRC 00179
CORAM : COMMISSIONER T EMMANUEL
HEARD : FRIDAY, 11 MARCH 2016
DELIVERED : FRIDAY, 1 APRIL 2016
FILE NO. : U 24 OF 2016
BETWEEN : ROBERT GROVE
 Applicant
 AND
 ANDREW GROVE
 MINOR OWNER OF INDIAN OCEAN HOTEL
 Respondent

CatchWords : Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should not be exercised - Acceptance of referral out of time not granted - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i),(2)&(3)
 Legislation : *Industrial Relations Act 1979* (WA) s 29(2) and s 29(3)
 Result : *Application dismissed*
Representation:
 Applicant : Mr R Grove (on his own behalf) and Mr J Grove (as agent)
 Respondent : Mr S Barry (as agent)

Cases referred to in reasons:

Malik v Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 135 IR 238
Jackamarra v Krakouer [1998] HCA 27; (1998) 195 CLR 516

Reasons for Decision

- 1 The applicant, Mr Robert Grove, was the assistant general manager at the Indian Ocean Hotel. The respondent, Mr Andrew Grove, is the applicant's uncle and a minor owner of the hotel. The applicant was summarily dismissed for serious misconduct on 27 January 2015. He referred his claim of unfair dismissal on 9 February 2016.
- 2 Section 29(2) of the *Industrial Relations Act 1979* (WA) (the Act) requires the applicant to refer his claim of unfair dismissal not later than 28 days after the day he was dismissed.
- 3 The respondent objects to the Commission granting an extension of time. At a hearing on 11 March 2016, the applicant and respondent were given the opportunity to provide evidence and make submissions in relation to whether the Commission should accept the applicant's claim out of time.

Applicable law

- 4 Under s 29(3) of the Act, the Commission may accept a referral by an employee that is out of time if the Commission considers that it would be unfair not to do so.
- 5 In deciding whether it would be unfair not to accept the applicant's unfair dismissal claim, I have applied the principles considered by the Industrial Appeal Court in *Malik v Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 135 IR 238.

Length of the delay

- 6 The applicant's evidence is that he was dismissed from his employment on 27 January 2015. Under the Act, he had until 24 February 2015 to refer his application. The applicant referred his claim of unfair dismissal 350 days out of time, nearly one year later, on 9 February 2016.
- 7 A delay of nearly one year is very long.

Reason for the delay

- 8 The applicant gave evidence at the hearing. At times his evidence was vague. I understood him to be saying that at the time of his dismissal there was a dispute between the owners and management of the respondent's business. He testified that he felt a bit at risk of physical and verbal abuse if he were to make the claim at the time. The applicant said that his grandfather was one of the major owners of the business. The applicant did not want to add to conflict that existed at the time.
- 9 During his evidence, the applicant said his brother was dismissed by the respondent and that his grandfather had recently passed away. These events contributed to the applicant making his claim when he did. He testified that he now feels that enough time has passed and it is safe for him to bring his unfair dismissal claim.
- 10 The applicant testified that his grandfather's funeral was a month or so ago. Under cross-examination, the applicant agreed that his grandfather passed away in October 2015, more than three months before the applicant referred his claim to the Commission.
- 11 The applicant also gave evidence that he was assaulted by the respondent. He said that assault occurred in July 2013 and tendered a document written by a witness to the aftermath of the event which is dated 31 July 2012.
- 12 The respondent cross-examined the applicant in relation to this point and submitted that the applicant's real reason for filing his application when he did was to increase pressure on the respondent in relation to legal disputes between the respondent and the applicant's family members. In his submissions, the respondent denied the allegations of physical abuse.
- 13 I make no finding in relation to whether the assault occurred. However, I note that the applicant continued to work for the respondent for more than 17 months after the assault he described.
- 14 Taking into account the applicant's evidence that he felt unsafe, that he didn't want to contribute to conflict while his grandfather was alive and that those were the reasons for his delay, I do not accept that the applicant could not have brought his claim earlier.
- 15 Overall, I am not persuaded that the applicant had an acceptable reason for a delay of nearly one year. This goes against granting an extension of time.

Merits of the case

- 16 In deciding whether it would be unfair not to accept the applicant's claim out of time, it is necessary to make some assessment of the merits. It would not be unfair to dismiss a claim that was filed out of time if it could not succeed. At this preliminary stage my assessment of the merits is 'fairly rough and ready': *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516 [9] (Brennan CJ & McHugh J).
- 17 The applicant gave evidence that he was dismissed for no reason and without notice. He tendered various exhibits which related to events in 2012 and 2013. I do not consider those exhibits to be relevant to whether the applicant was unfairly dismissed.
- 18 The respondent submitted that the applicant was dismissed for serious misconduct and tendered exhibits he says support his argument. The applicant objected generally to the respondent's exhibits. I note that the respondent did not give evidence. The applicant did not have the opportunity to cross-examine any witnesses for the respondent (including the authors of the respondent's exhibits). The respondent submitted that there was a limit to how much he could speak to the documents because he did not author them.
- 19 The applicant did not persuade me that he had a strong case. However, that is not necessary in the context of his request for an extension of time. At a substantive hearing the respondent may be able to establish that the applicant engaged in misconduct. However, given the conflicting versions of events, lack of the respondent's sworn evidence and lack of opportunity for the applicant to cross-examine the respondent including in relation to the respondent's exhibits, I do not find that the applicant's claim has no merit.

Prejudice to the respondent

- 20 The applicant was dismissed more than one year ago. The respondent submitted that the previous owner of the hotel has passed away, the previous general manager has moved interstate and relevant staff members who were employed at the time of the dismissal and who could provide evidence have also moved on from their employment. In circumstances where the respondent dismissed the applicant for serious misconduct, the onus would be reversed at a substantive hearing. The respondent submitted that he would be prejudiced if the Commission were to accept the applicant's claim out of time.
- 21 The applicant made no submission in relation to this factor.
- 22 I find that there would be prejudice to the respondent if I were to accept the application out of time. This goes against granting an extension of time.

Action taken to contest dismissal

- 23 The applicant did not give evidence or make submissions about action he took to contest his dismissal, other than by applying to the Commission under the Act. This does not favour granting an extension of time.

Considerations of fairness between the applicant and others in a like position

- 24 No evidence was led or submissions made by either party about considerations of fairness between the applicant and others in a like position.

Conclusion

- 25 The Act allows the Commission to accept a claim out of time if it would be unfair not to do so.

- 26 I have considered the above principles. They are not exhaustive and none is necessarily decisive. Each case turns on its own individual facts and circumstances: *Malik* [27].
- 27 Special circumstances are not necessary but I must be positively satisfied that the time limit should be extended.
- 28 The time limit of 28 days should be complied with unless there is an acceptable reason for the delay that makes it unfair for the extension of time not to be granted.
- 29 As EM Heenan J states in *Malik*:
 Fairness...involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the Commission [74].
- 30 The respondent did not give evidence but instead relied upon submissions made from the Bar table. He tendered exhibits without providing context for those exhibits or an opportunity for the applicant to cross-examine him, including in relation to his exhibits. The applicant submitted he had various issues with the respondent's exhibits. In those circumstances, I cannot conclude the applicant's case has no merit.
- 31 However, I do not find that there is a positive reason to extend the period. A delay of nearly one year is very long. I find that the applicant did not act promptly. He could have brought his claim sooner. The applicant did not have an acceptable reason for his delay. He did not contest his dismissal, other than by referring his claim to the Commission. I consider the respondent would be prejudiced if the applicant's request for an extension of time were granted.
- 32 In the circumstances, the applicant has not shown it would be unfair not to accept his claim out of time. I will dismiss his claim of unfair dismissal.

2016 WAIRC 00178

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	ROBERT GROVE	APPLICANT
	-v-	
	ANDREW GROVE	
	MINOR OWNER OF INDIAN OCEAN HOTEL	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 1 APRIL 2016	
FILE NO/S	U 24 OF 2016	
CITATION NO.	2016 WAIRC 00178	

Result	Claim of unfair dismissal made out of time dismissed
Representation	
Applicant	Mr R Grove (on his own behalf) and Mr J Grove (as agent)
Respondent	Mr S Barry (as agent)

Order

HAVING HEARD Mr R Grove on his own behalf, Mr J Grove on behalf of the applicant and Mr S Barry on behalf of the respondent;

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

THAT this claim of unfair dismissal made out of time be dismissed.

[L.S.]

(Sgd.) T EMMANUEL,
 Commissioner.

2016 WAIRC 00141

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2016 WAIRC 00141
CORAM : CHIEF COMMISSIONER A R BEECH
HEARD : TUESDAY, 1 MARCH 2016
DELIVERED : FRIDAY, 11 MARCH 2016
FILE NO. : U 166 OF 2014
BETWEEN : MATTHEW GUGIATTI
 Applicant
 AND
 SOLARISCARE FOUNDATION
 Respondent

CatchWords : Termination of employment – Harsh, oppressive and unfair dismissal claim – Claim of unfair dismissal also filed in Fair Work Commission – Fair Work Commission claim dismissed because applicant not dismissed – Employment ending at conclusion of fixed term is not a dismissal – Effect of Fair Work Commission decision on WAIRC claim considered – Estoppel
Legislation : *Industrial Relations Act 1979* s 29AA(1), s 29AA(2)
 Fair Work Act 2009 s 382, s 386(2)(a)
Result : Claim of unfair dismissal dismissed
Representation:
Applicant : Mr M Gugiatti (by written correspondence)
Respondent : Ms E Moran, of counsel

Case(s) referred to in reasons:

Gallotti v Argyle Diamond Mines Pty Ltd [2003] WASCA 166; (2003) 83 WAIG 3053

Gugiatti v SolarisCare Foundation Ltd [2015] FWC 2447

Gugiatti v SolarisCare Foundation Ltd [2016] FWCFB 280

Knight v Commissioner of Police [2011] WASC 93

Reasons for Decision

1 On 6 August 2014, Mr Gugiatti referred a claim of unfair dismissal to the Commission. He also made a claim of unfair dismissal in the Fair Work Commission (FWC). Section 29AA(1) and (2) of the *Industrial Relations Act, 1979* (WA) (the Act) state as follows:

29AA. Certain claims not to be determined

- (1) Subject to subsection (2), the Commission must not determine a claim of harsh, oppressive or unfair dismissal from employment if the dismissed employee has lodged an application with Fair Work Australia for relief in respect of the termination of that employment.
- (2) Despite subsection (1) the Commission may determine the claim if the application to Fair Work Australia is —
 - (a) withdrawn; or
 - (b) rejected or dismissed on the ground that it is not within the jurisdiction of Fair Work Australia to determine the application.

2 Therefore his claim of unfair dismissal in this Commission did not proceed.

The FWC proceedings

3 Mr Gugiatti proceeded with his claim in the FWC and on 9 April 2015, the FWC issued its decision dismissing Mr Gugiatti's claim ([2015] FWC 2447). The FWC decision notes that the respondent raised the following jurisdictional objections:

1. That Mr Gugiatti was engaged for a specified period of time for the purposes of s 386(2)(a) of the *Fair Work Act 2009* (Cth) and was not dismissed; and
2. Mr Gugiatti failed to complete the minimum employment period applicable to a small business employer pursuant to s 382 of the *Fair Work Act 2009*.

4 After considering the evidence, the FWC found that Mr Gugiatti's contract of employment was for a specified period of time ending on 6 August 2014. The FWC found that the respondent decided not to offer him a new contract and that he was

informed of this on 9 July 2014. Mr Gugiatti last worked on the morning of 15 July 2014 and he sent a text message to the respondent saying he was not going to be coming into work again. Mr Gugiatti did not work after 15 July 2014 and was paid to the end of the period of his contract of employment; he was also paid an additional two days' pay which was not a contractual entitlement.

- 5 Consequently, the FWC found that Mr Gugiatti's employment terminated at the end of his specified period of employment and therefore he had not been dismissed.
- 6 The FWC then considered the second jurisdictional objection and held that Mr Gugiatti had not completed the required minimum employment period.
- 7 Mr Gugiatti appealed the FWC decision, however, he did not appear at his appeal. On 5 February 2016, a Full Bench of the FWC dismissed his appeal ([2016] FWCFB 280).

The respondent's request that the claim be dismissed

- 8 On 10 February 2016, the respondent requested that his claim of unfair dismissal in this Commission now be dismissed. It did so on the basis that Mr Gugiatti has proceeded in the FWC at first instance and in his application for permission to appeal, on the basis that the respondent is a constitutional corporation. Accordingly, on Mr Gugiatti's position, the respondent does not fall within the jurisdiction of this Commission.
- 9 It submits that Mr Gugiatti is estopped from proceeding in the Commission because he has represented to the FWC, and to the respondent, that he regards the respondent as a constitutional corporation. The respondent has relied upon this representation and has participated in the FWC proceedings without challenging jurisdiction on this point. It would be to the respondent's detriment if his claim of unfair dismissal in this Commission was to proceed and cause the respondent to devote further time and resources to those proceedings.
- 10 It states the respondent is a small not-for-profit organisation without a dedicated human resources staff member or in-house counsel. Further proceedings will impose a real and substantial burden on the respondent in terms of time and resources diverted from its core activities, which are to support cancer patients and their families.
- 11 The respondent's request that Mr Gugiatti's claim of unfair dismissal in this Commission now be dismissed was set down to be heard on 1 March 2016 at 11.30 am and the notices of hearing were sent on 15 February 2016.

Mr Gugiatti's request for an adjournment

- 12 On 25 February 2016, Mr Gugiatti sought an adjournment. He noted he had received the notice of hearing via email on 16 February 2016, although he says he did not read it until late on 18 February 2016, and that he had received a printed copy of the notice of hearing by post on 22 February 2016. Mr Gugiatti stated that the respondent's request raises issues that involve complex areas of law, including arguments regarding estoppel and whether the respondent is a constitutional corporation, which are issues not previously raised by the respondent and not tested before this Commission.
- 13 Mr Gugiatti stated that he is impecunious and self-represented. He says he has been suffering from significant ill health and has been the carer for a high needs individual. He also says that the parties are presently in settlement discussions and these discussions could benefit from some small amount of additional time to progress the matter. He requested that the hearing be adjourned and the programming for the filing of documents in relation to this matter be accordingly adjusted for a period of two weeks.
- 14 The respondent objected saying that Mr Gugiatti has had since August 2014 to seek legal advice about jurisdiction. He has persistently raised ill-health as a reason to avoid hearings or seek adjournments. The respondent submits it will be prejudiced by a further adjournment, and refusing the adjournment will have no effect in relation to any settlement proposal.
- 15 On 29 February 2016, I refused the request for an adjournment and informed the parties that the hearing would proceed.

The hearing

- 16 On the day of the hearing Mr Gugiatti did not attend. The hearing commenced in his absence. At 11.43 am, which is after the time set for the commencement of the hearing, he telephoned the Commission to say that he would not be attending and requesting that his written submissions be considered instead. He said he had already emailed them, with a copy to the respondent. A note to that effect was passed to me in the hearing and I made its contents known to the respondent.
- 17 I note that the Commission did not receive these submissions until late afternoon that day because the Commission's email system was not working, however Mr Gugiatti has not suffered any detriment from that because although the hearing proceeded in his absence, I adjourned the hearing after the respondent's submission in order to take his written submissions into account.

The respondent's submission

- 18 In the hearing the respondent spoke to its written request. The respondent pointed out that although the merits of Mr Gugiatti's claim of unfair dismissal have not been considered by the FWC, the FWC had considered the nature of his engagement and concluded that he was not dismissed. In that respect the issue of whether the respondent is a constitutional corporation does not arise because if Mr Gugiatti has not been dismissed, he cannot claim he has been unfairly dismissed.

Mr Gugiatti's written submissions

- 19 In Mr Gugiatti's written 'Reply to the respondent's application for dismissal for want of jurisdiction', he submits regarding estoppel that the doctrine is designed to protect a party from the detriment that would flow from a change in position of the other party that would leave the expectations of the first party groundless.

- 20 He says that he was advised to lodge claims of unfair dismissal in both jurisdictions and did so, and that the issue of whether or not the respondent is a constitutional corporation was not raised, agreed or determined at the time he did so and nor was that issue raised, tested or determined before the FWC. In relation to his claim in this Commission he has not changed his position, therefore an argument of estoppel cannot be substantiated.
- 21 Mr Gugiatti also submits that s 29AA(1) prevented him from proceeding with his claim in this Commission and he had proceeded with his claim in the FWC on that basis. The FWC has not considered the substantive merits of his claim of unfair dismissal and if the respondent now succeeds in having his claim in this Commission dismissed for want of jurisdiction, his claim will not have been considered on its merits in any jurisdiction. This is undesirable as a matter of public policy.

Consideration of the issues

- 22 I refused Mr Gugiatti's request for an adjournment because, in my view, a proper consideration of the respondent's request to dismiss this claim does not require an investigation of whether the respondent is or is not a constitutional corporation, or an in-depth knowledge of the doctrine of estoppel. Mr Gugiatti is self-represented and says he is impecunious and I did not consider it fair to him to allow him an adjournment if its principal purpose was to give him time to investigate matters which, at this stage, were not necessary.
- 23 The respondent's submission is quite correct because Mr Gugiatti's claim of unfair dismissal in this Commission cannot proceed because he was not dismissed – his employment ended when his contract expired. That is not a dismissal under the *Fair Work Act* and it is not a dismissal under the *Industrial Relations Act 1979* (WA) either: as Ms Moran correctly pointed out, the law is clear that where an employee's employment comes to an end at the end of a fixed term of employment, it does not constitute a dismissal: *Gallotti v Argyle Diamond Mines Pty Ltd* [2003] WASCA 166; (2003) 83 WAIG 3053. If Mr Gugiatti was not dismissed, he cannot claim to have been unfairly dismissed.
- 24 The FWC is a tribunal with jurisdiction over claims of unfair dismissal and heard evidence of the merits of Mr Gugiatti's claim of unfair dismissal, sufficient to be able to find that Mr Gugiatti's employment terminated at the end of his specified period of employment and therefore he had not been dismissed. The decision disposes once and for all of that fundamental matter so that, except on appeal, it cannot be re-litigated between the persons bound by the decision. That same fundamental matter should not be permitted to be re-litigated in this Commission between these same parties as the parties to the FWC decision. It is that which is undesirable in the public interest.
- 25 This does not raise complex questions of whether the respondent is a constitutional corporation. If estoppel applies at all, it is not whether Mr Gugiatti has changed his position; he has not done so. It is that a tribunal with the jurisdiction to decide at least whether he was or was not dismissed, has heard the evidence about that threshold issue and determined it against him and he should not be permitted now to argue in this Commission that the FWC decision was wrong. The respondent's request that Mr Gugiatti's application be dismissed should be granted.
- 26 Mr Gugiatti's written submission would be quite correct if the FWC had not dealt with his claim of unfair dismissal at all, but it had at least to the extent of determining that he had not been dismissed.
- 27 The issue is capable of being looked at from a different direction. Mr Gugiatti has shown that he is aware that s 29AA(1) of the Act prevents this Commission from determining his claim of unfair dismissal if he has lodged an application with the FWC for relief in respect of the termination of his employment. There are two exceptions in s 29AA(2). These are that this Commission may determine his claim if the application to the FWC is —
- (a) withdrawn; or
 - (b) rejected or dismissed on the ground that it is not within the jurisdiction of Fair Work Australia to determine the application.
- 28 Mr Gugiatti's claim in the FWC was not withdrawn. It was dismissed on the ground that the claim was not within the jurisdiction of the FWC to determine the application because Mr Gugiatti was not dismissed.
- 29 Section 29AA(1) is a provision which prevents a person being allowed to argue in both the FWC and this Commission that he has been unfairly dismissed. That is as it should be: a person does not have 'two bites at the cherry'. That provision prevents Mr Gugiatti, having argued in a claim of unfair dismissal in the FWC that he had been dismissed and having been found by the FWC not to have been dismissed, from then coming to this Commission to argue in this claim of unfair dismissal for a second time, that he was dismissed. Correspondingly, the respondent should not be required to have to defend the same claim in two different jurisdictions.
- 30 Section 29AA(1) in my view reflects the doctrine of issue estoppel which applies where some question of fact or law was necessarily decided as part of the legal foundation of a decision. Regardless of whether the action failed or succeeded, issue estoppel will operate to prevent that same question of fact or law from being relitigated in proceedings on a different cause of action between the same parties: *Knight v Commissioner of Police* [2011] WASC 93 at [49]. Mr Gugiatti was not dismissed by the respondent. As such, his claim in this Commission that he has been unfairly dismissed falls at the first hurdle.

Decision

- 31 For all of those reasons, an order now issues dismissing Mr Gugiatti's application in this Commission.
-

2016 WAIRC 00140

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MATTHEW GUGIATTI	APPLICANT
	-v-	
	SOLARISCARE FOUNDATION	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	FRIDAY, 11 MARCH 2016	
FILE NO/S	U 166 OF 2014	
CITATION NO.	2016 WAIRC 00140	

Result	Application dismissed	
Representation		
Applicant	Mr M Gugiatti (by written correspondence)	
Respondent	Ms E Moran, of counsel	

Order

HAVING HEARD Mr M Gugiatti, by written correspondence, and Ms E Moran, of counsel on behalf of the respondent;
AND HAVING given reasons for decision;
NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order:
 THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2016 WAIRC 00146

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DALE LEWIS	APPLICANT
	-v-	
	MICHAEL VOGEL	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	TUESDAY, 15 MARCH 2016	
FILE NO/S	B 139 OF 2015	
CITATION NO.	2016 WAIRC 00146	

Result	Application dismissed	
Representation		
Applicant	No appearance	
Respondent	Ms C Nguyen Mr R McMahan	

Order

WHEREAS on 19 August 2015 the applicant made an application to the Commission under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) which alleged denial of contractual benefits;
AND WHEREAS this matter was listed on 9 March 2016 for mention to show cause;
AND WHEREAS at the hearing on 9 March 2016 there was no appearance for or by the applicant and the Commission proceeded in the absence of the applicant;

NOW THEREFORE I, the undersigned, having given reasons for my decision during the hearing and pursuant to the powers conferred on me under s 27(1)(a) of the *Industrial Relations Act 1979* (WA), hereby order –

THAT the application be, and is hereby dismissed.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2016 WAIRC 00147

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DALE LEWIS

APPLICANT

-v-

RADIUM ST LUNCH BAR

MICHAEL VOGEL

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE TUESDAY, 15 MARCH 2016

FILE NO/S U 139 OF 2015

CITATION NO. 2016 WAIRC 00147

Result Application dismissed

Representation

Applicant No appearance

Respondent Ms C Nguyen
Mr R McMahan

Order

WHEREAS on 19 August 2015 the applicant made an application to the Commission under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) which alleged unfair dismissal;

AND WHEREAS this matter was listed on 9 March 2016 for mention to show cause;

AND WHEREAS at the hearing on 9 March 2016 there was no appearance for or by the applicant and the Commission proceeded in the absence of the applicant;

NOW THEREFORE I, the undersigned, having given reasons for my decision during the hearing and pursuant to the powers conferred on me under s 27(1)(a) of the *Industrial Relations Act 1979* (WA), hereby order –

THAT the application be, and is hereby dismissed.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2015 WAIRC 01014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MR NICHOLAAS SALMON LOUW

APPLICANT

-v-

BEYOND CEMENT AND TOOL SALES PTY LTD

(ABN 15 163 866 537)

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE MONDAY, 16 NOVEMBER 2015

FILE NO/S B 130 OF 2015

CITATION NO. 2015 WAIRC 01014

Result	Order issued
Representation	
Applicant	Mr D de Klerk of counsel
Respondent	Mr T Lethbridge of counsel

Order

HAVING heard Mr D de Klerk of counsel on behalf of the applicant and Mr T Lethbridge 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 name of the respondent be amended by deleting the name “Beyond Bricklaying Pty Ltd (ACN 158 959 589)” and inserting in lieu thereof the name “Beyond Cement And Tool Sales Pty Ltd (ABN 15 163 866 537)”.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2016 WAIRC 00057**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR NICHOLAAS SALMON LOUW	APPLICANT
	-v-	
	BEYOND CEMENT & TOOL SALES PTY LTD (ABN 15 163 866 537)	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	MONDAY, 8 FEBRUARY 2016	
FILE NO/S	B 130 OF 2015	
CITATION NO.	2016 WAIRC 00057	

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr T March

Order

HAVING heard Mr Louw on his own behalf and Mr T March 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 4 February 2016 be and is hereby vacated.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2016 WAIRC 00184**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR NICHOLAAS SALMON LOUW	APPLICANT
	-v-	
	BEYOND CEMENT & TOOL SALES PTY LTD (ABN 15 163 866 537)	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	TUESDAY, 5 APRIL 2016	
FILE NO/S	B 130 OF 2015	
CITATION NO.	2016 WAIRC 00184	

Result Discontinued by leave
Representation
Applicant In person
Respondent Mr T March

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 00180

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MR LES MAGYAR **APPLICANT**

-v-

THE DIRECTOR GENERAL
DEPARTMENT OF EDUCATION **RESPONDENT**

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE FRIDAY, 1 APRIL 2016
FILE NO/S B 180 OF 2015
CITATION NO. 2016 WAIRC 00180

Result Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
WHEREAS on 8 February 2016 the Commission convened a conference for the purpose of conciliating between the parties; and
WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and
WHEREAS on 24 March 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.

2016 WAIRC 00182

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MR LES MAGYAR **APPLICANT**

-v-

THE DIRECTOR GENERAL
DEPARTMENT OF EDUCATION **RESPONDENT**

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE FRIDAY, 1 APRIL 2016
FILE NO/S B 203 OF 2015
CITATION NO. 2016 WAIRC 00182

Result Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on 8 February 2016 the Commission convened a conference for the purpose of conciliating between the parties; and
 WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and
 WHEREAS on 24 March 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.

2016 WAIRC 00138

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PETER MATTHIESSEN	APPLICANT
	-v- PILBARA PORTS AUTHORITY	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 11 MARCH 2016	
FILE NO/S	B 207 OF 2015	
CITATION NO.	2016 WAIRC 00138	

Result	Application dismissed
Representation	
Applicant	Mr P Matthiessen on his own behalf
Respondent	Ms R Roach of counsel

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on 3 February 2016 the Commission convened a conference for the purpose of conciliating between the parties; and
 WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and
 WHEREAS by 25 February 2016 the applicant had not contacted the Commission; and
 WHEREAS by letter dated 25 February 2016 the Commission directed the applicant to advise the Commission of his intentions regarding the application by no later than close of business Thursday 3 March 2016 and that if he had not contacted the Commission by that date it would be concluded that he did not intend to pursue the application and an order of dismissal would issue; and
 WHEREAS by email on 1 March 2016 the applicant advised that he wished to withdraw his 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.

2016 WAIRC 00137

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PETER MATTHIESSEN
APPLICANT

-v-
PILBARA PORTS AUTHORITY
RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE FRIDAY, 11 MARCH 2016
FILE NO/S U 207 OF 2015
CITATION NO. 2016 WAIRC 00137

Result Application dismissed
Representation
Applicant Mr P Matthiessen on his own behalf
Respondent Ms R Roach of counsel

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
WHEREAS on 3 February 2016 the Commission convened a conference for the purpose of conciliating between the parties; and
WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and
WHEREAS by 25 February 2016 the applicant had not contacted the Commission; and
WHEREAS by letter dated 25 February 2016 the Commission directed the applicant to advise the Commission of his intentions regarding the application by no later than close of business Thursday 3 March 2016 and that if he had not contacted the Commission by that date it would be concluded that he did not intend to pursue the application and an order of dismissal would issue; and
WHEREAS by email on 1 March 2016 the applicant advised that he wished to withdraw his 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 00883

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
IAN MOONEY
APPLICANT

-v-
SEVEN G ENGINEERING PTY LTD
RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE MONDAY, 21 SEPTEMBER 2015
FILE NO/S B 89 OF 2015
CITATION NO. 2015 WAIRC 00883

Result Order issued
Representation
Applicant In person
Respondent Mr S Bradley

Order

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

THAT the applicant be granted leave to amend his claim in the terms as set out in the amended notice of claim of entitlement to a benefit under a contract of employment filed on 18 September 2015.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2015 WAIRC 01048**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION IAN MOONEY	APPLICANT
	-v-	
	SEVEN G ENGINEERING PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 25 NOVEMBER 2015	
FILE NO/S	B 89 OF 2015	
CITATION NO.	2015 WAIRC 01048	

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr S Bradley

Order

HAVING heard Mr I Mooney in person and Mr S Bradley on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders that –

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

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2016 WAIRC 00102**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2016 WAIRC 00102
CORAM	: COMMISSIONER S J KENNER
HEARD	: TUESDAY, 15 SEPTEMBER 2015, THURSDAY, 12 NOVEMBER 2015, TUESDAY, 22 DECEMBER 2015
DELIVERED	: WEDNESDAY, 24 FEBRUARY 2016
FILE NO.	: B 89 OF 2015
BETWEEN	: IAN MOONEY Applicant AND SEVEN G ENGINEERING PTY LTD Respondent

Catchwords	:	Industrial law (WA) - Contractual benefits claim - Claim for unpaid wages, rostered days off, superannuation and accrued annual leave - Other benefits claimed under the terms of a site agreement document - Engagement entirely oral - Concession by respondent that the terms of the site agreement document applied to its employees - Principles applied - Content of site agreement document implied as terms and conditions of employment between applicant and respondent - Necessary to give business efficacy to the contract - Finding of denied contractual benefits - No superannuation contribution rate prescribed in site agreement document - Commission has no jurisdiction to enforce an obligation in relation to superannuation solely prescribed by a Commonwealth statute - Application upheld in part - Order made
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Corporations Act 2001</i> (Cth) <i>Superannuation Guarantee (Administration) Act 1992</i> (Cth) <i>Minimum Conditions of Employment Act 1993</i> (WA)
Result	:	Application upheld in part
Representation:		
Applicant	:	In person
Respondent	:	No appearance

Case(s) referred to in reasons:

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

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

BP Refinery (Westernport) Pty Limited v Hastings Shire Council (1977) 52 ALJR 20

BP Refinery (Westernport) Pty Limited v Hastings Shire Council (1977) 180 CLR 266

Hawkins v Clayton (1988) 164 CLR 539

Gregory Oates v Sanders Executive Pty Ltd t/a LJ Hooker Morley (1988) 79 WAIG 1192

Eleanor Angela Keane v Lomba Pty Ltd (1998) 78 WAIG 810

Peter Dellys v Elderslie Finance Corporation Limited (2001) 81 WAIG 1632

Conti Sheffield Real Estate v Denise Brailey (1992) 72 WAIG 1965

BGC (Australia) Pty Ltd v Phippard (2002) 82 WAIG 2013

Reasons for Decision

- 1 The applicant Mr Mooney was employed by the respondent Seven G Engineering Pty Ltd on the Burrup TAN project in Karratha. The company is engaged in the construction industry, and was contracted to another company to perform work on the site in connection with the construction of a fertiliser plant. Mr Mooney was performing grouting, form working and finishing work in connection with the construction of grout plinths. He was engaged on the project from 15 November 2014 to 28 April 2015 and worked approximately 60 hours per week on the basis of a four weeks on and one week off roster.
- 2 By an amended notice of application, Mr Mooney claims denied contractual benefits in the sum of \$30,158.39. The claims relate to wages, Rostered Days Off ("RDO") payments, accrued annual leave and superannuation. There were also other benefits claimed by Mr Mooney under the terms of a site agreement document known as the "AMMA Tecnicas Reunidas TAN Project". Its terms reflect what are said to be "indicative terms and conditions applying to construction work for the Burrup TAN Project in Karratha WA". A copy of this document was exhibit A1.
- 3 The company accepted that this document containing terms and conditions of employment applied to the site, and applied its terms to its employees. The company also, by an amended notice of answer, admitted that it owed Mr Mooney \$18,819.59. Such an admission is able to be relied on by the Commission in making any order from these proceedings (see: Bernard Cairns *Australian Civil Procedure* 10th Ed par 12.480).
- 4 These proceedings were originally heard on 15 September 2015. However, because Mr Mooney was not properly prepared, the matter was adjourned, and at the request of the Commission, he filed an amended notice of application on 18 September 2015. I pause to note that at the hearing on 15 September 2015, Mr Bradley on behalf of the company undertook to at least pay what the company admitted it owed Mr Mooney. The matter was relisted for hearing on 12 November 2015. At that time the Commission was informed that Mr Mooney had been paid by the company a total of \$4,762.39 in relation to accrued RDOs and accrued annual leave, as set out in the company's answer and Mr Mooney's amended particulars of claim. The other amounts admitted to be owed had not been paid.
- 5 Additionally, another matter raised by the company in the course of that hearing was a submission that the company was under administration. As the basis for this contention was unclear, and the submission raised the issue as to whether, under the terms of the *Corporations Act 2001* (Cth), Mr Mooney's claim could proceed, the application was further adjourned. It was

subsequently confirmed that the company itself was not under administration, and there was no impediment to the matter being further heard and determined by the Commission.

- 6 As a result, the application was relisted for further hearing at the Commission's first opportunity on 22 December 2015. By this time Mr Mooney had relocated to Adelaide, and he sought and was granted leave to appear by video link. After the matter had been listed for hearing, no response having been received from the company as to the date of hearing, the company subsequently advised that Mr Bradley would be away from Perth after 19 December 2015, and another hearing date was sought.
- 7 Given the delays to that time, the Commission declined to grant any further adjournment unless the company actually made payments to Mr Mooney of the amounts admitted to be owed to him since April 2015, and in relation to which the company had previously undertaken to pay, but failed to do so. As no such undertakings or payments were given or made, the Commission also granted the respondent leave to appear by video link, with the matter to proceed to be heard on the date listed. As the company did not appear on the date of the hearing as listed, and no contact was received by my Chambers from the company, in accordance with s 27(1)(d) of the *Industrial Relations Act 1979* (WA), the Commission proceeded to hear the matter.

Background facts

- 8 Mr Mooney was the only witness to give evidence on his behalf. He testified that he was offered the job with the company at very short notice and not long before he travelled to the site. All he was informed by a member of the staff of the company was that he was going to be paid \$43.97 per hour. He would be working 60 hours per week and would be on a four weeks on one week off working roster. He said he was also told that he would be entitled to receive superannuation at around \$195.00 per week. No other terms and conditions of employment were discussed with him at that time. When Mr Mooney got to the site, and after working for a period of time he was made aware of the AMMA document by staff of the business that Mr Mooney's company was contracting to. He said he understood there was a major agreement which would apply to big projects and everyone would be working under it. Mr Mooney was also told by Mr Bradley that he would be entitled to holiday pay and RDO accrual. As it turns out, those are the only claimed payments that Mr Mooney had received from the company, which were not paid until after these proceedings commenced.
- 9 Mr Mooney testified that his amended particulars of claim have been drawn from the AMMA document. Mr Mooney said that Mr Bradley had admitted that he applied the terms of the AMMA document to the company's employees on the site, and that he should be entitled to receive the appropriate benefits. Mr Mooney testified that in accordance with his particulars of claim, he worked on the site full time in accordance with his rostered hours, and had not been paid his wages, RDOs and annual leave accrued or superannuation contributions owed to him. In addition, Mr Mooney claimed for severance payments, a Rest and Recreation ("R and R") payment and a project special leave payment, accruing under the AMMA document, over the period of his employment, in the total sum of \$7,684.66.
- 10 Mr Mooney referred to the company's amended notice of answer and a lengthy document attached to it, which were copies of electronic gate entries, which log an employee's movement in and out of the project site. According to the company, the wages and entitlements owed to Mr Mooney should have deducted an amount of \$3,050.57, in relation to what it contended were overstated hours of work claimed in Mr Mooney's timesheets and as reflected in the electronic gate log. Mr Mooney accepted that the gate logs were accurate and there were some errors on his timesheets. He testified that the timesheets were completed by either his supervisor or the employees, who simply followed their supervisor's directions as to the completion of the timesheets for work performed.
- 11 The area of dispute in Mr Mooney's evidence was that the company's gate log records commenced from 31 January 2015 through to the end of his employment on 28 April 2015, whereas his wages claim was over the period from 30 March 2015 to 28 April 2015. Accordingly, based on the same gate log records as used by the company, Mr Mooney contended that the deductions should only be in the sum of \$1,263.92, being the period over which his wages claim fell.
- 12 In relation to the termination of his employment, Mr Mooney testified that shortly before he left the site he made a complaint to the company that a co-worker was bullying him, because of his Irish background. Mr Mooney said that two days later he was flown out for his R and R. Mr Bradley informed him that he would be back at work in about a week's time. This was said to be on the basis that he had worked about nine weeks straight and needed to be off site to take R and R. Mr Mooney said that he sent an email to the company office on 26 April 2015 complaining about bullying on site, a copy of which was exhibit A3. After Mr Mooney sent the email and he had left the site, he was informed by "Alex" from the company that he would not be going back. He did not return.
- 13 Mr Mooney testified that there had been no prior concerns raised by the company in relation to his work performance or conduct. The only issue he had on site was on one occasion, about a month prior to leaving, he failed a random breath test. He did not work for the rest of that day, but returned to work the following day and continued working as normal. Mr Mooney testified he had no indication that his services were being terminated for misconduct or any other reason.

Terms of the contract

- 14 Despite the admissions made by the company, given the further claims made by Mr Mooney, the first issue to consider is the terms and conditions of Mr Mooney's contract of employment whilst he was employed by the company on the Burrup TAN site.
- 15 From Mr Mooney's evidence, he was only initially told by the company prior to going to the site that he would be paid \$43.97 per hour. I pause to note that this is the rate of pay for the CW 3 classification set out in cl 1 of the AMMA document. Mr Mooney confirmed that this was the classification of work that he understood he was to be engaged in. Some mention was made to him of superannuation contributions and that he would be entitled to holiday and RDO accrual. Apart from this, no

other conditions were discussed with him and certainly nothing was put in writing. As noted earlier, the company has now paid Mr Mooney his accrued annual leave and accrued RDOs and these matters are no longer in dispute.

- 16 As to Mr Mooney's terms and conditions under his contract generally, it was not until he got to the Burrup TAN site that he became aware of the AMMA document. According to Mr Mooney, he understood that the terms and conditions set out in it applied to all contractors and their employees on the project. This was confirmed by Mr Bradley for the respondent in the hearing on 15 September 2015. He said that the terms and conditions contained in the AMMA document were applied to the company's employees on the site.
- 17 Given that the present claim is for the recovery of a denied contractual benefit, it is for Mr Mooney to establish that the benefits he claims were entitlements under his contract of employment. The benefits must not arise under an award or order of the Commission and they must have been denied: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704; *Anne Patricia Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867.
- 18 In this case Mr Mooney's employment terms were not to any extent written, and his engagement was entirely oral. Moreover, very little seems to have been discussed between the company and Mr Mooney, apart from the offer of a position, his rate of pay per hour and some other basic entitlements. Given that few, if any express terms of contract were discussed, an issue arises as to any terms of employment that may be necessary to be implied. It is trite to observe that terms of a contract may be implied either as a matter of law, by the nature of the contract in question or as a matter of fact. In the latter case, implication could arise from a particular usage, more often in mercantile or trade contracts, and from the application of the "business efficacy" test set out in *BP Refinery (Westernport) Pty Limited v Hastings Shire Council* (1977) 52 ALJR 20. In the subsequent appeal to the Privy Council in the *BP Refinery* case (1977) 180 CLR 266 Lord Simon of Glaisdale said at 283:

In their [Lordship's] view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

- 19 In the case of contracts which are purely oral, or one in where there are few terms expressed in writing, the application of the test for the implication of terms in fact is less stringent. In *Hawkins v Clayton* (1988) 164 CLR 539 it was said by Deane J at 571-573 as follows:

Care must be taken to avoid an automatic or rigid application of the ordinary cumulative criteria for determining whether a term should be implied in a written contract to a case where the contract is oral or partly oral or where it is apparent that the parties have never attempted to reduce their agreement to complete written form. The cases in which those criteria were laid down or accepted as the cumulative ingredients of an overall test were concerned with the question whether a term should be implied in a formal contract which was complete upon its face. In such cases, the insertion of an additional term effectively involves an alteration to what the parties have formally accepted as the complete written record of the compact between them. As the judgment of Mason J in *Codelfa* ... clearly indicates, the cumulative criteria formulated or accepted in such cases cannot be automatically applied to cases such as the present where the parties have not attempted to spell out all the terms of their contract but have left most or some of them to be inferred or implied. Where that is so, there is no question of effectively altering the terms in which the parties have seen fit to embody their agreement; the function of a court is, as Lord Wilberforce pointed out in *Liverpool City Council v Irwin* 'simply ... to establish what the contract is, the parties not having themselves fully stated the terms.' In the performance of that function, considerations of what is 'reasonable', 'necessary to give business efficacy to the contract' and 'so obvious that "it goes without saying"' may be of assistance in ascertaining the terms which should properly be implied in the contract between the parties. There will not, however, be the need or the justification for the law to refuse to imply any imputed term which does not clearly satisfy all such requirements. This is particularly so where, as here, the contract has passed from the executory stage and has been executed by one or both parties...

The most that can be said consistently with the need for some degree of flexibility is that, in a case where it is apparent that the parties have not attempted to spell out the full terms of their contract, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case. That general statement of principle is subject to the qualification that a term may be implied in a contract by established mercantile usage or professional practice or by a past course of dealing between the parties.

- 20 On the basis of the concession by the company that the terms of the AMMA document applied to the employees of the company on the Burrup TAN site, I consider that in applying the tests set out in *BP Refinery*, with the less stringent requirements referred to in *Hawkins*, that the content of the AMMA document should be implied as terms and conditions of employment between Mr Mooney and the company. I conclude that for the following brief reasons. Plainly, in my view, to do so in light of the evidence and the admissions by the company would be reasonable and equitable. Furthermore, given that very few conditions of employment were even mentioned to Mr Mooney before he travelled to site, and many important matters such as termination of employment, accommodation conditions and allowances, given the remote location of the work, were not mentioned, it would be necessary to give business efficacy to the contract that such terms be implied. The contract of employment could not operate effectively without such terms.
- 21 An obvious example, in the context of this case, is what would be the arrangements for accommodation and what payments might need to be made in connection with this subject? Additionally, given the company's admission that the AMMA terms were extended to its employees on the Burrup TAN site, it would also be obvious to the parties to the contract that it would go without saying in this case that the AMMA document terms apply. There is also no question that the terms would be capable of clear expression, and there would be no contradiction with any express terms of the contract between the parties. Certainly in

my opinion, the implication of the AMMA document as a term of the contract between Mr Mooney and the company in this case, would, in accordance with *Hawkins* be “necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case”.

- 22 Based on this approach, I consider that Mr Mooney’s terms and conditions of employment for the purposes of this application were those set out in the AMMA document.

Wages

- 23 Mr Mooney claims \$15,993.21 in wages not paid to him. The company admitted that these wages were owed and were not paid. Therefore I find that this sum is due and owing to Mr Mooney.

RDOs accrued

- 24 As noted, the sum of \$2,570.05 is admitted to have been owed by the company, and this has now been paid to Mr Mooney. Therefore this claim falls away.

Annual leave accrued

- 25 As for the RDOs accrued, the sum of \$2,192.34, also admitted by the company to have been owing to Mr Mooney, has now been paid and therefore this claim also falls away.

Superannuation

- 26 The superannuation provision of the AMMA document in cl 4 specifies that the employer will make payments to the employee in accordance with the *Superannuation Guarantee (Administration) Act 1992* (Cth). It does not prescribe a superannuation contribution rate itself. The Commission has no jurisdiction to enforce an obligation in relation to superannuation, solely prescribed by a Commonwealth statute: *Gregory Oates v Sanders Executive Pty Ltd t/a LJ Hooker Morley* (1988) 79 WAIG 1192 per Kenner C; *Eleanor Angela Keane v Lomba Pty Ltd* (1998) 78 WAIG 810; *Peter Dellys v Elderslie Finance Corporation Limited* (2001) 81 WAIG 1632. Therefore this claim is beyond the Commission’s jurisdiction and is refused.

Gate times

- 27 According to the company, Mr Mooney’s timesheets for times and days worked on the project in the period 31 January 2015 to 28 April 2015 were overstated. As already noted, copies of electronic gate logs recording Mr Mooney’s entry and exit from the site, along with copies of timesheets for this period, were annexed to the company’s amended notice of answer. The company contended that the amount of overstatement of hours of work, in wages terms, was in the sum of \$3,050.57, which it says should be deducted from any sum ordered to be paid to Mr Mooney.
- 28 Mr Mooney did not dispute that there was some overstatement of hours of work based on the electronic gate logs. However, he contended that the deductions should only be made from 31 March 2015 to when he left the site, in the sum of \$1,263.92. This is because Mr Mooney’s claim for wages underpaid was for the period 30 March 2015 to 2 May 2015. However, the company’s gate log adjustments run from 31 January 2015, prior to the period of Mr Mooney’s claim.
- 29 The difficulty arising in the present circumstances is that the Commission is restricted to a consideration of Mr Mooney’s claim and the period of it. It is not open for the Commission in these proceedings, to retrospectively make deductions in respect of payments already made by the company to Mr Mooney, prior to the period of the claim before the Commission, by way of a general set-off, without any contractual or statutory authority to do so: *Conti Sheffield Real Estate v Denise Brailey* (1992) 72 WAIG 1965; *BGC (Australia) Pty Ltd v Phippard* (2002) 82 WAIG 2013. Section 17C of the *Minimum Conditions of Employment Act 1993* (WA) (“MCE Act”) requires an employee to receive his or her pay in full, subject to the other terms of Part 3A of the MCE Act. Any amounts sought to be recovered by the company from Mr Mooney, will need to be the subject of separate proceedings elsewhere.
- 30 In this case therefore, for the foregoing reasons, the only amount to be deducted is the sum of \$1,263.92 admitted by Mr Mooney.

Severance

- 31 Mr Mooney claimed a severance payment in accordance with cl 7 of the AMMA document. It provides that a person who ceases employment on the project in circumstances other than for misconduct is entitled to a payment calculated at two times the employee’s ordinary hourly rate of pay for each completed week of service.
- 32 The evidence of Mr Mooney was that he was removed from site a couple of days after making a complaint about bullying by a co-employee. Mr Bradley, on behalf of the company, told him that as he had worked for about nine weeks in a row, he needed to get off site for R and R purposes. The company advised Mr Mooney he would return to site about one week later, but he never did. As mentioned earlier, Mr Mooney was told by another employee of the company, “Alex”, that he was not going back to site once he returned to Perth. Aside from failing a random breath test on one occasion a month or so earlier, Mr Mooney testified that there were no complaints as to his work performance or conduct, and no reason was given for him not returning to the site. He contended that he was removed from site because he had made a bullying complaint.
- 33 On the basis of the evidence before the Commission, which I am obliged to accept unless I find it to be inherently incredible, which I do not, I am satisfied that Mr Mooney is entitled to the benefit of cl 7 of the AMMA document in the sum of \$1,187.10.

R and R

- 34 Under cl 11 of the AMMA document, employees are entitled to be paid for some period off site when on R and R. In the case of the first R and R, as claimed by Mr Mooney, employees are entitled to be paid for two days at their ordinary rate. Mr Mooney’s evidence was that he did take some R and R off site, but was never paid for it. Mr Mooney should be paid \$879.40 for this.

Project special leave

35 Under cl 31.3 of the AMMA document, an employee is entitled to accrue 32 hours project special leave at the end of each 28 day work cycle. Project special leave is to be paid at the employee's ordinary hourly rate of pay. Mr Mooney claimed for four work cycles over his employment, totalling 128 hours at his hourly rate of \$43.97, in the total sum of \$5,628.16. Mr Mooney did not receive this payment for the work he did on site. He is entitled to be paid this amount.

Conclusion

36 I have had regard to all of the evidence, the submissions and the admissions and concessions made by the company. Taking into account the amounts now paid to Mr Mooney by the company, and the deductions in respect of gate times, the Commission finds that Mr Mooney should be paid the total sum of \$22,423.95 as denied contractual benefits made up as follows:

(a) Wages:	\$15,993.21
(b) Less gate times:	\$1,263.92
	\$14,729.29
(c) Severance:	\$1,187.10
(d) First R and R:	\$879.40
(e) Project Special Leave:	\$5,628.16
	\$22,423.95
TOTAL	

37 I order accordingly.

2016 WAIRC 00120

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

IAN MOONEY

APPLICANT

-v-

SEVEN G ENGINEERING PTY LTD

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

WEDNESDAY, 2 MARCH 2016

FILE NO/S

B 89 OF 2015

CITATION NO.

2016 WAIRC 00120

Result Order issued

Representation

Applicant In person

Respondent No appearance

Order

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

- (1) THAT the respondent pay to the applicant as a denied contractual benefit the sum of \$22,423.95 less any amount payable to the Commissioner of Taxation pursuant to the *Income Tax Assessment Act 1997* (Cth) and actually paid within 21 days of the date of this order.
- (2) THAT otherwise the application be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2016 WAIRC 00165

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2016 WAIRC 00165
CORAM : CHIEF COMMISSIONER A R BEECH
HEARD : WEDNESDAY, 3 FEBRUARY 2016
WRITTEN
SUBMISSIONS : MONDAY, 22 FEBRUARY 2016; THURSDAY, 25 FEBRUARY 2016
DELIVERED : TUESDAY, 22 MARCH 2016
FILE NO. : U 153 OF 2015
BETWEEN : ALISON PALMER
 Applicant
 AND
 FORREST PERSONNEL INC
 Respondent

CatchWords : Termination of employment – Harsh, oppressive and unfair dismissal claim – Whether Commission has jurisdiction to hear and determine the applicant’s claim – Whether respondent a trading corporation – Whether predominant activities of the respondent are trading activities – Public benevolent institution – Not for profit – Services provided controlled by a Deed with Government – Services provided to clients without charge – Fee for services fixed by Government – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i); *Fair Work Act* (Cth) s 14, 27; *Australian Constitution* (Cth) s 51(xx) and s 109.

Legislation : *Associations Incorporation Act 1985* (SA)
Associations Incorporation Act 1987 (WA)
Australian Constitution s 51(xx), s 109
Industrial Relations Act 1979 (WA) s 29AA(4)
Corporations Act 2001 (Cth)
Fair Work Act 2009 (Cth) s 14, s 26
Higher Education Funding Act 1988 (Cth) s 39

Result : Declaration that respondent is not a trading corporation; matter re-listed for further hearing

Representation:
Applicant : Mr K Trainer, as agent
Respondent : Mr S Mare, as agent

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

Bankstown Handicapped Children’s Centre Association Inc v Hillman [2010] FCAFC 11; (2010) 192 IR 213

Hoffman v Perth Mobile GP Services Ltd [2013] WAIRC 00816; (2013) 93 WAIG 1488

Pellow v Umoona Community Council Inc PR973365; [2006] AIRComm 426 (Unreported, 19 July 2006)

Quickenden v O’Connor [2001] FCA 303; (2001) 109 FCR 243

West v Central Wheatbelt Division of General Practice (Inc) [2016] WAIRC 00029; (2016) 96 WAIG 64

Reasons for Decision - Jurisdiction

- 1 The claim by Alison Palmer that her dismissal from the position of Chief Operations Officer on 14 August 2015 is harsh, oppressive or unfair is opposed by the respondent on the basis that it is a trading corporation and therefore a national system employer. It claims the Commission does not have the jurisdiction to hear and determine her claim.
- 2 Ms Palmer does not accept that the respondent is a trading corporation and submits that the Commission does have the jurisdiction to hear and determine her claim.
- 3 At the commencement of the hearing it became apparent that the respondent considers Ms Palmer’s salary exceeds the cap in s 29AA(4) of the *Industrial Relations Act, 1979* (WA) (the Act). Ms Palmer had not come prepared to deal with that issue and, after a brief adjournment, it was agreed that the hearing will be restricted to whether the respondent is a trading corporation, and if it is going to be necessary to decide whether Ms Palmer’s salary exceeds the cap, that will be dealt with at a later date and could be done on the papers.

- 4 It is common ground that if the respondent is a trading corporation then it is a national system employer as defined in s 14 of the *Fair Work Act 2009* (Cth) and that by operation of s 26 of that Act and s 109 of the *Australian Constitution*, the Commission will not have the jurisdiction to hear and determine her claim of unfair dismissal.
- 5 A number of matters are agreed and these were read into the transcript at p 74. Evidence was given for the respondent by Mr Sullivan. Ms Palmer also gave evidence. Their evidence generally did not conflict. Where it has been necessary to prefer the evidence of one over the evidence of the other, this will be referred to in what follows.
- 6 Two bundles of documents were tendered being exhibits A1 and R2 respectively. Where there is an objection to a particular document in a bundle, the objection has been noted and, where necessary in what is to follow, where a document objected to has been referred to, the objection to it is dealt with at that time.

The Facts

- 7 The respondent was established in about 1986 and is incorporated under the *Associations Incorporation Act 1987* (WA). It is, and on Ms Palmer's evidence always has been, a community-based not-for-profit charitable organisation. It is a public benevolent institution and pays no income tax on surplus funds or stamp duty on the purchase of its motor vehicles. It offers salary sacrificing to its staff. It is eligible for and has received Lotterywest grants for buildings. It could not operate as it does without the status of being a charitable and public benevolent institution.
- 8 Its constitution (dated December 2014) sets out its objects, and makes provision about property and income, as follows:

3. Objects

The purposes for which the Association is established and maintained are:

- (a) to arrange for the vocational training and placement of a Person with a Disability;
- (b) where considered practicable and desirable to provide support and/or supervision for a Person with a Disability entering employment;
- (c) to investigate and where necessary assist a Person with a Disability to obtain the best possible working conditions and wages;
- (d) where considered practicable and desirable to create, develop or otherwise establish enterprises and undertake initiatives which are intended to enhance and contribute to the objects of the Association;
- (e) to promote with the public and with responsible authorities a social conscience and a more affirmative attitude to a Person with a Disability.
- (f) to purchase, rent or otherwise acquire or deal in, provide and establish, endow, furnish and fit out with any or all necessary furniture, instruments and other equipment, and maintain and manage employment ventures and community enterprises having special reference to a Person with a Disability;
- (g) to collect funds and accept subscriptions and donations of real or personal property and gifts by will for all or any of the purposes aforesaid;
- (h) to purchase, sell or deal in or otherwise acquire land or any legal or equitable interest therein and to improve, manage, lease, mortgage or otherwise deal with all or any of the property of the Association;
- (i) to build and maintain any building for the purposes aforesaid and alter such building and provide any such building with all or any suitable equipment and facilities;
- (g) to borrow or raise money for or in connection with the above objects in any manner whatsoever and in particular by mortgaging or charging the property of the Association or any part thereof;
- (k) to invest any moneys of the Association not immediately required in any security authorised by the law of Western Australia for the investment of trust moneys, and generally to manage, invest or expend all moneys and properties belonging to the Association;
- (l) to undertake and execute any trusts which may be deemed desirable or conducive to the objects of the Association;
- (m) to enter into arrangements with any Government, municipal, local or other authority or any other society or body that may seem conducive to the objects of the Association or any of them and to obtain from any such Government or authority or society or body any rights, privileges or concessions, and to carry out, exercise and comply with any such rights, privileges and concessions;
- (n) to make arrangements and enter into contracts to provide and supply services or work or goods, equipment, appliances and other things which the Association may deem necessary or desirable for the purpose of carrying out its objects;
- (o) to subscribe or donate to or become a member of and co-operate with any other body of persons whose objects are altogether or in part similar to those of this Association, and in particular a federation with similar bodies in Australia, and/or elsewhere;
- (p) to establish or carry on or participate financially or otherwise, directly or otherwise in the business of printing or publishing of a general newsletter or newsletters, or of books, pamphlets

or publications of any kind whatsoever in the interests of and with the main purpose of furthering the objects of the Association; and

- (q) to undertake and or do all such things or activities which are necessary, incidental or conducive to the advancement of these purposes.

3.2 Property and income of the Association

The property and income of the Association shall be applied solely towards the promotion of the objects or purposes of the Association and no part of that property or income may be paid or otherwise distributed, directly or indirectly, to Members of the Association, except in good faith in the promotion of those objects or purposes.

- 9 The respondent's predominant activity is placing into employment persons with disabilities seeking employment who have been referred to them by the Commonwealth Government via Centrelink. On Ms Palmer's evidence, the referral is an automated process dictated by market share. Approximately 90% of the respondent's clients are referred to it in this way. Those who are on a Centrelink benefit have an obligation to look for work with a provider and the clients are obliged to remain with that provider.
- 10 In less than 5% of cases, job seekers with a disability come to the respondent through their own initiative. These are described as walk-in clients.
- 11 The respondent employs persons with disabilities to clean commercial premises, for which it receives what Mr Sullivan described as a fairly small amount of money. Similarly, people with disabilities collect and return trolleys for a supermarket for which the respondent is paid. The respondent owns other premises which it retains in case it needs to expand in the future, and it rents these premises out to other providers. The respondent also receives grants to employ staff to run support programs for people with mental illnesses. These activities are incidental to its predominant activity. The hearing has proceeded on the basis that the issue to be determined is whether the respondent's predominant activity is 'trade' or 'trading': if it is, the respondent will be a trading corporation; if it is not, the respondent will not be a trading corporation.
- 12 The evidence of Mr Sullivan, who has been the CEO of the respondent since July 2015, is the respondent tendered for a deed with Department of Social Services (DSS) by which DSS will send persons with a disability to the respondent. Ms Palmer, who was Chief Operations Officer from March 2013 and who had acted as CEO, says there was no tender for the Deed.
- 13 Her evidence, which I accept on this issue given her role and her evidence that she familiarised herself with the respondent's history, is that the respondent already had been providing these services when the Government changed its funding model from grant funding to the present funding model. As an existing provider, the respondent did not have to tender for the Deed but was invited accept it. It was more of a reallocation of market share than a separate tender. I therefore find that the respondent did not tender for the Deed in 2010.
- 14 A sample copy of a Disability Employment Services Deed effective 2 March 2015 was tendered. It is agreed that it contains the terms of the Deed which the respondent has with DSS and which continues to March 2018.
- 15 The body of the Deed is 127 pages long and divided into 5 chapters with 137 clauses, plus appendices. I draw attention to the following provisions of the Deed.
- 16 The Deed obliges the respondent to deliver the services specified in the Deed. The Deed prescribes how the services are to be carried out: efficiently, effectively and ethically; in accordance with the Deed and not inconsistent with it; in accordance with the respondent's undertakings given in the tender; in a manner which meets the Objective of the Deed; and so as to achieve an optimum performance when measured against the KPIs and to DSS's satisfaction.
- 17 The Deed's Objective is to improve the nation's productive capacity by employment participation of people with a disability, thereby fostering social inclusion. The location from which the respondent is to provide the services under the Deed is to be accessible to people with a disability and presented in a manner that upholds the good reputation of the services as determined by DSS. The Deed obliges the respondent to be open on business days and at specified times.
- 18 Certain conduct is regulated by the Deed, such as acting in good faith towards DSS and not engaging in practices which would manipulate the service provided so as to maximise payments to it. The Deed provides that DSS does not guarantee volume or type of business, or the number of participants for services.
- 19 The Deed obliges DSS to pay to the respondent the fees provided at the times specified in the Deed, subject to there being sufficient funds and depending upon the services provided, and sets conditions for the respondent to provide documentary evidence to prove its claims for payment.
- 20 The Deed stipulates that the respondent must not demand or receive any other payment or any other consideration from a participant for or in connection with the services. DSS may vary by giving written notice the payments, the number of participants receiving services from the respondent and its business share, and the respondent is obliged to accept those variations and to continue to provide the services unless it relinquishes the Deed. The respondent is obliged by the Deed to provide reports and financial statements and guarantees and provide a customer feedback process in a prescribed manner.
- 21 The Deed requires the respondent to use the DSS computer system. It obliges the respondent to maintain insurance policies for public liability, injury at work, motor vehicle insurance including third-party insurance, professional indemnity and personal accident insurance and product liability insurance and prescribes conditions for these.
- 22 It requires the respondent to produce its constitution to DSS upon request. It prescribes conditions about who the respondent may not employ in its management, financial administration or the performance of services and states that the respondent will breach the Deed if it does not transfer or terminate the employment of someone who has been employed contrary to those conditions and immediately notify DSS of its actions. Any change in the control of the respondent must be notified to DSS. The Deed gives the right to DSS to require the respondent to remove its personnel from work on the service provided.

- 23 It restricts the respondent using a subcontractor to provide services. It requires the respondent to produce and implement a disability employment strategy. It places conditions on the respondent's publications and advertising. It requires the respondent at its cost to have a certificate of compliance.
- 24 It obliges the respondent to provide the services to all persons who are referred to, or who directly register with, it, at the sites and in accordance with the business share specified. Also, it restricts the respondent from providing the services to a person whose permanent address is outside its business share location. It restricts the respondent to accept only referrals made via the DSS IT system and places restrictions on it providing the services to a person who presents without a referral. It obliges the respondent to provide the services to a person transferred from another service provider. It places time restrictions on the respondent's delivery of the services to a person and prescribes in considerable detail the manner the respondent is to deliver the services and the assistance it provides to persons.
- 25 The Deed makes clear that the respondent's entitlement to receive a fee is only if the respondent has provided the service in accordance with the requirements of the Deed. The Deed gives to DSS the right to monitor, measure and evaluate the respondent's performance and, at its absolute discretion, increase the respondent's business share for a period of time specified by DSS or alternatively decrease it or require the respondent to discontinue providing the services at a particular site.
- 26 Mr Sullivan described the Deed as very prescriptive and Ms Palmer described the Deed as a complex contract. I agree with their descriptions and with Ms Palmer's evidence that practically every part of the respondent's operations is dictated by the Deed's requirements.
- 27 On Ms Palmer's evidence, there are also over 1,000 pages of guidelines which dictate in extreme detail what the respondent can and cannot do in its delivery of the service, in terms of the computer system and what can and cannot be claimed.
- 28 The evidence is that DSS made a very substantial number of policy changes, perhaps 1,000 in the last two years on Ms Palmer's evidence, which generally are imposed without discussion.
- 29 Ms Palmer's evidence is that there is little difference between the way the respondent conducted its predominant activity in the past when it received block funding and the way it does so now under the Deed, but there is tight control through the Deed of the quality of the services it delivers.
- 30 The respondent assesses clients according to their particular needs around employment, career planning, preparation for employment and assistance to actually get into employment and then supports them to keep their jobs. It prepares a client for future employment by way of either providing TAFE training or preparing them for work by doing a job description for them or giving them access to a job club where they can get help with interview techniques. The respondent also tries to secure employers who are willing to employ persons with a disability; Mr Sullivan and Ms Palmer describe this as absolutely crucial for its financial future.
- 31 On the initial placement of a client with the respondent, it is eligible to receive a fee; it then is eligible to receive further support fees. The fees are not sufficient to cover the cost of supporting clients, so the respondent is reliant on finding employment for a client for which it receives fees after 13 weeks' employment and then after 26 weeks' employment. The fees are the maximum which can be claimed, and Mr Sullivan's evidence is that the respondent claims much less because it may be less successful in finding a job for a client.
- 32 The service fees in Annexure B1 of the Deed are as follows:

Table 1 Service Fees – Disability Employment Services – Disability Management Service

(1) Time period	(2) Fee amount
First and second 13 weeks in Employment Assistance	\$1,595
Third to sixth 13 weeks in Employment Assistance	\$715
First and second 13 weeks in Extended Employment Assistance	\$715

JOB PLACEMENT FEES

Table 2 Job Placement Fees – Disability Employment Services – Disability Management Service

(1) Fee type	(2) Fee amount
Job Placement Fee	\$770 per Job Placement

OUTCOME FEES

Table 3 Outcome Fees – Disability Employment Services – Disability Management Service

Period	Full Outcome Fee amount	Full Outcome Bonus Fee amount (20% bonus)	Pathway Outcome Fee amount	Pathway Outcome Bonus Fee amount (20% bonus)
13 Week Period	\$2,860	\$572	\$945	\$189
26 Week Period	\$4,400	\$880	\$1,450	\$290

- 33 The Deed contains other fees, however the fees above are the Disability Management Service fees identified in the table helpfully provided by Mr Sullivan. They mean the maximum possible fee receivable by the respondent if not successful finding employment for a client is \$7,810 and if the respondent is successful, \$15,070. The fees are pre-set by DSS and are not negotiable.
- 34 In order to receive the fee, the respondent accesses a shared computer system where DSS has entered the names of the clients which the respondent is to see. When a client arrives at the respondent, it enters into the system that the client has arrived. There is an automatic referral through the DSS computer; the computer automatically generates an invoice which is automatically sent to the Government for payment. If a client is not placed in employment, they will continually get 13 weeks of service until 78 weeks of service has been delivered. At that point in time, there can be an extension for another 26 weeks, but at 104 weeks the client will be automatically exited from the service.
- 35 Mr Sullivan's evidence is that DSS evaluates whether the respondent is capable of offering the services to the standard required; the higher the standard provided, the greater the market share provided to the respondent by DSS. With a larger market share comes a greater volume of persons sent to the provider by DSS. The higher the market share, the more financially successful and viable will be the service provider.
- 36 Correspondingly, if the provider's market share is such that it receives a fewer number of persons seeking employment, the provider may become uneconomic and cease to operate. In that event, that provider's market share may be given by DSS to the more successful provider. In this regard, Mr Sullivan states the respondent is in competition with other such service providers.
- 37 The respondent has grown in the last three or four years from nine locations in 2013 to 17 locations in 2015. Mr Sullivan states that in the last financial year the respondent was offered new market share. The respondent decided to accept some of the market share but made what he described as a 'commercial trading decision' that some of the other services that it would take on would not be financially viable.
- 38 The fees paid by DSS to the respondent are the same DSS pays to each service provider; the competition is not between the respondent and DSS about the fees to be charged by the respondent for the service provided; it is that the more efficient and productive the provider is compared to its competitors, the larger the market share which may be given by DSS to that provider.
- 39 I find from the evidence of Ms Palmer that the respondent has submitted a tender only twice: in 2012 and 2014, in limited circumstances where a Government Department delivering services was closed and its market share was put up for tender.
- 40 The respondent did some advertising in 2015 to attract walk-in clients, or potential employers of the respondent's clients, and spent perhaps \$130,000 in 2015. It is taking new initiatives in advertising, such in newspapers, however those new initiatives are since Ms Palmer's dismissal and are not relevant here because the question is whether the respondent was a trading corporation at the time it dismissed Ms Palmer and she referred her claim of unfair dismissal to the Commission.
- 41 There is some suggestion in the evidence of Mr Sullivan that the respondent's constitution does not properly reflect its activities, however neither the respondent, nor Ms Palmer, took this suggestion any further and in my view correctly. There is no basis to find that it is acting outside its constitution given at least 3(a), (b) and (c).
- 42 Mr Sullivan's evidence is that the respondent has decided to review and renew its constitution and bring itself under the *Corporations Act 2001* (Cth), however they are matters for the future and do not form part of the consideration here.
- 43 The respondent's statement of income shows that 90% of its income is received from the Commonwealth Government as represented by DSS.

FORREST PERSONNEL INC.

CONSOLIDATED STATEMENT OF INCOME & EXPENDITURE

For the year ended 30 June 2015

	2015	2014
	\$	\$
INCOME		
DSS Income	5,859,998	5,148,150
Cleaning Income	33,971	35,480
Trolley Income	235,438	225,904
Rental Income	117,730	109,001
Gain/(Loss) on Sale of Assets	68,504	51,919
Partners in Recovery	151,301	-
Open Workforce	12,987	-
Misc Income	758	-
Interest Income	21,440	28,789
	<hr/>	<hr/>
Total INCOME	6,502,127	5,599,243

- 44 The respondent's total expenses for 2015 were \$6,427,001 which gave a surplus of \$75,126.

Submissions

45 At the conclusion of the giving of evidence the hearing was adjourned and Ms Palmer and the respondent subsequently provided written submissions and Ms Palmer also made a written submission in reply. It is convenient to refer to the submissions in the course of the consideration which follows.

Trading Corporation - The legal principles

46 I am bound to follow and apply applicable decisions of the Full Bench of this Commission and of the Western Australian Industrial Appeal Court. The Full Bench of this Commission in *Hoffman v Perth Mobile GP Services Ltd* [2013] WAIRC 00816; (2013) 93 WAIG 1488 recently considered the principles of determining whether a corporation can be characterised as a trading corporation within the meaning of s 51(xx) of the *Australian Constitution*. At [31] the Full Bench referred to the summary of those principles by Steytler P in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* [2008] WASCA 254; (2008) 89 WAIG 243; (2008) 37 WAR 450 (being a decision of the WA Industrial Appeal Court) as follows (references omitted):

- (1) A corporation may be a trading corporation even though trading is not its predominant activity.
- (2) However, trading must be a substantial and not merely a peripheral activity.
- (3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services.
- (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant.
- (5) The ends which a corporation seeks to serve by trading are irrelevant to its description. Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade'.
- (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisation as a 'trading corporation' is a question of fact and degree.
- (7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade.
- (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading.

47 I apply those principles, as they have been considered and applied in other matters, in this case.

Consideration

48 There are a number of factors pointing to the respondent not being a trading corporation. These are that it is not established to trade but rather that it is a public benevolent institution, which is a type of charitable institution, which enjoys tax concessions and which has as its main purpose arranging for the vocational training and placement into employment of persons with a disability. It exists for no other purpose. It does provide a cleaning service and a trolley collection service in a supermarket carpark for which it charges and receives income, and which are trading activities, but there is no suggestion that these activities are not directed to assisting its predominant activity.

49 Its constitution requires that its property and income can be applied solely towards the promotion of that purpose, and that no part of its property or income may be paid or otherwise distributed, directly or indirectly, to its members, except in good faith in the promotion of those objects or purposes.

50 This by itself is not determinative but there are other factors. Almost all of its income is received not from clients or customers but from Government as represented by DSS. Further, the respondent provides the services pursuant to a very prescriptive Deed which tightly controls almost every part of its operations in ways not usually characteristic of commercial business.

51 Thus, the respondent does not search for or even choose 90% of the persons to whom it is obliged by the Deed to provide the services: its clients are sent to it by the Government, which usually means via Centrelink. It merely provides a service to clients sent to it by Government.

52 Moreover, the respondent is obliged to accept whomever Centrelink sends to it, whether or not the person is a 'good' or a 'bad' referral from the respondent's perspective. It cannot choose its clients. However while the Deed commits DSS to providing the prescribed market share, it provides no guarantee relating to the number of clients who may be sent to the respondent.

53 This model of service delivery ensures that the persons referred are within a specified disadvantaged group within society, being those with a disability who are seeking employment, so that it is precisely, and only, those persons who are 'targetted'; in this way the purpose of the Government providing funding is met. It is for the efficient provision of Government funds and the provision of the precise services Government requires, not for the commercial gain of the respondent.

54 The respondent may provide the services to a person who is not referred by Government and who comes to the respondent on their own initiative, the walk-in clients, but first must refer them for assessment by allied health professionals who are not part of the respondent. If the walk-in client has no disability, the respondent cannot provide any services to the person. Walk-in clients must reside within the set geographic area which DSS has allocated to the respondent under the Deed and the respondent cannot accept a walk-in client who is already with another service provider. The respondent is not free to seek walk-in clients from anywhere whereas a business buying or selling generally in the community would be free to seek its customers. In any event, the respondent has only a small number of walk-in clients, likely to be 5% of its clients, even if there is possibly an unlimited potential for the number to increase, and if the respondent now is taking steps to try to increase their number.

- 55 The respondent is not free to create or provide its own type of services for revenue to these clients because the only service, or services, it is able to provide is prescribed in detail in the Deed, and the Deed restricts the respondent to provide only those services.
- 56 There are even restrictions on the locations it can provide those services, when the respondent is to be available to provide them, and even regarding the staff who are to provide the services.
- 57 The respondent is not permitted to charge a fee to its clients for any of the services it is obliged to provide to them, and thus it provides the services free of charge to the clients sent to it.
- 58 The respondent made a surplus in 2014 and in 2015, but its constitution requires it to be applied towards the promotion of its objects or purposes and not to be paid or otherwise distributed to its members. The respondent's purpose or intention is stated to be to arrange for vocational training and placement of persons with a disability rather than to earn a profit. As the authorities show, the making of a profit is not an essential prerequisite to trade, but it is a usual concomitant. This may be of particular importance when considering whether an activity of a public benevolent institution constitutes 'trade' or 'trading'. Therefore the absence of profit, or a profit motive for its predominant activity, is another indicator, no more, that the respondent does not trade.
- 59 The fees it receives for providing the prescribed services come from Government, not the 'client' to whom it provides the services and the respondent is not free to fix the fees it can receive – the fees in the Deed are fixed by DSS. In fact, they are the same fees for all providers who sign the Deed. The respondent has no opportunity to tender to provide the required services at a more competitive rate, or indeed at any other rate.
- 60 Mr Sullivan's evidence is that the respondent is much more focussed now on finding employment for clients that it used to be, however that does not suggest to me that it is now providing different services under the Deed than it used to provide previously.
- 61 Indeed it is open on the evidence to find that the respondent is, in essence, providing the same services as it did in earlier years during Ms Palmer's employment when it received block funding, or grants, from the Government to provide the services, even if now it is providing services with a less holistic approach, providing them more efficiently and with a greater focus on finding employment for clients, than it used to. Its goals and outcomes are the same.
- 62 All of these factors are more consistent with the respondent providing a Government-funded public welfare service than being engaged in trade or trading.
- 63 The only significant thing that has changed is the Government's method of providing fees to the respondent. The Government no longer gives block funding to the respondent to provide the services but operates more on a fee-for-service model. The respondent is paid on outcomes: if it has not provided a service, it does not receive a payment. The payments are structured to provide an incentive to the respondent to provide the services: it is entitled to receive an initial consultation fee and thereafter a support fee. If the respondent places a client in employment it is eligible for a bonus if the client remains for 13 weeks and another if the client remains for 26 weeks.
- 64 It is this changed model whereby the respondent invoices the Government for each service it provides, and that the respondent may have its market share increased or decreased, which is the respondent's strongest argument that its predominant activity is trade, or trading. Mr Sullivan's evidence is that if the respondent is judged by DSS's Star Ratings to have a greater success rate in placing people in jobs in its geographic area than the success rate of another provider in that area, it scores high in the Star Ratings and DSS may, at its discretion, allocate a greater client share to the respondent, thus reducing the number of persons Government refers to the other provider and correspondingly increasing the number of persons it refers to the respondent. The evidence of Ms Palmer is to the same effect.
- 65 The greater the number of referrals to the respondent, the greater the number of fees, and thus the greater income, it will receive. Correspondingly, a provider which scores low in the Star Ratings can have its client share re-allocated which may even lead to it not being able to continue to operate.
- 66 This evidence is largely supported by the Deed which provides KPIs by which DSS is able to assess the respondent's performance. If DSS considers the respondent's performance warrants it, it may with the respondent's agreement increase the respondent's business share (Deed clause 134.1). In this sense, the respondent has an incentive to deliver the services at a higher standard compared to other providers and 'competes' for market share.
- 67 The respondent's bundle of documents contains a document prepared by a peak body for disability employment services 'Jobs Australia' which talks about the competitive nature of providing those services. Ms Palmer objected to this document. I have read and considered it, and I do not give it great weight. This is because although it refers to a tender process to award contracts, the evidence in this case is that the respondent did not tender for the Deed in 2010 because it was already providing the services. It is the respondent's circumstances, and not circumstances generally, with which the Commission is dealing.
- 68 I do note that it refers to the process of mid-contract business reallocations based on provider performance but that it states this process is not automatic and there is not a competitive process to win the additional market share that is up for reallocation. This by itself does not suggest the respondent operates in a competitive environment.
- 69 I found that document and also the NESAs document to be of limited assistance given the direct evidence before me of the respondent's operations and activities, and the lack of ability to cross-examine the writers of those documents. The documents are not persuasive in showing the respondent's principal activity is trade or trading.
- 70 When considering the evidence about competition for market share, it is important to keep in mind that the issue is not whether the respondent competes for market share, or even that it may be seen as providing a fee-for-service. The issue is whether the respondent's predominant activity is, in all of the circumstances, trade or trading.

- 71 In other words, just because the respondent provides the services efficiently, and perhaps more efficiently than others providing the same services, does not mean the activity is for that reason a trading activity. I was not referred to any authority for the proposition that if a provider is competing with other providers to provide the services required, providing those services is, for that reason, trade or a trading activity when the evidence as a whole suggests it is not.
- 72 It stands to reason that a non-trading activity, such as the respondent employing staff to run support programs for people with mental illnesses pursuant to grant funding, also may need to be undertaken efficiently. An organisation's non-trading activity may be an activity also provided by others so that they may be competing with each other in relation to that activity, however that doesn't mean the non-trading activity therefore changes into a trading activity.
- 73 Nor does the evidence that Government measures the respondent's efficiency in delivering the services define whether the respondent is 'trading' by providing the services under the Deed for a fee fixed by Government.
- 74 In fact it is significant that the respondent does not set the fees it is to be paid for the services it provides and that those fees are fixed by Government because in *Quickenden v O'Connor* [2001] FCA 303; (2001) 109 FCR 243 the Federal Court of Australia considered whether HECS payments paid directly by students to the University of WA should be characterised as revenue derived from trading. Fees paid directly from students for HECS contributions amounted to \$8.849 million and HECS payments paid to the university directly from the Commonwealth amounted to \$17.318 million for those students who had taken out HECS loans from the Commonwealth. The amount of the payments was not fixed by the University but by the Minister and were expressed under s 39 of the *Higher Education Funding Act 1988* (Cth) as a 'contribution' ascertained in accordance with the section towards the costs of the provision of that course of study. Chief Justice Black and French J said at [51]:
- It is questionable whether the provision of educational services within the statutory framework of the *Higher Education Funding Act* amounts to trading. The Act creates a liability for each student to the University in respect of each course of study undertaken in a semester. The amount is not fixed by the University but rather by the Minister under published guidelines. The concept of 'trading' is a broad one. It is doubtful, however, that it extends to the provision of services under a statutory obligation to fix a fee determined by law and the liability for which, on the part of the student, appears to be statutory.
- 75 Although the Court in that matter held that the university was a trading corporation for other reasons not relevant here, the decision shows that it is questionable whether the activity of a university providing educational services to students under a system of fixed fees determined by Government is 'trading'. Here, the predominant activity of the respondent might be described as delivering the service required by Government to Government-provided clients under a system of fixed fees determined by Government, and *Quickenden* suggests it is doubtful whether that predominant activity is trading.
- 76 I note in passing too that a university competes with other educational institutions for students, and may well deliver the services efficiently compared to another university, but these were not factors relevant to the Court's conclusion on whether the activity is 'trading'. I see those factors as being of limited relevance to the question of whether the respondent's predominant activity is trade or trading.
- 77 In *Pellow v Umoona Community Council Inc* PR973365; [2006] AIRComm 426 (Unreported, 19 July 2006) the Council, which was incorporated under the *Associations Incorporation Act 1985* (SA), engaged in activities which included the provision of a housing program, a youth program, an alcohol strategy, a child-care centre, a Centrelink agency, an advocacy service and other relief or aid facilities for local communities.
- 78 O'Callaghan SDP distinguished between grant funded social service activities and agency arrangements involving a charge on a Government department for the provision of a designated service. He referred to:
- ...the provision of services on an agency basis for Government instrumentalities such as Centrelink. The Centrelink services appear to be undertaken by the Council on an agency basis and must be regarded as trading activities notwithstanding that the Council may have entered into these arrangements with the objective of improving social services for the local community. They differ from a grant in that the agency arrangement involves a charge on a Government department for the provision of a designated service which the department would be otherwise required to provide at its own cost. This is consistent with common arrangements for the delivery of traditional Government services through private providers. For instance, the provision of job search services by a private provider involves trading as the provider makes a charge or even bids to the Government for the right to provide that service. In these instances the trade is actually constituted by the provision of the commodity or service. It reflects a commercial undertaking. In contrast, grant funding is provided for defined purposes which cannot be defined as commercial activities.
- 79 The decision refers to the Council as undertaking Centrelink services on an agency basis and it is not clear from the decision precisely what the relationship was between the Council and Centrelink.
- 80 It was submitted on behalf of the respondent in this matter that a predominant part of the respondent's work comes from Centrelink, and this is true in that 90% of its clients are referred to it by Centrelink. However the evidence does not show that the respondent has an agency relationship with Centrelink. I therefore find the decision in *Pellow* of limited relevance here.
- 81 The respondent also submitted that its predominant activity can be likened to a medical practitioner who renders 90% of his services to Medicare, submitting that the medical practitioner has no control over the Medicare rate, which is fixed by Government, and in some cases the recovery of payment directly from Medicare by way of bulk billing could be regarded as trading.
- 82 However, this submission cannot be regarded as a strong submission because, as the Full Bench in *Hoffmann (op cit)* observes at [45], those cases are medical practices which are usually administered on a fee for profit basis and often require patients to pay a fee that represents the gap between the amount of a Medicare benefit payment or HICAP payment and the fee charged by the general medical practice. In such circumstances, these transactions could clearly be regarded as 'trade' or 'trading'.

- 83 Fee-for-service was referred to in *West v Central Wheatbelt Division of General Practice (Inc)* (2016 WAIRC 00029; (2016) 96 WAIG 64), but the facts of that matter are quite different to the facts here. In that matter, the purpose of the Central Wheatbelt Division of General Practice (Inc) was not only to provide social facilities to its members but also to provide support for general practitioners and primary health care providers and to operate and manage a number of general practices in the Wheatbelt; it was not a public benevolent institution enjoying tax concessions. Its operation was not subject at all to the tight control of a deed with the Government.
- 84 Significantly, its clients were not sent to it by Government; it had to attract its own clients and in doing so it competed with other medical practices in Northam, and would do so in Toodyay if it was not the sole medical practice there; it charged fees to its patients for some of its services and its general health care activities were carried on with a view to earning revenue, not to delivering a service.
- 85 Further, the amount of revenue it received is a function of the number of patients it can attract, not the number Government sends to it, and the range of its own services it provides to them, leading to the finding that in that case its activities do have a commercial character. The facts of that matter actually illustrate how different the principal activity of the respondent in this matter is from the activities of the incorporated body in that matter.
- 86 The Federal Court of Australia found the Bankstown Handicapped Children's Association Inc was a trading corporation (*Bankstown Handicapped Children's Centre Association Inc v Hillman* [2010] FCAFC 11; (2010) 192 IR 213) however some significant facts of that matter differ from the facts here. That Association provided accommodation and support services and operated a preschool; it had various operational divisions, such as the adult disability accommodation program, the ASPIRE Out-of-Home-Care service, the Occasional Care Centre, the Day Program, Respite Programs and Clinical Support Services. Fees are paid by the participants in most of the programs it provided. As pointed out in Ms Palmer's submissions, it accepted private clients and fees and there is no finding that its services are prescribed and directed by Government.
- 87 Significantly too, in relation to payments received by it from at least some Government agencies, the prices at which the services were provided were negotiated between the parties having regard to the price at which others provide similar services. The Government did not have to use the services of the Association at all, and the Association for its part did not have to accept any offer or request by the Government to provide such services. Rather, the Government selected those entities which it wished to provide services, once the header agreements were negotiated, on the basis of the quality of the service to be provided, but the Association (or others) did not have to agree to provide them. Thus, the relationship between that Association and the Government was seen as a commercial one involving trade in services.
- 88 The facts of that matter serve to illustrate how different the respondent in this matter is from that Association, and how its predominant activity differs from the activities of that Association. The relationship between the respondent and the Government cannot be seen as a commercial one involving trade in services.
- 89 The leading authority in this jurisdiction on the principles to be applied to the facts in this matter is the majority decision in *Aboriginal Legal Service (ALS)*. The facts of that matter are not identical to the facts in this matter, as Mr Mare for the respondent correctly submits. In particular, the ALS received payments similar to block funding, in contrast to the model here.
- 90 Nevertheless, there are parallels. In reaching the conclusion that what the ALS does does not have a commercial character, Steytler P concluded at [74]:
- None of these factors, taken individually, necessarily has the consequence that the appellant is not a trading corporation. A trading corporation can contract with Government to provide a charitable or welfare function in fulfilment of Government policy. Ordinarily, the provision of large scale legal and allied services, for reward, is trading and the fact that it is not done for profit is not determinative of its character, as I have said. However, when all of the factors to which I have referred are taken together, it cannot be said that what is done by the appellant has a commercial character. Rather, its activities, including its entry into the contract, seem to me to be removed from ordinary concepts of trade or trading, whether for reward or otherwise, in much the same way as those of a Government-run legal aid agency. As I have stressed, its services are provided, in all but the most exceptional cases, free of charge: *St George County Council* (569). They are provided for altruistic purposes, not shared by ordinary commercial enterprises (*Ku-ring-gai* (160) (Deane J)), under a constitution which requires the appellant to act only in furtherance of the altruistic objects. The appellant engages in a major public welfare activity pursuant to an agreement with the Commonwealth under which it will be re-imbursed for most of its costs: *E* (343) (Wilcox J); *Fowler*. Although its services have been 'purchased' by the Commonwealth under the contract, its activities continue to lack a 'commercial aspect': *Hardeman* [26]; *J S McMillan* (355) (Emmett J); *Ku-ring-gai* (142) (Bowen CJ), (167) (Deane J).
- 91 Here, the respondent's services are provided free of charge to the client; they are provided for altruistic purposes not shared by ordinary commercial enterprises, under a constitution which requires the respondent to act only in furtherance of the altruistic objects.
- 92 Although the services have been 'purchased' by the Commonwealth under the Deed, the issues set out in the preceding paragraphs lead to the conclusion that the respondent's operation is so tightly constrained by the obligation to abide by the conditions of the Deed that its predominant activity is restricted to providing only the precise services required by Government in the Deed. The services under the Deed are overseen and controlled by Government for a fee fixed by Government and which cannot be varied by the respondent whether or not it provides the service in a businesslike, or comparatively efficient, way.
- 93 Its funding arrangements, the 'fee-for-service' structure, which can be seen as providing an incentive to the respondent to provide the services, cannot be viewed in isolation from all of this. Rather, it is to be viewed in the context of all of the evidence. In the words of Steytler P at [72], although fees are paid on invoice, this is merely an accounting device and the fees must be provided in the pre-ordained sums, so long as the contracted services are provided. In this case too, the invoice system

is automated on the DSS computer. The respondent does not use its own system to generate the invoice. Its entering into the Deed lacked any commercial aspect of tendering and price was not able to be negotiated.

- 94 Even in relation to market share, it is difficult to conclude that the respondent is freely competing in the open marketplace for market share because it cannot increase its own market share by its own efforts. Its market share is allocated to it by Government; therefore an increase in its market share is not within its own control but depends upon a decision by DSS, at DSS's absolute discretion, whether to increase, or even reduce, the respondent's market share. It is a reallocation process by DSS and there is even, on Mr Sullivan's evidence, some randomness in it.
- 95 This decision by DSS is more about how DSS considers the services are being delivered than it is about the respondent's interests because an improvement by the respondent in the quality or efficiency of the services it provides under the Deed does not necessarily lead to an increase in its market share if its competitors also increase the quality or efficiency of their service delivery. The respondent may accept or decline DSS's offer of market share, but it cannot set it.
- 96 The respondent may seek to attract 'walk-in' job seekers looking for work however they are such an insignificant part of the respondent's predominant activity that this is not a determinative issue here.
- 97 Mr Trainer, who appeared on behalf of Ms Palmer, submits that the respondent's activity under the Deed is not commercial in character and in my view that submission is correct. When seen as a whole, the respondent's predominant activity lacks a 'commercial aspect'. The respondent's predominant activity of placing into employment persons with disabilities seeking employment who have been referred to them by the Commonwealth Government is not trade or a trading activity.
- 98 This predominant activity accounts for 90% of its income. It is agreed that its cleaning services, trolley collection service and rental of buildings are trading activities, however it was not argued that these activities alone mean that the respondent is a trading corporation. In my view, these activities, which earned the respondent \$33,971, \$235,438 and \$117,730 respectively representing only 6% of its total income, are peripheral and not substantial. They by themselves cannot characterise the respondent as a trading corporation.
- 99 Income received as 'Partners in Recovery' and 'Open Workforce' is agreed to be from non-trading activities.
- 100 The respondent has a certified agreement in the Fair Work Commission (the FWC) however this does not show that it is a trading corporation. There is nothing to show that the lodging of the certified agreement involved a decision by the FWC that the respondent was a trading corporation. It appears to have been lodged by the respondent without any such decision being made. In that respect, the respondent cannot 'choose' to be a national system employer if it is not either a trading corporation.

Conclusion

- 101 For the above reasons, I find that the respondent's predominant activity of placing into employment persons with disabilities seeking employment in the circumstances set out above is not trade or a trading activity. I find also that the respondent's activities generating the income described as Partners in Recovery and Open Workforce are not trade or trading activities.
- 102 I further find that the respondent's cleaning services, trolley collection service and rental of buildings are trading activities, however these are peripheral and not sufficient by themselves to characterise the respondent as a trading corporation.
- 103 I declare that the respondent is not a trading corporation. A Minute of a Declaration and Order now issues to that effect and ordering that Ms Palmer's claim of unfair dismissal be re-listed for further hearing and determination.
- 104 Before the claim will be re-listed, the parties are directed to confer about the remaining issues and whether further conciliation is desirable.

2016 WAIRC 00169

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ALISON PALMER

APPLICANT

-v-

FORREST PERSONNEL INC

RESPONDENT

CORAM

CHIEF COMMISSIONER A R BEECH

DATE

THURSDAY, 24 MARCH 2016

FILE NO.

U 153 OF 2015

CITATION NO.

2016 WAIRC 00169

Result

Declaration that respondent is not a trading corporation; matter re-listed for further hearing

Representation

Applicant

Mr K Trainer, as agent

Respondent

Mr S Mare, as agent

Declaration and Order

HAVING heard Mr K Trainer, as agent for the applicant, and Mr S Mare, as agent for the respondent;

AND HAVING given reasons for decision, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979* (the Act), hereby –

1. DECLARE THAT Forrest Personnel Inc is not a trading corporation; and
2. ORDER THAT Ms Palmer's claim be re-listed for further hearing and determination.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2016 WAIRC 00215

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

VICKI THERESA REDFERN

APPLICANT

-v-

COLIN FRANCIS GRAY TRADING AS WEST COAST REALTY

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE THURSDAY, 14 APRIL 2016

FILE NO/S U 208 OF 2015

CITATION NO. 2016 WAIRC 00215

Result Application discontinued

Order

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

AND WHEREAS on Wednesday, 23 March 2016, the Commission convened a conference and a hearing for the purpose of conciliating between the parties and ascertaining the status of the matter respectively;

AND WHEREAS during the conference, the parties reached agreement to settle the matter;

AND WHEREAS during the hearing, the parties recorded the terms of their agreement;

AND WHEREAS the hearing adjourned on the basis that the matter would be discontinued by order of the Commission unless either party advised that this should not happen;

AND WHEREAS by letter dated Wednesday, 23 March 2016, the Commission advised the parties that it intended to issue an order discontinuing the matter unless, by Wednesday, 6 April 2016, either party objected to the discontinuance or a *Form 14 – Notice of withdrawal or discontinuance* was filed;

AND WHEREAS the Commission has received no further correspondence from either party;

AND WHEREAS I am of the opinion that the parties' agreement means further proceedings are not necessary or desirable in the public interest;

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Cindy Lovett	Aqwest	U 21/2016	Chief Commissioner A R Beech	Discontinued
Jon Starink	Arrowhead Resources Limited (ACN 004 766 376) (formerly Gippsland Limited)	B 209/2015	Commissioner S J Kenner	Discontinued
Kim Charles Ingram	Dampier Bowling Club	B 18/2016	Commissioner T Emmanuel	Withdrawn
Liam Christopher Porter	Mr Cesare Violanti and Mrs Somsu Violanti trading as Kwinana Pizza	U 99/2013	Chief Commissioner A R Beech	Discontinued

Parties		Number	Commissioner	Result
Michael Spozetta	Total Hoists and Cranes	B 143/2015	Chief Commissioner A R Beech	Discontinued
Mr Sergio Murua	Carey Baptist College Inc	U 206/2015	Chief Commissioner A R Beech	Discontinued
Neil Andrew White	Shire of Capel	U 166/2015	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters arising out of—

2016 WAIRC 00201

DISPUTE RE POSSIBLE TERMINATION OF EMPLOYMENT WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2016 WAIRC 00201
CORAM : COMMISSIONER D J MATTHEWS
DELIVERED : THURSDAY, 7 APRIL 2016
FILE NO. : C 6 OF 2016
BETWEEN : WESTERN AUSTRALIAN MUNICIPAL ROAD BOARDS, PARKS AND
RACECOURSE EMPLOYEES UNION OF WORKERS, PERTH
Applicant
AND
CITY OF SWAN
Respondent

CatchWords : Industrial Law (WA) - Dispute over possible termination of employment - Employer entitled to continue disciplinary proceedings - Unless allegations baseless proceedings should not be interfered with

Legislation : *Industrial Relations Act 1979* (WA) s 44, s 44(6), (ba)(i)

Result : Application Dismissed

Representation:

Counsel:

Applicant : Mr K Trainer as agent

Respondent : Ms A Cameron of counsel

Solicitors:

Respondent : Allion Legal

Case(s) referred to in reasons:

Civil Service Association of Western Australia Inc v. Director General of Department for Community Development [2002] WASCA 241

Reasons for Decision

- 1 The applicant's member, Mr Wayne Wildes, is employed by the respondent as a truck driver/general hand.
- 2 On 5 April 2016 the respondent gave to Mr Wildes a letter headed "Your Ongoing Employment" which, after giving background stated, "you are now required to show cause why your employment should not be terminated for breach of the duty of good faith and fidelity and serious misconduct."
- 3 The applicant wrote to the respondent the next day asking the respondent to agree to do certain things in relation to the procedure to be followed by the respondent in relation to the matter.
- 4 There was no agreement and the applicant brought an application under section 44 *Industrial Relations Act 1979* which sought a permanent stay of the current proceedings against Mr Wildes. The applicant did not seek an order that proceedings could not recommence in relation to the matter but did seek orders relating to the procedure that should be followed if those proceedings were reinstated.
- 5 At the conference convened pursuant to section 44 *Industrial Relations Act 1979* on 7 April 2016 I dismissed the application and these are my reasons for doing so.
- 6 An employer is entitled to commence disciplinary proceedings against an employee where it sees fit to do so and, unless the allegations made are demonstrated to be baseless, those proceedings ought to be allowed to conclude without interference by

the Western Australian Industrial Relations Commission. (see *Civil Service Association of Western Australia Inc v. Director General of Department for Community Development* [2002] WASCA 241 at [20]).

- 7 There was no argument made to me that the allegations were baseless.
- 8 If the outcomes of the proceedings are ones that the applicant or Mr Wildes is not happy with there are avenues open to them to challenge those outcomes and to raise the complaints they presently have.
- 9 Except in an extreme case, such as when allegations are baseless, it is appropriate for disciplinary proceedings to run their course and for any complaints to be aired later.
- 10 That the application seeks to have the Western Australian Industrial Relations Commission interfere with the proceedings before they have run their course in circumstances where there is no argument that the allegations are baseless is my main reason for dismissing it.
- 11 I note also that, even if that reason were absent, the applicant has not demonstrated that this matter is within section 44(6) (ba)(i) *Industrial Relations Act 1979*, which was relied upon by the applicant.
- 12 The submission that the orders sought are needed to “prevent the deterioration of industrial relations” was not a strong one and there was no request to lead evidence to support it.
- 13 The high water mark of the submission was that there was a “level of disquiet” or a “level of concern” among some employees about how Mr Wilde was being treated. Such emotional reactions cannot ground a submission that an order is needed to “prevent the deterioration of industrial relations.” Much more would be needed.
- 14 I note that the respondent objected to the Western Australian Industrial Relations Commission having jurisdiction to deal with the application on the basis that the respondent is a constitutional corporation. If I was proposing to make orders for the benefit of the applicant or its member I would need to look at that issue closely. However, in the event, I find it unnecessary to do so.
- 15 The application is, for the reasons given above, dismissed.

2016 WAIRC 00200

DISPUTE RE POSSIBLE TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN MUNICIPAL ROAD BOARDS, PARKS AND RACECOURSE
EMPLOYEES UNION OF WORKERS, PERTH

APPLICANT

-v-

CITY OF SWAN

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE THURSDAY, 7 APRIL 2016
FILE NO/S C 6 OF 2016
CITATION NO. 2016 WAIRC 00200

Result	Application Dismissed
Representation	
Applicant	Mr K Trainer as Agent
Respondent	Ms A Cameron of Counsel

Order

HAVING heard Mr K Trainer, as agent for the applicant, and Ms A Cameron, of counsel, on behalf of the respondent;

AND HAVING given reasons for decision;

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

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

CONFERENCES—Matters referred—

2016 WAIRC 00134

DISPUTE RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2016 WAIRC 00134
CORAM : PUBLIC SERVICE ARBITRATOR
 ACTING SENIOR COMMISSIONER P E SCOTT
HEARD : THURSDAY, 30 JULY 2015, FRIDAY, 31 JULY 2015, FRIDAY, 7 AUGUST 2015
DELIVERED : THURSDAY, 10 MARCH 2016
FILE NO. : PSACR 20 OF 2013
BETWEEN : AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
 Applicant
 AND
 THE MINISTER FOR HEALTH
 Respondent

CatchWords : Public Service Arbitrator – Matter referred for hearing and determination pursuant to s 44 – Medical practitioner – Plastic Surgeon – Non-renewal of contract of employment – Alleged misconduct – Suspension from duty – Termination of employment – Procedural fairness – Contract negotiation – Termination Form – Contract Completion Payment – Fixed term contract expires due to the effluxion of time

Legislation : *Industrial Relations Act 1979* s 44
Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013

Result : Matter dismissed

Representation:

Applicant : Mr R Hooker of counsel and with him Ms D Webb of counsel

Respondent : Mr D Matthews of counsel and with him Ms C Reid

Reasons for Decision

- 1 The issues in this matter revolve around Dr James Savundra having contracts of employment with the respondent, particularly at Royal Perth Hospital (RPH) and Fremantle Hospital (FH), the renewal of the FH contract, the non-renewal of the RPH contract, and whether Dr Savundra was denied procedural fairness in the decision not to renew the RPH contract.
- 2 The applicant, on behalf of Dr Savundra, challenges the respondent's decision to not renew Dr Savundra's contract of employment to work at RPH and seeks a review of the decision and the circumstances which preceded it, and that it be nullified.
- 3 The respondent says that a number of the issues arising as part of the applicant's and Dr Savundra's grievances have already been resolved and that the RPH contract came to an end in accordance with the terms of the contract. In those circumstances, the Arbitrator ought not intervene, and the matter should be dismissed.
- 4 It is my understanding that surgeons are entitled to the title of 'Mr' or 'Ms', however, various doctors and surgeons were referred to during the hearing as 'Dr' and at other times as 'Mr' or 'Ms'. For the purposes of these reasons, it is convenient to refer to each of them as 'Dr'.

Dr Savundra's employment with the respondent

- 5 Dr Savundra is a senior plastic surgeon. He commenced employment with the WA public health system in 1993 as an intern. The evidence of his various contracts of employment is not complete but it shows a number of short term contracts of varying lengths in 2002-03.
- 6 More recently, Dr Savundra had a contract as Consultant (Sessional) at RPH which was renewed for five years from 1 November 2009 (exhibit A1, tab 69) and which was due to expire on 31 October 2014. It contains, amongst other provisions:

The date of commencement of renewal is **1st November 2009**. Your contract will be for five years from the date of commencement.

The Employer shall not be liable to employ you in any capacity beyond the specified term. In the event that the Hospital does elect to make a subsequent offer of employment, it will be in the form of a written offer subject to such terms and conditions as may be contained in that offer to you.

Exhibit A1, tab 69

- 7 During at least some of the time Dr Savundra was employed by the respondent, he had a series of contracts to work at Fremantle Hospital (FH). At the beginning of 2013, he had a contract which was due to expire on 12 December 2013.
- 8 Dr Savundra's employment was covered by the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013 (the Agreement). It provides in Part 3 – Senior Practitioners, at clause 20 – Contract of Service, subclause (1)(a):
- All appointments shall be on 5 year contracts unless there is written agreement to the contrary between the employer and practitioner.
- 9 At subclause (4), it provides '[t]here shall be no automatic right of reappointment upon expiry of a contract.'
- 10 It also provides at subclause (5), that in circumstances of there being no new contract, there is a Contract Completion Payment equal to 10% of their final base salary for each year of continuous service.

The incident at RPH on 15 February 2013

- 11 In February 2013, according to Dr Savundra, there were two plastic surgeons employed at RPH as senior registrars; Dr O'Sullivan, a fully trained plastic surgeon from the Republic of Ireland, and Dr Rawlins, who finalised his training in Perth and had worked as a specialist in the United Kingdom. As I understand it, each doctor is required to be accredited to work at a particular hospital. They are accredited or classified at a particular level, for example as registrar or consultant. These two doctors were accreditable in Australia as specialist plastic surgeons which would mean they could be classified and paid at a higher level, as consultants. But, he says, due to some errors made by the Health Department, they were not yet accredited, unlike the equivalents at Sir Charles Gairdner Hospital (SCGH) who were credentialed as consultants. The terms 'specialist' and 'consultant' have been used interchangeably during the hearing, and I note that there is a combined definition of 'Consultant/Specialist' in clause 8 – Definitions of the Agreement.
- 12 From July 2012, Dr Savundra and others at RPH were pushing for Dr O'Sullivan and Dr Rawlins to have recognition as specialists within the hospital. By February 2013, this had gone on for six months. According to Dr Savundra, they were senior registrars rather than consultants, however RPH was, in effect, using them as consultants and had them doing plastic surgery work as well as being on-call consultants. He said that 'we thought the Department was being incompetent. Like - like with so many other things, we thought that they weren't able to do what we said they needed to be' (ts 79).
- 13 Dr Savundra gave evidence that registrars and senior registrars, although qualified medical practitioners, require supervision by consultants. Therefore, the consultant plastic surgeons had to be on-call as a backup to supervise Dr O'Sullivan and Dr Rawlins when they were on-call because they had not been credentialed as consultants. The consultants were, therefore, doing what Dr Savundra said was 'a second on-call system, unpaid, so that these guys could do first on-call as Senior Registrar slash ... unofficial consultant' (ts 79). Without a consultant to cover him, Dr O'Sullivan was saying that he could not perform the role of senior registrar.
- 14 Dr Savundra had no difficulty with Dr O'Sullivan's clinical skills, experience and training, but it was just that he had not been employed as a consultant.
- 15 In the period leading up to 15 February 2013, Dr Frank Daly was Executive Director, RPH, and Dr Mark Duncan-Smith was Head of Department of the Plastic Surgery Department at RPH. According to Dr Savundra, Dr Daly was telling Dr Duncan-Smith to sort it out and Dr Duncan-Smith was saying that he could not sort it out, it was up to the Department.
- 16 At that point, Dr Savundra was participating in the on-call roster, and was on duty until 6.00 pm on Friday, 15 February 2013. He was to leave the country at 8.00 am the next day, for three weeks, to do voluntary surgery. Dr Savundra says that others were also away and so they, the consultants, let Dr Daly know two weeks in advance that if the problem was not resolved by 6.00pm on 15 February 2013, there would be a difficulty as there would be no consultants willing to do the unofficial, second on-call roster.
- 17 By letter dated 6 February 2013, Dr Savundra, Dr Anthony Williams, Dr Brigid Corrigan and Dr Paul Quinn, all surgeons at RPH's Plastic Surgery Department, and Dr Duncan-Smith, the Head of Department, wrote to Dr Daly saying that while they had presumed that Dr Rawlins and Dr O'Sullivan had been engaged as consultants, it had come to their attention that they were senior registrars. In those circumstances, they were concerned about patient care and these two doctors having ultimate responsibility for patients who were actually the responsibility of consultants. They said that if the hospital recognises them as senior registrars, then the plastic surgeons would do likewise. Otherwise, the senior registrars require supervision. They continued:

Unless both Mr Jeremy Rawlins and Mr Barry O'Sullivan are given equivalent appointments as Consultant Plastic Surgeons and equivalent remuneration and employment conditions, including access to the Consultant Plastic Surgeon Roster Agreement 2011, they are not able to act as Consultant Plastic Surgeons for the On Call Roster at Royal Perth Hospital.

The Plastic Surgery Department has already deemed it unsafe to do more than 5 weeks On Call per year at Royal Perth Hospital. Therefore we are unable to cover Mr Rawlins and Mr O'Sullivan when they are supposedly On Call as Consultants.

Plastic Surgeons advise you that as of 6 pm Friday, 15 February 2013, we will not be able to cover Mr Rawlins or Mr O'Sullivan in the present appointments as Senior Registrars/Senior Medical Practitioners.

This means that Mr Barry O'Sullivan who is on-call from that time will be unable to complete duties as the specialist Plastic Surgeon on-call for Royal Perth Hospital. Mr O'Sullivan will not have any supervision or back up from any consultant Plastic Surgeon at Royal Perth Hospital or Fremantle Hospital.

Mr O'Sullivan will not be able to supervise the training Registrars, rotating Registrars, Resident Medical Officers and Interns as the Consultant Plastic Surgeon On Call. There will be no other Consultant available to cover Mr O'Sullivan. The Head of Department will have no option but to explain to these junior medical staff that they will be unable to see patients safely without Consultant Plastic Surgeon oversight and supervision.

This situation needs to be resolved as soon as possible so that Mr Jeremy Rawlins and Mr Barry O'Sullivan can be given admitting rights and responsibilities as Consultant Plastic Surgeons. This means admitting rights and access to all pay agreements available to Consultant Plastic Surgeons in the State. We certainly feel they have the appropriate qualifications for this appointment and they are both proceeding with obtaining their FRACS qualifications.

We note that there have been similar appointments at Sir Charles Gairdner Hospital for Surgeons with similar qualifications and they have been recognised by Supervised Consultant Plastic Surgeons.

Exhibit A1, tab 4

The letter was signed by each of them.

- 18 Dr Savundra gave evidence that by late afternoon on Friday, 15 February 2013, the issue was not resolved.
- 19 Dr Savundra intended to go to RPH prior to 6.00 pm when his on-call rostered period ended before he went on leave that night. There had been a discussion between Dr Savundra and his colleagues sometime prior to his going into RPH, that as he was the most senior plastic surgeon on the on-call trauma roster at RPH, and he had spoken to SCGH, that he was going to RPH and would initiate action.
- 20 At some stage (I infer that it was both prior to his going to RPH and during that afternoon) Dr Savundra spoke to Dr Patterson, the Head of Department of RPH Emergency Department (ED), and Dr Ruven Gurfinkel, the plastic surgeon on-call for the weekend at SCGH. He told Dr Patterson of the situation, that, having checked the on-call roster for specialist plastic surgeons for the weekend, he noted that Dr O'Sullivan was rostered. So he advised Dr Patterson, that in the circumstances, there would be no consultant plastic surgeon on call for the weekend. He told Dr Patterson that Dr O'Sullivan had been contracted by RPH as senior registrar/senior medical practitioner, 'not as a specialist plastic surgeon and therefore could not carry out certain duties without consultant oversight' (exhibit A2 [23] – [24]).
- 21 Dr Savundra told Dr Gurfinkel at SCGH, of the situation. Dr Gurfinkel organised extra operating theatre time on the weekend at SCGH and advised the plastic surgery registrars at SCGH of the situation.
- 22 At around 4.30 pm that day, as Dr Savundra was driving to RPH, he received a call from Dr Daly. He asked Dr Daly whether there was a plastic surgeon consultant on call for RPH from 6pm Friday 15 February 2013 and Dr Daly did not answer. He told Dr Daly that he was on his way to RPH and he was going to the ED. He told Dr Daly that he had already spoken with Dr Patterson about the situation.
- 23 Dr Savundra says:
 15. Dr Daly directed me multiple times over the telephone not to attend RPH's ED.
 16. I said to Dr Daly words to the effect that I had to make sure all plastic surgery patients were safe and that was why I was going to the ED.
 17. I also said to Dr Daly that I could not follow his directive and do my job properly. (I emphasise for the avoidance of any doubt that whilst Dr Daly in this phone conversation used the word 'direct' or its derivatives, I denied, and continue to deny, that any material direction from him to me was either lawful or a reasonable direction).
 18. The reason I went to the ED was to ensure patients were safe, and the resident medical officers, registrars and senior registrar (Barry O'Sullivan) understood what work they could do without consultant oversight.
 19. I went to the triage area and checked whether the hospital computer system had a specialist plastic surgeon listed as on call for the weekend.
 20. The system listed the senior registrar Dr O'Sullivan in the consultant box.
 21. I spoke to Dr Patterson the HOD of the ED.
 22. I said to him words to the effect that there was no consultant plastic surgeon on call for the weekend.
 23. I told him that Dr O'Sullivan had been contracted by RPH as Senior Registrar/Senior Medical Practitioner.
 24. I said that Dr O'Sullivan was not contracted as a specialist plastic surgeon and therefore could not carry out certain duties without consultant oversight.
 25. Together with Dr Patterson, we checked that there were no patients with serious injuries in the ED requiring plastic surgeon consultant attention.
 26. I told the plastic surgery doctors that the patients who were already admitted to the plastic surgery department would have consultant oversight over the weekend, but they were the last of the patients that we could admit given the inadequate staffing levels.
 27. Patients who presented to RPH ED and required prompt plastic surgery care were to be given a piece of paper with SCGH's address.
 28. I told Dr Patterson words to the effect that any non-urgent injury could be seen on Monday in the RPH plastic surgery trauma clinic.
 29. This clinic was scheduled to run as per usual on the Monday.

30. I also told Dr Patterson that any other more urgent treatment would require the ED to contact the plastic surgery registrar on call, to assess if it was a life or limb threatening emergency.
31. I told the plastic surgery registrar to assess those patients, stabilize them and organize appropriate transfer to SCGH.
32. I told Dr Patterson that any non-limb threatening or non-life threatening emergency would not be able to be seen by the plastic surgery registrar because there was no consultant oversight. I said if the patient needed treatment prior to Monday morning, the patient would need to be transferred to SCGH.
33. I went on three weeks planned leave from the very next day, 16 February 2013, to partake in voluntary surgery in Laos.

Exhibit A2 [15] – [33]

- 24 Dr Savundra elaborated on this in cross-examination saying that in his telephone conversation with Dr Daly, and agreed that he told Dr Daly that if Dr O’Sullivan ‘got accredited at 10 to 6 that would have been okay’ (ts 82). He says the patient safety issue was the fact that Dr O’Sullivan was not willing to take the responsibility of being a consultant when the hospital had him credentialed not as a consultant.
- 25 Dr Savundra told the registrars and staff in the ED not to admit any patients over the weekend who might need emergency treatment by plastic surgeons and to refer them to SCGH. If the situation was dire, they could stabilise the patient and transfer them to SCGH, if there was no specialist plastic surgeon on call at RPH.
- 26 He says Dr Daly had the option to have a specialist plastic surgeon cover the shift, which it appears is what ultimately happened.
- 27 Dr Daly directed him not to attend the ED. Dr Savundra says he responded that as he was the consultant on call until 6.00 pm and he was ‘going to make sure that all the patients are safe’ and that Dr Daly could not tell him to ‘not to go to the Emergency Department’ (ts 84, 85).
- 28 In cross-examination, Dr Savundra was asked:

I know that I’ve summarised, but tell me if it was the essence, of Frank saying, ‘Butt out. I’ll manage this.’ Is that fair or not?---Something like that, yeah.

ts 85

- 29 He was asked:

But Frank [Daly] didn’t satisfy you that he would be getting coverage over that weekend, did he?---He made it clear to me that he wouldn’t tell me.

Okay, so he wasn’t able to satisfy you?---No.

Okay. So when you went in there and started talking to people you didn’t preface it with, ‘If there is no coverage,’ did you, you just said - - -?---No, I - - -

- - - that this is what should be happening?---I said to them, ‘At this stage - at this stage there is no plastic surgeon.’

No, the way I read it, ‘I said to him words to the effect that there was no plastic surgeon on call for the weekend’?---Yes.

ts 87

I had not placed any finite time on that and, um, the - the complexities of the discussion that went - went on are not all carried out in this - in these paragraphs, but what I can safely say is that I went to all the people involved in patient care from the Head of Department, to emergency, to my juniors and Registrars, and I said to them, ‘This is the situation. At the present - - -’

Okay, well, perhaps - - -?---I had - - -

ts 88

- 30 He also said in respect of what he told the registrars and staff:

Yes?---I said to them, ‘I’ve spoken to the Executive Director, and he refuses to answer my questions - - -

Yes. Yes, absolutely?--- - - a specialist in his hospital - - -

That’s right - - -?--- - - asking the Executive Director a very important question.

Yes. Yes - - -?--- - - and he refuses - - -

I’m sorry - - -?--- - - to answer it.

And I understand - - - ?---And it’s a very reasonable question.

...

Frank was not able to satisfy you that there would be plastic surgery coverage over that weekend?---Frank was not willing to answer my question.

That’s right. And a result of him not answering your question was that you came to the conclusion that there wouldn’t be plastic surgery coverage over the weekend?---Well, for some time.

Okay. For some time.

ts 88-89

31 I note for completeness that Dr Duncan-Smith, the Head of Department, was suspended from duty soon after the incident of 15 February 2013.

32 When Dr Savundra returned from being away for three weeks, he was asked to attend a meeting at which Dr Daly handed him a letter dated 12 March 2013 from Mr Marshall Warner, Director, Health Industrial Relations Service, suspending him from duty, in the following terms:

The Director General has directed me to undertake a preliminary inquiry into your conduct in connection with industrial action by medical staff of the Plastic Surgery Department of Royal Perth Hospital.

The Director General has given this direction as delegate of the Board of the Metropolitan Health Service in which capacity he acts as your employer.

The purpose of this preliminary inquiry is to establish whether or not there are grounds to initiate a formal disciplinary investigation.

I am advised that contrary to an explicit direction from Dr Frank Daly, you attended the Hospital on Friday 15 February 2013 and gave instructions, to Emergency Department and other staff, to the effect:

- no plastics on-call service would be provided from Friday 15 February 2013;
- no plastics admissions would be accepted on the immediately following Saturday and Sunday; and
- plastics referrals from other hospitals to be diverted to Sir Charles Gairdner Hospital.

I would be obliged if you would make yourself available to meet with Dr Daly and myself at the earliest opportunity.

You are not obliged to do so, however in the circumstances it would be prudent if you were accompanied at the meeting by an Australian Medical Association representative.

The purpose of this meeting will be to establish the chronology of events, elicit your perspective on the matter and such documentary evidence as is presently available.

You are not obliged to cooperate in this preliminary inquiry however, if you do not a formal disciplinary investigation may be initiated without further notice.

Dr Daly's office will be in contact with you today to arrange a mutually convenient time to meet.

On the recommendation of Dr Daly, the Director General has determined that you be suspended from duty with full pay pending a decision on whether a formal disciplinary investigation is warranted.

Accordingly, I communicate that you are directed not to attend for duty at Royal Perth Hospital with immediate effect and until further notice. Further you are directed not to communicate with Hospital staff on any matter pertaining to the operations of the Plastic Surgery Department of the Hospital generally. You will continue to be paid as if you had attended for duty.

Exhibit A1, tab 6

33 On 27 March 2013, Dr Savundra wrote to Dr David Russell-Weisz, addressing him as Director General, regarding patient care in his absence. Dr Savundra then went away to Africa for some weeks, again to undertake voluntary surgery.

34 In accordance with Mr Warner's letter, on Dr Savundra's return a meeting was arranged. It took place on 16 May 2013.

35 By letter dated 13 May 2013, Dr Savundra's lawyers sought, amongst other things, his reinstatement and that this occur by 15 May 2013.

36 By letter dated 15 May 2013, Dr Savundra's lawyers also raised other issues regarding the preliminary inquiry referred to in Mr Warners' letter.

37 It appears from a letter from Dr Savundra's lawyers to Mr Warner dated 23 May 2013 that there was a meeting on 16 May 2013, however, there was no evidence as to what occurred in it.

38 By letter dated 6 June 2013, Professor Stokes, Acting Director General, wrote to Dr Savundra in the following terms:

In March 2013, the then Director General (Mr Snowball) directed that a preliminary enquiry into your conduct in connection with industrial action by medical staff of the Plastic Surgery Department of Royal Perth Hospital be undertaken.

I have had the opportunity to review the matters at issue.

It is plain that industrial action, in the form of withdrawal of labour, occurred and further action was threatened. This is entirely unacceptable and any repetition will necessitate retaliatory industrial action being taken by the Hospital.

There are well established processes to deal with disputes about contractual and other entitlements including ultimately recourse to relevant industrial tribunals. Failure to follow these processes in future will result in sanctions being imposed.

The industrial action having ceased, little purpose would be served by pursuing the matter further.

It is plain that you failed to comply with a verbal direction given to you by the Executive Director Royal Perth Hospital Group, Dr Frank Daly, to the effect that you were not to attend the Hospital on Friday 15 February 2013. It is apparent that you did attend the Hospital and gave various directions in connection with the admission of patients in the furtherance of the industrial objectives then being pursued.

If in future should you fail to comply with your contractual obligations or unreasonably involve yourself in matters pertaining to the organisation of the business of the Hospital then disciplinary action, which may call into question your continuing association with the Hospital, will be taken.

Whether the Medical Board of Australia (Board) will take any action is a matter for the Board to consider. The Hospital has no further action to take in this regard.

In the present circumstances, I am satisfied that there is nothing to prevent you from returning to your clinical duties at a date to be fixed by Dr Daly. Dr Daly's office will liaise with you directly in this regard.

Exhibit A1, tab 19

39 Dr Savundra duly returned to work at RPH on 10 June 2013.

40 There were continuing proceedings in the Commission during this time.

41 Mr Warner wrote to the Executive Director of the applicant, a letter dated 12 July 2013, in the following terms:

I refer to the Conference proceedings before the Public Service Arbitrator (PSA) on Thursday 4 July 2013.

It is apparent that the Applicant's claim that Mr Savundra was not afforded procedural fairness in connection with this matter cannot be contested.

Acknowledging the procedural error, I advise that the finding of misconduct is abandoned, the formal warning is withdrawn and that the matter is discontinued.

Exhibit A1, tab 22

The Fremantle Hospital contract renewal

42 As I have noted above, Dr Savundra also had a contract to work at FH which was due to expire on 12 December 2013.

43 By letter dated 4 December 2013, Dr David Blythe, Consultant Intensivist, Executive Director FH, wrote to Dr Savundra in the following terms:

I am advised that you have concurrent appointments at Royal Perth Hospital and Fremantle Hospital with different terms. Your appointment at Fremantle Hospital is technically due for renewal on 13 December 2013 and at Royal Perth Hospital on 31 October 2014.

I am advised that your appointment at Fremantle Hospital can be extended to match the longer term.

Accordingly, I propose that your appointments be synchronised by extending the Fremantle Hospital appointment to 31 October 2014.

In these particular circumstances no other appointment formalities need be completed and you may indicate your acceptance of the extended term by signing the attached copy of this correspondence and return it to my office as soon as possible before 13 December 2013 to ensure your appointment at Fremantle does not lapse.

Exhibit A1, tab 27

44 Dr Savundra wrote back, a letter dated 10 December 2013, acknowledging that he had concurrent appointments at RPH and FH with different terms. He sought renewal of the FH contract for five years and said that if the contract dates were to be aligned, then the RPH contract renewal could be brought forward and renewed for five years from 13 December 2013 (exhibit R3).

45 Dr Blythe responded by email dated 12 December 2013 indicating that:

The Hospital is unable to accommodate your request. The offer of the appointment to 31 October 2014, as set out in my letter dated 4 December 2014, remains open to you accept and I encourage you to do so.

I would greatly appreciate your immediate confirmation, by return email, of acceptance or rejection of the offer.

Exhibit A1, tab 28

46 There were further correspondence and telephone calls between Dr Savundra and Dr Blythe. Dr Savundra wrote an email to Dr Blythe on 15 December 2013 to confirm their telephone conversation of 12 December 2013. He said, amongst other things:

During that phone call you suggested that:

1. You were unable to offer me a 5 year contract.
2. You wanted me to bring my contract in line with RPH for convenience and not because you could not offer me a 5 year contract.
3. If I did not accept this 10 month extension to my contract, I would be without a job here at Fremantle Hospital on Monday 19 December 2013.
4. You could not bring my RPH contract forward to align with my Fremantle contract because you had no influence over what Frank Daly could offer me at RPH.
5. You had got advice from Health Department Industrial Relations team regarding my contract prior to this phone call we had.

Exhibit A1, tab 32

47 Subsequently, a further four weeks' extension to Dr Savundra's contract was initially agreed. However, Dr Savundra then advised Dr Blythe that he would only extend the contract for long enough to allow the paperwork for a five year contract to be done. He did not agree to a lesser term. He noted that another doctor, Mr Stewart Fleming, had his five year contract renewed

only two months previously, a matter known to Dr Savundra in his capacity as Head of Department at FH. The exchange of correspondence included arguments and counter-arguments about putting patient care at risk.

- 48 Around this time, there was also communications between the applicant and Dr Blythe about Dr Savundra's contract.
- 49 Also, on 12 December 2013, Dr Blythe wrote an email to Mr Steve Gregory, who was involved in HR management, about Dr Savundra's contracts and his proposal to align them. He said, amongst other things:

James has a contract which expired Dec 13 2003 and has been continuously employed at Freo since then without a written contract - so the expiry date of his (presumed) contract is tomorrow. I found this out fairly recently. We are beginning a process of looking at all contracts and trying to rationalise them so that they are sensible and concurrent. James also has a contract with Royal Perth Hospital which expires in 2014.

I wrote to him last week suggesting that the first thing we should do is to get the two contracts aligned and offered him an extension of Freo to the RPH expiry date next year. He has declined, saying he wants a five year contract, and that if the contracts are to be aligned, the RPH date should align with a renewed five year Freo contract.

My problem is that I don't know what sort of plastics service I will be needing from about October next year when elective surgery starts moving to FSH [Fiona Stanley Hospital]. It will be smaller and my feeling is that I shouldn't be employing plastic surgeons on my own at Freo - they should be joint appointments with FSH or RPH in support of an area-wide service. I have explained this to James but I don't think he accepts it.

We agreed on a four week extension, in order to try and sort this out. If James were to resign now, it would leave a significant hole in my service and affect other services too, so I would like him to stay on in the immediate future. He and I have had our differences in the past, but at the moment things are fine. However, if I give him a five year contract and I don't have much of a service here, I am making a decision on behalf of other hospitals which I clearly cannot do. Hence my preference for a short term contract until things are clearer

Exhibit A1, tab 65

- 50 Mr Gregory responded that day, amongst other things:

In short we can offer a contract for less than 5 years and given the circumstances it seems reasonable that Dr Savundra be offered a contract to 31 October 2014.

Exhibit R4

- 51 Mr Gregory and Mr Warner corresponded over the issue, including that Mr Gregory sent Mr Warner an email on 16 December 2013, noting that he had 'spoken to David earlier and there are some issues with the proposed response, given that a decision has yet to be made as to Plastic Services at this stage' (exhibit R4).
- 52 Dr Savundra says that Dr Blythe explained to him the issues set out in his email to Mr Gregory about not having yet sorted out 'what sort of plastic service [he would] be needing from about October last year when elective surgery starts moving to FSH' (ts 55). However, Dr Savundra did not accept this. This is because, he says, only two months earlier, Dr Fleming had been given a five year contract.
- 53 By letter dated 23 December 2013, Dr Blythe wrote to Dr Savundra saying:

Further to our recent discussions I have discussed your position with the Chief Executive South Metropolitan Health Service and the Director General.

In the short term, the DG is of the opinion that aligning the contracts between Fremantle and RPH is a reasonable step for all practitioners with multiple contracts, and we would like to repeat our offer of a contract at Fremantle until October 2014.

In the longer term, the Director General wishes to speak to you about future employment within South Metropolitan and has requested that you make an appointment to see him personally. If you ring his office on [phone number] his Liaison Officer ... can arrange a time.

Exhibit A1, tab 34

- 54 In late December 2013, Dr Savundra met with the Director General, Professor Stokes, as he had been asked. According to Dr Savundra, at the end of the meeting, the Director General told Dr Savundra that he would look into the question of Dr Savundra's five year contract. Dr Savundra had a clear impression from what the Director General said to him in that meeting that Professor Stokes believed Dr Savundra did not want a five year contract at FH rather than the other way around.
- 55 Following the meeting, Dr Savundra sent Professor Stokes an email setting out information apparently requested by Professor Stokes as to the FTE for plastic surgery specialists at RPH and FH (Exhibit A1, tab 35). He also referred to his involvement in the Plastic Surgery Review Implementation Committee and that he 'would be happy with a further 5 year contract across SMHS [South Metropolitan Health Service], allowing me to work at all 3 campuses, depending on where the work is'. He also referred to issues associated with Dr Daly and tension and morale at RPH.
- 56 During 11 and 12 February 2014, Dr Blythe as Executive Director FH, Professor Daly as Executive Director of RPH and Dr David Russell-Weisz as Chief Executive FSH Commissioning, exchanged emails regarding a five year contract for Dr Savundra and the plastic surgery FTE and sessional requirements at FH, FSH and RPH. This culminated in an email from Dr Blythe to Dr Daly and Dr Russell-Weisz of 11 February 2014 in the following terms:

James is 0.3 FTE (out of contract) with me and 0.3 with Frank (contract expires 1 Nov 14). He also has 0.1FTE with PMH - a five-year contract, which expires on 2 Nov 2016.

Our departmental service plan for plastics at Fremantle (Level 4 service) indicates we will need not very much. There is no outpatient service at all and inpatient activity is confined to low-moderate complexity procedures, largely as same-day admissions. We estimate about one theatre session per week and I suppose that equates to 0.2FTE at most. If we developed a hand service at Fremantle, which has been discussed, then that would change significantly.

For further discussion and then I will send the info to DG ?

Exhibit R5

- 57 On 20 February 2014, Dr Savundra was advised he would be offered a five year contract at FH, and this was subsequently provided to him, and he signed and returned it. It was for a fixed term of five years commencing on 4 February 2014 to 4 February 2019 as a Sessional Plastic Surgeon Consultant.
- 58 Dr Savundra believes that Dr Blythe had received instructions from someone else to align his FH contract with his RPH contract, and that Dr Blythe found an excuse to try to do so. He says it was quite peculiar that the contract for 0.3 FTE at FH was justified on the basis of operational needs.

The RPH contract not renewed

- 59 As I noted earlier, Dr Savundra signed a five year contract with RPH in 2009. This was his second such contract. Dr Savundra says he expected that when his 2009 contract was due to expire in 2014 it would be renewed. He says he was expecting that the usual process of a recommendation for such a renewal would be made by his Head of Department and acted upon. However, Dr Savundra said that he was aware that at least six other doctors did not get a new contract when theirs expired.
- 60 On 19 March 2014, Dr Aresh Anwar, Director of Clinical Services at RPH, wrote to Dr Savundra saying that a decision would be made as to whether a further contract of employment would be offered to him on the cessation of his existing contract on 1 November 2014 (exhibit A1, tab 37). The letter also noted that should he not be offered a further contract, he would be eligible for a Contract Completion Payment in accordance with the Agreement.
- 61 By letter dated 28 July 2014, Mr Alex Smith, A/Executive Director, Royal Perth Group SMHS, wrote to Dr Savundra informing him that 'a further contract of employment will not be offered'. The letter noted the terms of cl 20(4) of the Agreement that 'there shall be no automatic right of reappointment upon expiry of a contract'. His employment at RPH would cease at close of business on Saturday, 1 November 2014 and he would receive the Contract Completion Payment (exhibit A1, tab 39).
- 62 The evidence of the considerations given by the respondent to whether or not to renew Dr Savundra's RPH contract are contained in a series of emails between various staff; Dr Savundra's record of a meeting with Professor Stokes on 8 October 2014, and some very limited evidence given by a number of Dr Savundra's colleagues of the responses they received to enquiries they made. There is also evidence in the emails recited above that the respondent was considering where and whether Dr Savundra's services were needed as part of the area wide plastic surgery service, including FH and the soon to be opened FSH.

(i) The emails

- 63 A number of emails covering the period of March to October 2013 were received into evidence. They provide little more than an indication that consideration was being given to the renewal of the contracts of nine consultants at RPH, one of whom was Dr Savundra. There is no evidence of how many of the other eight were offered new contracts.
- 64 An email of 24 September 2014 from Dr Daly to Professor Stokes, copied to David Russell-Weisz, the subject 'Mr James Savundra', said that:

We will not enter into a new contract with Mr Savundra at RPH but instead offer him up to 5 sessions at [FH] for plastic surgery at that site within his contract there. His commitment to other SMHS sites will be reviewed in two years (November 2016) depending on performance.

Secondly, I have asked Grant Waterer to provide a confidential file note outlining his conversations and concerns. He has already

Exhibit A1, tab 63

- 65 The only response in evidence is from Dr Russell-Weisz to Dr Daly, the next day, asking 'Any response?' (Exhibit A1, tab 63). The applicant challenges the respondent's advice that no such confidential file note, which was to be prepared by Grant Waterer, could be found.
- 66 According to Dr Savundra's evidence, prior to the expiration of his five year contract with RPH but after he had been told he would not be offered a new contract there, Professor Stokes arranged for a meeting with him, to be held on 8 October 2014.
- 67 On the advice of two of his colleagues, Dr Savundra went to the HR office at RPH to examine his employment file in anticipation of that meeting, to check what his records indicated. He says he was surprised at how small his personal file was because he had heard about the reasons he was not going to be given another contract. He says there were no documents of a negative nature, except for two: the letter advising him of his suspension received at the meeting with Dr Frank Daly on 12 March 2013 (exhibit A1, tab 6) and the letter of 6 June 2013 from Professor Stokes (exhibit A1, tab 19). That of Mr Warner of 12 July 2013 (exhibit A1, tab 22) was not on the file.
- 68 The file contained a note regarding a meeting Dr Savundra and his AMA representative, Mr Bucknall, and Dr Savundra's professional representative, Dr John Ker, had with Dr Mark Platell, Director of Clinical Services at RPH and Dr Daly in June 2012. This arose because Dr Savundra says he had made an inappropriate note in a patient's medical notes. He said he made this notation out of frustration with hospital administration about transferring the patient. The notation Dr Savundra made was 'If anyone in Executive blocks my ability to transfer this patient for proper care I will be taking it further' (ts 35). He says the meeting was over very quickly.

69 Dr Savundra disagrees with the file note on his record which identifies two issues being discussed, the first being '[h]ow staff working with him and around him perceived his work and personality style?' The second was in respect of the proper approach to notations on a patient's notes.

70 The file note says that both issues were vigorously discussed and debated. It also noted:

The outcomes of the meeting were positive and were that Mr Savundra was aware of how he impacted upon other staff and Mr Savundra agreed as to what were appropriate and inappropriate notations within the medical record.

Exhibit A1, tab 55

71 The file note indicates that it was signed by Dr Platell and Dr Daly (exhibit A1, tab 55).

72 Dr Savundra says there was no vigorous discussion and debate, and the only issue dealt with was regarding his note on the patient's records.

(ii) Dr Savundra's meeting with Professor Stokes

73 In accordance with Professor Stokes wanting to meet Dr Savundra, a meeting between them took place on 8 October 2014. Dr Savundra made notes of that meeting. He said that Professor Stokes stated that his contract at RPH should not be renewed due to several issues regarding Dr Savundra's behaviour at RPH. Professor Stokes suggested that there was evidence of bullying and intimidation towards other staff members. Dr Savundra asked for specific details about the alleged misconduct, taking into account that there is no such documentation on his HR file.

74 Professor Stokes suggested that surgeons he had spoken to had stated Dr Savundra was a highly competent surgeon, but that he had a 'polarising effect on the people' he works with and he 'needed to learn to work with management in a more cohesive way' (exhibit A1, tab 45).

75 Professor Stokes proposed that Dr Savundra could work an extra two sessions at FH in lieu of his contract terminating at RPH. Professor Stokes also stated that Dr Savundra could attend RPH to teach registrars and other doctors and to give advice on difficult cases such as the management of complex pressure sores. He said that after 12 months of this service he would personally review the merits of Dr Savundra returning to RPH.

76 Professor Stokes also said that a young plastic surgeon who was asked whether they would work at RPH, stated that they would not work there due to the intimidation of working with Dr Savundra.

77 Professor Stokes stated that the circumstances surrounding Dr Savundra's suspension from RPH were evidence that he had not behaved well.

78 Dr Savundra says he advised Professor Stokes that he expected to receive approximately \$45,000 contract completion payment and \$20,000 for leave owed, and that he felt this was a waste of public health funding.

79 Dr Savundra expressed to Professor Stokes concerns about patients at RPH, particularly the socially disadvantaged patients, getting proper care, and about proper, specialty treatment of patients.

80 He asked Professor Stokes why he, as the Director General, needed to be involved in his contract renewal at FH in December 2013. Dr Savundra said that he felt it was irregular that Professor Stokes asked him to come and visit him on 30 December 2013, to discuss the length of renewal of the contract, and reminded Professor Stokes that two weeks following that meeting, Professor Stokes reversed Dr Blythe's decision to offer him a nine month contract and requested that he be offered instead, a five year contract. Professor Stokes did not give a reason for this involvement.

81 They also discussed work at FSH.

(iii) Dr Savundra's colleagues' evidence

82 Dr Duncan-Smith, Dr Corrigan and Dr Williams are all plastic surgeons and in the case of Dr Duncan-Smith he was formerly Head of Department at RPH, and Dr Corrigan and Dr Williams are co-Head of Department at RPH. They each gave evidence about enquiries they made about the reasons for Dr Savundra not being offered a renewed contract at RPH.

83 Mr Duncan-Smith says that at one of his meetings –

... Professor Stokes said to me words to the effect that:

- (a) he did not wish to intervene with the decision management of the health group;
- (b) there had been issues with James over the industrial action;
- (c) he was aware of concerns about an incident involving an entry James had made in a patient's medical record at Shenton Park Hospital; and
- (d) some information raised by the plastic surgery review committee regarding James being a bully.

Exhibit A6 [65]

84 Dr Corrigan says Dr Waterer told her that Dr Savundra's appointment was being blocked further up the line than himself and that Dr Savundra cannot be reappointed because he was difficult. Towards the end of 2014, someone in management told her that Dr Savundra would not be given a five year contract because he was difficult and there had been allegations of bullying against him.

85 Dr Williams gave his account of the meetings he attended with Dr Duncan-Smith with the Director-General, Professor Stokes. He says Professor Stokes said at the second such meeting that Dr Savundra's contract at RPH would not be renewed because he 'had been a naughty boy' (exhibit A4, [52]).

86 Dr Williams says that all recommendations of appointments as Consultant Plastic Surgeon that he and Dr Corrigan had made to Dr Waterer had been accepted except the recommendation in respect of Dr Savundra.

Other evidence of Dr Duncan-Smith, Dr Corrigan and Dr Williams.

- 87 In addition to their evidence of their knowledge of the circumstances of Dr Duncan-Smith's suspension from duty on 18 February 2013, Dr Duncan-Smith, Dr Corrigan and Dr Williams gave evidence of their knowledge and opinion as to Dr Savundra's skill, expertise and dedication and of the need for such skill and expertise in the WA public health system.
- 88 The evidence includes letters of support for Dr Savundra directed to him and to Professor Stokes, arguing for Dr Savundra's retention at RPH, citing his high level of skills and expertise and his commitment to his patients.
- 89 For completeness, I note that as at 30 July 2015, Dr Savundra continued as an employee of the respondent, working one day per week at FH and one day per fortnight at Princess Margaret Hospital, as well as doing on-roster work at RPH. Dr Savundra also has a private practice.

The Dispute and the remedies sought

90 The applicant complains that:

1. Dr Savundra was not heard, properly or at all, before his suspension in March 2013 and being given the directions to not attend for duty at RPH or to communicate with RPH staff.
2. The Acting Director General made adverse findings against Dr Savundra that:
 - (a) industrial action in the form of withdrawal of labour, occurred and further action was threatened; and
 - (b) Dr Savundra failed to comply with a verbal direction given to him by Dr Frank Daly to the effect that he (Dr Savundra) was not to attend Royal Perth Hospital on 15 February 2013.

The adverse findings were made without:

 - (a) according Dr Savundra any procedural fairness; or
 - (b) informing Dr Savundra under what source or sources of power the respondent purported to be acting in making the adverse findings and conducting any investigation or inquiry which preceded the adverse findings.
3. Dr Savundra, and accordingly the applicant, are aggrieved about:
 - (a) the failure of the respondent to accord Dr Savundra procedural fairness with respect to the suspension, the directions, and the adverse findings;
 - (b) the impact of the suspension on Dr Savundra's professional standing and reputation;
 - (c) the impact that the suspension had on the welfare of Dr Savundra's patients at RPH;
 - (d) the attempt of the respondent, through the directions, to impair Dr Savundra's freedom of communication on matters pertaining to his profession and his employment with RPH;
 - (e) the absence of any clarity or structure to any preliminary or substantive inquiry or investigation that the respondent conducted into Dr Savundra;
 - (f) the impact of the adverse findings on Dr Savundra's professional standing and reputation, including him being placed in peril of further adverse action by the Medical Board; and
 - (g) the peril of further disciplinary proceedings being taken against Dr Savundra if it be asserted that he breached either or both of the two directions.
4. The respondent's employment records for Dr Savundra include a 'Termination Form' which reflects an understanding by the respondent that there was a termination of part of Dr Savundra's employment with the respondent.
5. The reasons which caused, or alternatively contributed to, Dr Savundra not being offered by the respondent any more employment at RPH after 1 November 2014 were, or included:
 - (a) the adverse findings;
 - (b) allegations by the respondent that Dr Savundra:
 - (i) had bullied or intimidated other staff members of the respondent; and
 - (ii) has a polarising effect on people he works with and needs to learn to work with management in a more cohesive way.
6. Those allegations have not been put to Dr Savundra or the applicant at all, or with any particularity, nor has either of them been invited to respond to the allegations.
7. The decision to not renew Dr Savundra's contract was made without the adverse findings or the allegations being put to Dr Savundra or the applicant, nor has the respondent provided a fair hearing (or any hearing at all).
8. The RPH Contract Decision was accordingly made:
 - (a) in a manner devoid of natural justice;
 - (b) in a manner that took into account considerations which were based solely on assumptions made, or conclusions drawn, by the respondent on allegations or other material which are unknown to Dr Savundra or the applicant and thus which relevantly were irrelevant considerations;
 - (c) manifestly unreasonably;

- (d) unfairly to Dr Savundra and numerous other doctors employed by the respondent at RPH;
 - (e) unlawfully.
9. The applicant seeks that I:
- (a) review the decision not to offer Dr Savundra a new contract at RPH and the circumstances which preceded it;
 - (b) nullify that decision with the effect that:
 - (i) Dr Savundra is afforded an opportunity to understand and respond to any adverse allegations the respondent wishes to make against him;
 - (ii) Dr Savundra has an opportunity to be offered more employment with the respondent at RPH; and
 - (iii) a decision is made by the respondent about Dr Savundra's employment at RPH lawfully, fairly and transparently.
- 91 At the hearing, the applicant indicated that it does not press the remedy set out in paragraph 19(b)(ii) of the Schedule to the Memorandum, and reflected in [93]9(b)(ii) above, that 'Dr Savundra has an opportunity to be offered more employment with the respondent at [RPH]'.
- 92 The respondent says:
- 1. In relation to the suspension, the directions and the adverse findings:
 - (a) Dr Savundra was not allowed by the respondent to perform duties, but was paid, from 12 March 2013 to 6 June 2013;
 - (b) the respondent wrote to the applicant by letter dated 12 July 2013 admitting that a claim that Dr Savundra was not afforded procedural fairness in connection with the matter could not be contested and that the adverse finding against him was abandoned, the formal warning imposed withdrawn and the matter discontinued;
 - (c) the events took place two years ago; and
 - (d) taken in isolation, there is nothing more that the Arbitrator can or should do in relation to it given the length of time since the events occurred and the contents of the letter of 12 July 2013.
 - 2. The employment at RPH came to an end by agreement between Dr Savundra and the respondent, set out in a letter headed 'RENEWAL OF FIVE YEAR CONTRACT' signed by Dr Savundra on 17 December 2009.
 - 3. Dr Savundra's employment ended by way of the ordinary operation of an agreement between the respondent and Dr Savundra and did not involve any matter affecting or relating or pertaining to the work, privileges, rights or duties of an employee or employer.
 - 4. There cannot be an issue of industrial fairness relating to the ending of the employment of the applicant's member at RPH as that employment ended as a result of an agreement between the applicant's member and the respondent with neither party taking any action nor invoking any right or privilege.
 - 5. The respondent was not required to do anything and did not do anything in relation to the non-renewal. The contract expired on its own terms and according to the genuine agreement of the parties. The respondent could act neither fairly nor unfairly in relation to the matter.
 - 6. Even if the applicant's allegations, including an alleged connection between the suspension, the directions and the allegations on one hand and the circumstances in which the employment came to an end on the other hand, were entirely true, which is denied, they could not, in the context of the matter complained about (being the ending of the employment of Dr Savundra at RPH), evidence relevant unfairness given that the employment ended by the effluxion of time according to a genuine agreement between Dr Savundra and the respondent that this occur.
 - 7. The respondent maintains that the Arbitrator cannot, or in the alternative should not, make any order which has the effect that a genuine fixed term contract does not have the result intended by both parties to it. There should not be various unformulated terms such as that the employer must accord the employee procedural fairness before forming negative assessments of the employee, or the employer must give consideration to offering the employee further employment and the employer must successfully complete a process, as formulated by the Arbitrator, before deciding whether or not to offer the employee further employment.
 - 8. Although the respondent accepts that findings as to jurisdiction have been made ([2015] WAIRC 00333; (2015) 95 WAIG 590), the respondent maintains all of its previous jurisdictional challenges to any order being made which has the effect that a genuine fixed term contract does not operate according to its terms.
 - 9. The agreement between the parties to the contract that it will come to an end at a given time is a powerful factor against the Arbitrator exercising discretion, in the event it finds it has such discretion, to intervene in the current matter in the way the applicant seeks.
 - 10. The respondent seeks that the matter be dismissed.

Consideration

93 The Arbitrator's role is not to undertake judicial review, where it would be concerned with the fairness of the procedure adopted as an end in itself. It is concerned with the equity and substantial merits of the case. That role is set out in the joint judgment of Wheeler and Le Miere JJ in *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244; (2006) 86 WAIG 231 at [21] – [34]. The appropriate question may be, did the respondent act unfairly in deciding to not renew Dr Savundra's contract at RPH, or in not advising him of the issues it would consider and not giving him a hearing before deciding, that is, in denying him procedural fairness?

94 For the following reasons, I conclude that in the particular circumstances the respondent was not obliged to provide procedural fairness.

95 The applicant has raised a number of issues about a series of events. The issues contained in the Schedule to the Memorandum of Matters Referred for Hearing and Determination (the Schedule) include the suspension, the directions, and the findings arising from the incident on 15 February 2013. These matters caused the applicant and Dr Savundra to be aggrieved for two reasons. The first is those things of themselves and their direct consequences. The second is the effect they appear to have had on the respondent's decision to not renew Dr Savundra's contract at RPH. This includes whether Dr Savundra was denied procedural fairness in that decision.

1. The suspension, directions and findings arising from 15 February 2013

96 The applicant raised a number of matters said to arise from these issues including their effect on Dr Savundra's professional standing, reputation and potential adverse action by the Medical Board; his patients' well-being and the restriction on his freedom of communication pertaining to his profession and his employment. However, there was little evidence in respect of these matters. I infer that this is because these things, while they are of concern to the applicant and Dr Savundra, they are not the main concern. The main concern is that, while the respondent acknowledged in Mr Warner's letter of 12 July 2013 (exhibit A1, tab 22) that 'Mr Savundra was not afforded procedural fairness in connection with this matter cannot be contested', advised that the finding of misconduct was abandoned, the formal warning was withdrawn and the matter was discontinued, the respondent is said to have continued to believe and act as if they remain valid.

97 As the respondent has acknowledged the failings regarding the suspension, the directions and the adverse findings, and abandoned the finding, and withdrawn the warning, I do not need to address those issues. I intend to treat them as being accepted, that is, that:

1. Dr Savundra was denied procedural fairness in connection with that process;
2. There is no finding of misconduct; and
3. There is no formal warning;

in respect of the incident of 15 February 2013.

98 The issue arises later as to whether the respondent continued to hold to the findings and its view of the incident in spite of them having been effectively withdrawn. I will also address the consequences as part of that consideration.

99 As to the issue of the respondent attempting to impair Dr Savundra's freedom of communication on matters pertaining to his profession and his employment, this was not addressed to any extent, and likewise, I conclude that it is peripheral to what I have described above as the main concern.

2. The non-renewal of the RPH contract

(a) Fixed term contract expiry effect

100 Where an employer allows a fixed term contract to expire and does not offer a further contract, it is not a dismissal (*Gallotti v Argyle Diamond Mines Pty Ltd* [2003] WASCA 166; (2003) 83 WAIG 3053 [4]-[7]).

101 When an employee accepts employment for a fixed term, the employee must be taken to have consented to the position that the contract comes to an end on a specified day (*Ex parte Wurth; Re Tully* (1954) NSW (SR) 47, 59 – 60, 62 – 63). In this case, there are two important documents that recognise this concept.

102 Firstly, the industrial instrument that covers Dr Savundra's employment, the Agreement, makes five year fixed term contracts for those in Dr Savundra's circumstances, the norm (see cl 20 – Contract of Service, subclause (1)(a)). It not only explicitly recognises that 'there shall be no automatic right to reappointment', but also provides compensation of 10% of final base salary for each year of continuous service.

103 Secondly, the contract signed by Dr Savundra provided that it would be for five years and that there could be no expectation of employment beyond that point. It provided:

The Employer shall not be liable to employ you in any capacity beyond the specified term. In the event that the Hospital does elect to make subsequent offer of employment, it will be in the form of a written offer subject to such terms and conditions as may be contained in that offer to you.

Exhibit A1, tab 69

104 Dr Savundra signed this contract on 17 December 2009.

105 Where an employee is engaged on a fixed term contract, there is provision for that contract to come to an end according to its terms. In this case, that is the deal that both parties made. The Agreement provides the employee with compensation for the non-renewal of a contract.

106 Dr Savundra knew some months before the expiry of his contract that the respondent was considering whether to offer him a new contract.

107 In all of those circumstances he could have no genuine or objective expectation that he would be offered a new contract.

(b) Procedural fairness in the non-renewal decision

108 The evidence demonstrates, and I find, that the respondent made a decision not to renew the contract. It was a deliberate decision. I say this because it did not merely allow the contract to come to an end and do nothing about it. Rather, the

evidence is that from at least 19 March 2014, when Dr Anwar wrote to Dr Savundra saying there would be a decision made about whether to offer him a further contract, a number of people within RPH were going through a consultative and deliberative process about that matter.

- 109 Corrina O'Connor raised the issue of Dr Savundra's contract renewal with Professor Waterer as part of the consideration of the renewal of eight other employees' contracts (exhibit A1, tab 64). Professor Waterer appears to have sought Dr Daly's view. Dr Daly conferred with Dr Russell-Weisz and Professor Stokes.
- 110 Dr Savundra was then notified by Mr Smith in his letter of 28 July 2014 that a further contract would not be offered.
- 111 According to Dr Savundra, when he met Professor Stokes in October 2014, after the decision was conveyed to Dr Savundra, Professor Stokes outlined the reasons why his contract should not be renewed. Those reasons related to Dr Savundra's behaviour, said to be 'bullying and intimidation towards other staff members', that he had a 'polarising effect on people he works with' and 'needs to learn to work with management in a more cohesive way'. The circumstances of his suspension from RPH were said to be evidence that he 'had not behaved well'.
- 112 Professor Stokes is also said to have told Dr Duncan-Smith that there had been issues with Dr Savundra over the industrial action, the entry in patient's notes, and an issue having been raised of Dr Savundra being a bully.
- 113 Therefore, I conclude that a decision was made to not offer Dr Savundra a new contract at RPH. There appear to be particular reasons behind that decision. Those reasons appear on their face to include conclusions, findings and opinions associated with the incident on 15 February 2013, which the respondent had advised the applicant were made without affording Dr Savundra procedural fairness and which were effectively withdrawn. Dr Savundra was not informed before the decision was made of those reasons, nor was he given a chance to be heard before the decision.

(c) Is Dr Savundra entitled to procedural fairness in the non-renewal decision?

- 114 In *Jarratt v Commissioner of Police of New South Wales and Another* [2005] HCA 50; (2005) 224 CLR 44, Gleeson CJ noted that 'in *Annetts v McCann* (citation omitted) it was said that it can now be 'taken as settled' that the rules of natural justice regulate the exercise of such a power (to remove the applicant from public office) unless they are excluded by plain words of necessary intent'. His Honour went on to state that:

We are concerned with a statutory scheme for the management of the Police Service and for the employment of its members, likely to have been intended to embody modern conceptions of public accountability. Where Parliament confers a statutory power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, Parliament is taken to intend that the power be exercised fairly and in accordance with natural justice unless it makes the contrary intention plain. This principle of interpretation is an acknowledgment by the courts of Parliament's assumed respect for justice.

- 115 This was a case of a decision to remove an officer, not a decision to not renew a contract, that is to employ or re-employ.
- 116 In my view, the fact that the Agreement and the contract expressly state that there is no obligation on the respondent to offer a new contract on the expiration of the previous one and that there is no right to re-appointment means there can be no right to, interest in or legitimate expectation of a new contract. Past practice might have led Dr Savundra to hope for that outcome, but it is also clear from the negotiations for the FH contract that this was not a foregone conclusion. Further, a number of other doctors did not receive new contracts, as acknowledged by Dr Savundra. Also, Dr Savundra did not receive a hearing before previous decisions to renew his contract were made, with the possible exception of the FH contract renewal. However, that was a matter not of non-renewal but of the term of the contract. I would describe that process not as procedural fairness but as negotiation, which resulted in Dr Savundra getting what he wanted.
- 117 In my view, a decision to not offer a new contract is not dissimilar to a decision to not employ in the first instance. An employer is free to choose whom they wish to employ and whom they do not wish to employ, and on grounds they choose. It is quite different to a decision to dismiss where an existing right is affected. In this case, in particular, there are express provisions in the Agreement and the contract which deny such a right.
- 118 Further, neither the Agreement nor the contract place any obligation on the respondent to afford procedural fairness in that decision. There are no authorities that would suggest that there is an obligation to afford procedural fairness in a decision to offer or not offer a new contract. To now create a new requirement to afford procedural fairness in the employer making a decision of this nature would have widespread effects on employment practices, particularly, from my knowledge, in the public sector where such contracts are regularly used for particular purposes. To do so would open the floodgates.
- 119 To require employers to justify those decisions to not offer a further contract in the circumstances where the parties had agreed that there could be no expectation in the future is not reasonable, both in contractual terms and in public policy terms. In this case, such a process would be unreasonable given the basis upon which the parties had entered into their agreement in the first place.

(d) Unfairness demonstrated in the records

- 120 The applicant also claims that Dr Savundra was denied industrial fairness because, amongst the other issues raised, the respondent's records indicate that the respondent continued to hold the views it previously held regarding the adverse findings and the warning even though they had been withdrawn. Dr Savundra's file at RPH included the letter of 12 March 2013 suspending him, and the letter of 6 June 2013 where the findings and warning were set out. However, it did not contain the letter from Mr Warner withdrawing those things following the acknowledgement that Dr Savundra had been denied procedural fairness.
- 121 The applicant also relies on the T1 – Termination Form as reflecting the respondent's view that Dr Savundra had been dismissed.

(i) The RPH personnel file

- 122 As to the employment file, this was quite clearly incomplete. There is no indication whether it was called upon by the respondent in making a decision to not offer a new contract. However, given the involvement of a number of the same people in the events of 15 February 2013 and their aftermath, and the decision to not offer a new contract, and given that the matter of

Dr Savundra's and the applicant's grievances about those matters still being before the Arbitrator when the decision was made, I find it most likely that the decision was made based on the personal knowledge and opinion of those participants, particularly Professor Stokes and Dr Daly, without necessarily relying on an incomplete file.

- 123 In the circumstances, the incomplete file neither adds to nor subtracts from the fact that the respondent made a decision based on views of people who had dealt with Dr Savundra. It is most likely that the fact that the formal adverse findings and the formal warning were withdrawn did not mean that Dr Daly and Professor Stokes had changed their minds about Dr Savundra's conduct on 15 February 2013. That would appear to be the case from Dr Savundra's evidence of his meeting with Professor Stokes in October 2014.

(ii) **The termination form**

- 124 The applicant asserts at paragraph 14 of the Schedule that the respondent's employment records for Dr Savundra include a 'Termination Form' which reflects an understanding by the respondent that there was a termination by the respondent of part of Dr Savundra's employment with the respondent, that is, there was a dismissal.
- 125 The T1-TERMINATION FORM (exhibit A1, tab 38) provides a section headed '(D) CESSATION DETAILS' and provides for a choice between two boxes to be ticked. The first box says 'I'm an Employee wanting to terminate my employment'. The second box says 'I'm a Manager wanting to terminate someone else's employment, in accordance with employment conditions.' There are no other options provided such as the employment came to an end by the effluxion of time or that it is the end of a contract. There is then a box to be completed which provides 'Reason For Termination'.
- 126 In the case of Dr Savundra's T1 form, the second box is ticked and the Reasons for Termination box contains the words END OF CONTRACT.
- 127 In those circumstances, I do not believe it is reasonable to conclude that T1 form could be said to reflect that there was a 'termination of employment', as meaning a dismissal. I think that it is more appropriate to describe the 'termination' as being the end of the employment without it necessarily meaning either a dismissal or a resignation. It simply means the employment relationship terminated, as in it ended. In those circumstances, I do not accept that the T1 form reflects a view of the respondent that Dr Savundra was dismissed.

(e) **'unfairness to numerous other doctors employed by the respondent' and to the interests of patients**

(i) **Unfairness to other doctors**

- 128 Paragraph 18(d) of the Schedule sets out a claim that the decision to not offer a new contract at RPH was made 'unfairly to Dr Savundra and numerous other doctors employed by the respondent at RPH'.
- 129 Even if it is appropriate to consider whether the respondent's decision to not renew Dr Savundra's contract was made unfairly to Dr Savundra, there is no substantive evidence of unfairness to other doctors employed by the respondent at RPH by that decision.
- 130 There is some limited evidence to support the appointment of another plastic surgeon, and that there are clinical reasons why Dr Savundra fits the bill, but it is not that only his appointment would satisfy any workload issues.
- 131 The evidence of the impact of the decision to not renew Dr Savundra's contract at RPH, beyond its impact on Dr Savundra, is that of Dr Corrigan, Dr Williams and Dr Duncan-Smith. Yet their evidence is of not having an understanding of why the decision was made and why it was not reversed; the impact on the on-call roster in relation only to patient care, and about patient care generally. There is no real evidence of unreasonable workloads or demands placed on any doctors as a consequence of Dr Savundra not having a contract at RPH.
- 132 Dr Williams described the staffing situation at RPH as untenable, that the staffing levels are not enough to run a sustainable on-call service. He cited a number of reasons for this but each of them relates to patient care, training, skill mix and complexity of cases. His only reference to the impact on staff is in the final paragraph of his witness statement where he makes a general comment about being 'regularly asked by the rest of the team why we are not appointing James, why we are putting the rest of the department through stress being understaffed' (exhibit A4 [76]). His frustration is that he has no meaningful answers.
- 133 Dr Duncan-Smith's evidence was of the benefits to the patients and the system which Dr Savundra brings, rather than of any particular unfairness to other doctors brought about by the decision of the respondent to not offer Dr Savundra, in particular, a further contract.
- 134 Dr Williams noted in his witness statement, that the executive team at RPH 'has a different approach and an agenda which can be inflexible. The executive agenda is often focussed on limited resources, which can at times, be contrary to the patients' best interests' (exhibit A4 [21]).
- 135 While I accept that there may be a view amongst doctors at RPH about Dr Savundra's professional skills and they see a real demand for such skills, I am of the view that the matter referred for hearing and determination was never really about unfairness to other doctors at RPH consequential upon the decision to not renew the contract.
- 136 The inclusion of this issue in the Schedule occurred in the final preparation of the Memorandum but was never the subject of conciliation discussions. Perhaps this is because, as Mr Hooker says, following my decision on the scope of the matter to be referred for hearing and determination and the issue of jurisdiction, given the passage of time and the change in circumstance, this issue was never discussed.
- 137 However, the reference in paragraph 18(d) to unfairness to numerous other doctors employed at RPH is oblique and not at all in keeping with the tenor of the remainder of the matters canvassed in the 18 detailed paragraphs setting out the applicant's case. That tenor is about the treatment of Dr Savundra and a denial of natural justice. The inclusion of reference to unfairness to other doctors, with respect to the applicant, seems a stretch beyond that issue.
- 138 In any event, in the circumstances, whether the management of RPH decided to take some action against an individual doctor for good reason or ill, its impact on the doctor's colleagues is not directly material, nor appropriate to be dealt with in these Reasons. It could just as reasonably be argued that, regardless of the reasons for a non-renewal of a contract or, in different

circumstances, the dismissal of an employee, the fact that a particular individual's skills are, in the view of that individual's colleagues, necessary for the wellbeing of patients means the person ought to continue to be employed. It is not relevant to whether that individual has or has not been treated fairly in all of the circumstances.

(ii) 'Impact on patients' of the contract decision

139 Paragraph 18(c) of the Schedule raises this issue. The impact on patients, even if it is an industrial matter, which I doubt, although I make no determination one way or the other, is to be treated in the same way as unfairness to other doctors. It is not that it is of no consequence. I am sure that it is, but it is not a matter for this decision.

140 Therefore, I do not intend in these reasons for decision, to take account of the evidence of Dr Savundra's colleagues as to their views of the need for his particular skills at RPH or of the evidence regarding the benefit of his involvement in care of particular patients or patients in general.

141 I note in passing that the management of an organisation, regardless of its nature, needs to make decisions about the type of work the organisation will perform, how it will perform that work, and the structure, equipment and personnel it will utilise for that purpose. Whether individuals or groups of employees agree with those arrangements is not to the point. I am aware that often employees have invaluable information and well informed views and opinions about those things and organisations can benefit from those views being engaged. But the decisions are for management, whether they are made well or badly. The management personnel are the ones who have the duty and responsibility for such decisions. It is not for the employees or the Commission to decide how those things will be done. The exception to that is the extent to which the employees are treated unfairly as a consequence of those decisions. The Commission has a jurisdiction to deal with allegations of unfairness.

142 Even if, as Mr Hooker says, in light of the 'obstinacy' of RPH in there being a moratorium on Dr Savundra working at RPH, 'in the face of a demand that would suggest he's tailor-made to be permitted to work there', it is for the employer to choose how and by whom it staffs its service. Whether it treats him fairly is another matter entirely.

Alternatively

143 If I am wrong, and there is an obligation on the employer to provide procedural fairness in deciding whether to offer a new contract, the evidence is clear that before the decision to not offer a new contract was made, Dr Savundra was not informed of what matters would be taken into account and was not given an opportunity to be heard.

The remedy

144 The applicant seeks that:

1. the decision not to offer a new contract and its circumstances be reviewed;
2. that the decision be nullified; and
3. an opportunity be given for Dr Savundra to understand and respond to any 'adverse allegations' the respondent wishes to make against him; and
4. a new decision be made by the respondent 'lawfully, fairly and transparently'.

145 It does not pursue an opportunity for Dr Savundra to be offered more employment with the respondent at RPH. His evidence is that he has re-established his private practice.

146 The applicant sought that I review the decision to not offer a new contract and I have done so. In putting its case and the process for the hearing, the applicant has elicited evidence of at least some of the reasons for the respondent not offering Dr Savundra a new contract. They include those things are set out in [111] and [112] of these reasons.

147 Dr Savundra has answered many of those things as part of his response through his evidence, as part of the process of the enquiry in this matter. He also had the opportunity to hear from Professor Stokes as to his reasons in the meeting of 8 October 2014, even though it was after the decision was made. From my observation of Dr Savundra and from what he said to Professor Stokes in their two meetings, it is clear that Dr Savundra is up to the task of responding to issues put to him, and does so without demur.

148 As to the issue of writing on patients' notes, Dr Savundra seems to have been dealt with in respect of that matter and he appeared to accept, at the time, that he should have done things differently. The note he wrote is demonstrative of an attitude towards hospital administration which is reflected in his conduct and attitude in the incident of 15 February 2013, particularly his comments which I have reflected at [12] and [30] of these reasons.

149 Dr Savundra's own evidence of the incident of 15 February 2013 demonstrates and I find that:

1. In consultation with others in the department, as the senior plastic surgeon on-call at the time, Dr Savundra attended RPH ED.
2. He went to the ED contrary to an explicit and repeated instruction from Dr Daly, the Executive Director at RPH. He was frustrated not merely because of the situation with Dr O'Sullivan's and Dr Rawlins' credentialing, but because Dr Daly would not answer a question he felt he was entitled to have answered.
3. He instructed those under his clinical, but not organisational, supervision to refer patients to SCGH by giving them a piece of paper with directions how to get there, and in the case of an emergency to stabilise the patient then transfer them to SCGH. Dr O'Sullivan remained at the hospital on duty. Dr Savundra's evidence suggests that Dr Savundra had told Dr O'Sullivan and Dr O'Sullivan was prepared, to deal with any patients in an emergency to stabilise and transfer them but not to take responsibility for them as a specialist.
4. He made arrangements with another hospital to receive patients and that other hospital appears to have made additional resources available to deal with that situation.
5. He instructed more junior doctors as to what was to occur in a time frame when he was no longer to be on duty or on-call and, in fact, when he was to be out of the country, to not receive patients at the ED, but to provide them with directions to go to another hospital, except in the case of an emergency to stabilise the patient and transfer them, but not to take responsibility for the patient.

6. He did so in circumstances where he appears to have had no managerial or organisational authority. He was not Head of Department – that was Dr Duncan-Smith. The letter the plastic surgeons wrote on 6 February 2013 said that the ‘Head of Department will have no option but to explain to these junior medical staff’ etc. However, it was Dr Savundra who did this and more. There is no suggestion that he did so in any authorised capacity. On the contrary, he did so in the face of a direction to not go to RPH.
 7. Whilst he says Dr Daly was interfering in the care of his patients, Dr Savundra was not going to the ED to deal with the care of his then or future patients because he was about to end his on-call roster and within less than a day, to leave the country for some time. His intention was to intervene in the organisation of the hospital’s operations as part of his pursuit, along with that of his colleagues, of the hospital acting in relation to the credentialing of other doctors.
 8. There was no real or genuine risk to patient safety as alleged by Dr Savundra or the applicant. Dr Savundra said that Dr O’Sullivan was competent to deal with patients who presented, it was that he had not yet been credentialed. Further, Dr Daly arranged for another senior plastic surgeon to take on the on-call responsibility. Dr Savundra did not know this until he had returned from overseas some weeks later.
- 150 Therefore, he took matters into his own hands, beyond his authority.
- 151 I find without hesitation, that Dr Savundra’s own evidence makes clear that he was given a verbal direction by Dr Daly to not attend the ED at RPH on 15 February 2013 and that he refused to comply with that direction.
- 152 The respondent says that Dr Savundra’s conduct that day demonstrates, not the merits of the suspension from duty, but that Dr Savundra could stand up for himself. I find that combined with the evidence of his negotiations for a five year contract at FH and the evidence of his pursuit of his patients’ interests, it does indeed demonstrate that Dr Savundra is a person who will pursue what he believes is appropriate, whether in the interests of his patients, other colleagues or in his own interests.
- 153 Whether his and others’ conduct in regards to that day constitutes industrial action was not argued before me and it is unnecessary to make any findings.
- 154 Dr Savundra appears to have acted without authority in providing instructions to staff at RPH about what they would and would not do in respect of receiving and treating patients, and went beyond that to make arrangements with another hospital, which resulted in that hospital making additional resources available.
- 155 Dr Williams expressed clearly the inherent tension between the health service management and clinicians. The former are required to make decisions about the type of service and the allocation of resources, by taking a broad view of the best interests of the organisation, and, in this case, how that fits within the WA health system.
- 156 On the other hand, the clinician is focussed, quite properly, on the best interests of each patient and obtaining the best possible care for each of them.
- 157 There is an immediate tension between those two, and this can lead to conflict. It is how the two, the management and the clinicians, work together and cooperate, each understanding the other’s position and interests, which allows the whole system to work in the best interests, not merely of one patient or some patients, but the whole of the patients. That involves compromises, as resources are limited. Where that arrangement is difficult, where compromise and cooperation are troublesome, management will be entitled to make necessary decisions, and employees are not entitled to take things into their own hands regardless of the strength of their beliefs about those decisions.
- 158 It was interesting to note that in both Dr Savundra’s and Dr Williams’ evidence, there was an indication that they do not fully recognise or accept that their decisions about patient care might need to fit with management’s need to run an efficient facility or service with limited resources. There seems to be a reluctance to acknowledge that, from an organisational perspective, they are subject to someone else’s directions or decisions.
- 159 As to nullifying the decision, I do not see that is necessary because the decision was to not do something, that is, to not offer a new contract. Nullifying such a decision has no effect. Dr Savundra and the applicant do not specifically seek that a new contract be offered, rather that Dr Savundra have an opportunity to know what is against him and respond to it, and that the respondent consider that and make a decision. If I found in his favour, those other things might flow without the need for the original decision to be nullified.
- 160 The inquiry into the matter by the hearing and these reasons has given Dr Savundra the remedy sought of an opportunity to understand and respond to adverse allegations, and in giving his evidence, he has responded to them. Given my findings about Dr Savundra’s conduct, I would not require the respondent to revisit the decision, particularly as Dr Savundra does not seek an opportunity to be offered another contract at RPH as part of the remedy.

Conclusion

- 161 I find that the issues associated with the suspension, directions and findings regarding the events of 15 February 2013 do not require any further action because of Mr Warner’s letter 12 July 2013.
- 162 I also find that a deliberate decision was made to not offer Dr Savundra a new contract at RPH. It was made for reasons which included those associated with Dr Savundra’s conduct, or perception of that conduct. He was not told of those reasons or given an opportunity to respond before the decision was made, however, he was told later in a meeting with the Director General.
- 163 I find that there is no obligation on the respondent to afford procedural fairness in deciding not to offer a new contract, particularly in the circumstances of the terms of the contract and the Agreement.
- 164 The other grounds said to justify the making of orders are not relevant issues.
- 165 The hearing of this matter has otherwise enabled the applicant and Dr Savundra to know what was against him, if he did not already know.
- 166 The matter will be dismissed.

2016 WAIRC 00135

DISPUTE RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED

PARTIES**APPLICANT**

-v-

THE MINISTER FOR HEALTH

RESPONDENT**CORAM**

PUBLIC SERVICE ARBITRATOR

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

THURSDAY, 10 MARCH 2016

FILE NO

PSACR 20 OF 2013

CITATION NO.

2016 WAIRC 00135

Result

Matter dismissed

Order

HAVING heard Mr R Hooker of counsel and with him Ms D Webb of counsel on behalf of the applicant and Mr D Matthews of counsel and with him Ms C Reid on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the matter be, and is hereby dismissed.

[L.S.]

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

2016 WAIRC 00148

DISPUTE RE REQUIREMENT TO ATTEND MEETINGS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

PARTIES**APPLICANT**

-v-

SHARYN O'NEILL

DIRECTOR-GENERAL

DEPARTMENT OF EDUCATION

RESPONDENT**CORAM**

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

TUESDAY, 15 MARCH 2016

FILE NO/S

CR 36 OF 2015

CITATION NO.

2016 WAIRC 00148

Result

Application discontinued

Representation**Applicant**

Mr S Millman of counsel

Respondent

Mr R Bathurst of counsel

Order

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the *Industrial Relations Act 1979*; and
WHEREAS on 6 January 2016 the Commission issued a Direction [2016] WAIRC 00003 in preparation for the hearing of this matter; and

WHEREAS by email on 8 March 2016 the applicant requested that the matter be discontinued and the respondent has agreed;

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

THAT the matter be, and is hereby discontinued.

[L.S.]

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Medical Association (WA) Incorporated	The Minister for Health	Scott A/SC	C 204/2013	5/06/2013 7/06/2013	Dispute re suspension	Concluded
Electrical Trades Union WA	The Director General of Health as delegate of the Minister of Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board, the Peel Health Services Board, and the WA Country Health Service	Scott A/SC	PSAC 6/2016	8/04/2016	Dispute re long service leave	Consent
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Scott A/SC	PSAC 24/2015	27/10/2015 4/12/2015	Dispute re clause 9.1 (c) and (d) - Modes of Employment	Discontinued
The Civil Service Association of Western Australia Incorporated	Central Institute of Technology	Kenner C	PSAC 14/2015	7/08/2015	Dispute re proposed termination of employment	Discontinued
The State School Teachers' Union of Western Australia (Inc)	Ms Sharryn O'Neill, Director-General Department of Education	Scott A/SC	C 23/2015	20/08/2015 9/11/2015	Dispute re status of employee	Discontinued
Western Australian Municipal Road Boards, Parks and Racecourse Employees Union of Workers	Shire of Capel	Beech CC	C 35/2015	30/10/2015	Dispute re disciplinary proceedings	Discontinued
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Public Transport Authority of Western Australia	Kenner C	PSAC 26/2015	18/12/2015	Dispute re alleged overpayment of entitlement	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2016 WAIRC 00078

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR ALAN SCICLUNA AND MRS TRIXIE SCICLUNA	APPLICANTS
	-v-	
	MR WILLIAM PAUL BROOKS T/AS BAYVIEW MOTEL ESPERANCE, WA	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	WEDNESDAY, 10 FEBRUARY 2016	
FILE NO.	U 146 OF 2015, U 147 OF 2015	
CITATION NO.	2016 WAIRC 00078	

Result	Direction issued
Representation	
Applicant	Mr J Nicholas, of counsel
Respondent	Mr J Brooks, as agent and later Mr R Greer, of counsel

Direction

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

1. THAT these applications U 146 of 2015 and U 147 of 2015 be consolidated and heard together. The evidence and submissions in one application shall be taken as evidence and submissions in the other;
2. THAT both the applications be listed for a one-day hearing in Perth, on a date convenient to the Commission, with a video link to Auckland, New Zealand;
3. THAT the applicants' evidence may be given by video-link;
4. THAT the parties file a Statement of Agreed Facts annexing any agreed documents relevant to those facts by close of business on Wednesday, 17 February 2016;
5. THAT the applicants file in the Commission and serve on the respondent:
 - (a) any signed witness statements upon which they intend to rely; and
 - (b) an outline of submissions;
 by close of business on Tuesday, 23 February 2016;
6. THAT the respondent file in the Commission and serve on the applicants:
 - (a) any signed witness statements upon which they intend to rely; and
 - (b) an outline of submissions;
 by close of business on Wednesday, 16 March 2016;
7. THAT the parties have liberty to apply at short notice.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.



INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority/ARTBIU (Transwa) Industrial Agreement 2016 AG 18/2016	(Not applicable)	The Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner T Emmanuel	Agreement registered
Botanic Gardens and Parks Authority (Operations) General Agreement 2016 AG 1/2016	6/04/2016	Botanic Gardens and Parks Authority	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Acting Senior Commissioner P E Scott	Agreement registered
Department for Child Protection and Family Support Agency Specific Agreement 2016 PSAAG 1/2016	8/04/2016	Department for Child Protection and Family Support	Civil Service Association of Western Australia	Acting Senior Commissioner P E Scott	Agreement registered
Department of Culture and the Arts General Agreement 2016 AG 4/2016	13/04/2016	Department of Culture and the Arts	Shop, Distributive and Allied Employees Association of Western Australia, Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch	Commissioner S J Kenner	Agreement registered
Metropolitan Cemeteries Board (Western Australia) Cemetery Employees Industrial Agreement 2016 AG 2/2016	6/04/2016	Metropolitan Cemeteries Board	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Acting Senior Commissioner P E Scott	Agreement registered
Public Transport Authority/ARTBIU (TransperthTrain Operations Rail Car Drivers) Industrial Agreement 2016 AG 19/2016	8/04/2016	Public Transport Authority of Western Australia	Australian Rail, Tram and Bus Industry Union of Employees	Commissioner S J Kenner	Agreement registered
Rangers (National Parks) General Agreement 2016 AG 3/2016	2/03/2016	The Director General of the Department of Parks and Wildlife	United Voice WA	Chief Commissioner A R Beech	Agreement registered

JOINDER/CONCURRENCE OF PARTIES—Application for—

2016 WAIRC 00216

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
THE CIVIL SERVICE ASSOCIATION OF WA [INCORPORATED]

PARTIES**APPLICANT**

-v-

CHEMISTRY CENTRE RESOURCES AND CHEMISTRY PRECINCT
AND OTHERS

RESPONDENT**CORAM**

PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE

FRIDAY, 15 APRIL 2016

FILE NO

P 1 OF 2016

CITATION NO.

2016 WAIRC 00216

Result	Application dismissed
Representation	
Applicant	Mr M Finnegan of counsel
Respondent	Mr C Bretnall as agent

Order

WHEREAS this is an application to vary the Public Service Award 1992 pursuant to Section 38 of the *Industrial Relations Act 1979*; and

WHEREAS on 19 February 2016 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties agreed to continue discussions with a view to resolving the matter; and

WHEREAS on 12 April 2016 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

[L.S.]

NOTICES—Appointments—

2016 WAIRC 00166

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner DJ Matthews to be an additional Public Service Arbitrator for a period of one year from the 21st day of March, 2016.

Dated the 21st day of March, 2016.



(Sgd.) A.R. BEECH

CHIEF COMMISSIONER A.R. BEECH

PUBLIC SERVICE APPEAL BOARD—

2016 WAIRC 00128

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 16 NOVEMBER 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JASON HEARD

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
MR N PURDY - BOARD MEMBER
MR G LEE - BOARD MEMBER

DATE

TUESDAY, 8 MARCH 2016

FILE NO

PSAB 7 OF 2015

CITATION NO.

2016 WAIRC 00128

Result	Appeal dismissed
Representation	
Appellant	Mr J Heard on his own behalf
Respondent	Mr J Chapman

Order

WHEREAS this is an appeal to the Public Service Appeal Board (the Board) pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS on 16 December 2015 the Board convened a Directions and Scheduling hearing; and

WHEREAS the Board set the appeal down for hearing in Karratha on 27 and 28 April 2016; and

WHEREAS on 11 February 2016 the respondent contacted the Board and advised that the parties were unable to arrive at a Statement of Agreed Facts; and

WHEREAS the Board attempted to contact the appellant by telephone on 12 February 2016 and by email on 15 February 2016; and

WHEREAS the appellant did not make contact with the Board; and

WHEREAS by letter dated 18 February 2016 the Board directed the appellant to:

1. Advise of your intentions regarding the appeal;
2. Respond to the email regarding the issue of the statement of agreed facts; and
3. Indicate a response to the respondent's email of 16 February 2016 regarding Ms Cuneo giving evidence by video link.

by no later than Friday, 4 March 2016 and that should the appellant fail to respond within that time, the Board intended to dismiss the appeal;

WHEREAS by email dated 20 February 2016 the appellant provided further information to the Board but did not deal with the issues set out in the letter of 18 February 2016; and

WHEREAS by email dated 22 February 2016, at the direction of the Board, the Associate raised an issue with the appellant but also wrote:

I note that the Board still requires a response to all 3 of the questions raised in the letter of 18 February 2016, within the required time.

WHEREAS by 5.00 pm on 4 March 2016 the appellant had not responded to the issues raised in the letter of 18 February 2016, in particular as to his intentions regarding the appeal;

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

THAT this appeal be, and is hereby dismissed.

[L.S.]

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

2016 WAIRC 00168

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 5 NOVEMBER 2015

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MS JANE BLISS, THROUGH THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	APPELLANT
	-v-	
	ACTING CHIEF EXECUTIVE OFFICER MR PAUL WHYTE HOUSING AUTHORITY	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN MR S WARD - BOARD MEMBER MR G RICHARDS - BOARD MEMBER	
DATE	THURSDAY, 24 MARCH 2016	
FILE NO	PSAB 8 OF 2015	
CITATION NO.	2016 WAIRC 00168	

Result	Direction amended
Representation	
Appellant	Ms L Kennewell
Respondent	Mr S Thackrah of counsel

Direction

WHEREAS this is an appeal pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS on 13 January 2016 the Public Service Appeal Board (the Board) issued a Direction [2016] WAIRC 00022 (Directions) in preparation for the hearing of this matter; and

WHEREAS by email on 21 March 2016 the respondent requested an amendment to the Directions and advised that the appellant agrees to the request; and

WHEREAS the Board is of the opinion that in the circumstances it is appropriate to amend the Directions;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT Direction 3(a) of the Directions issued on 13 January 2016 [2016] WAIRC 00022 be replaced by:
 THAT the appellant:
 - a) file and serve on the respondent any witness statements constituting the whole of the evidence in chief of the witnesses upon which it intends to rely, 15 days before the hearing of the appeal.
2. THAT Direction 4 of the Directions issued on 13 January 2016 [2016] WAIRC 00022 be replaced by:
 THAT the respondent file and serve on the appellant any witness statements constituting the whole of the evidence in chief of the witnesses upon which it intends to rely, 12 days before the hearing of the appeal.

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

[L.S.]

2016 WAIRC 00173

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 5 NOVEMBER 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MS JANE BLISS, THROUGH THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPELLANT

-v-

ACTING CHIEF EXECUTIVE OFFICER MR PAUL WHYTE
 HOUSING AUTHORITY

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
 ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
 MR S WARD - BOARD MEMBER
 MR G RICHARDS - BOARD MEMBER

DATE WEDNESDAY, 30 MARCH 2016

FILE NO PSAB 8 OF 2015

CITATION NO. 2016 WAIRC 00173

Result	Appeal dismissed
Representation	
Appellant	Ms L Kennewell
Respondent	Mr S Thackrah of counsel

Order

WHEREAS this is an appeal to the Public Service Appeal Board (the Board) pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS the appeal is listed for hearing on 13 and 14 April 2016; and

WHEREAS on 30 March 2016 the appellant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

[L.S.]

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

EMPLOYMENT DISPUTE RESOLUTION ACT 2008—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008.

Application Number	Award, order or industrial agreement varied	Parties	Commissioner	Matter	Dates	Result
APPL 12/2016	N/A	N/A	Beech CC	Request for mediation	N/A	Closed

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2016 WAIRC 00153

REFERRAL TO COMMISSION UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DR JOHN HENRY COLLINS

APPLICANT

-v-

CHIEF EXECUTIVE OFFICER, WESTERN AUSTRALIAN TOURISM COMMISSION

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

FRIDAY, 18 MARCH 2016

FILE NO/S

APPL 7 OF 2016

CITATION NO.

2016 WAIRC 00153

Result	Application dismissed
Representation	
Applicant	Ms D Arntzen as agent
Respondent	Mr R Bathurst of counsel

Order

WHEREAS this is a referral to the Commission under the *Public Sector Management Act 1994*; and

WHEREAS on 17 February and 19 February 2016 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the last such conference the parties reached an agreement in principle; and

WHEREAS on 15 March 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.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2016 WAIRC 00142

DISPUTE RE ALLEGED BREACH OF CONTRACT
IN THE 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 COMMISSIONER S J KENNER
DATE MONDAY, 14 MARCH 2016
FILE NO/S RFT 31 OF 2015
CITATION NO. 2016 WAIRC 00142

Result Order issued
Representation
Applicant Mr A Dzieciol of counsel
Respondent Mr T McPhee of counsel

Order

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

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

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

Parties		Commissioner	Application Number	Dates	Matter	Result
BJ & NJ Tuffley Transport Pty Ltd	Aussie Car Carriers	Beech CC	RFT 33/2014	23/01/2015 16/03/2015	Dispute re outstanding payments	Discontinued
The trustee for the BAGP trust t/as Regulator Pty Ltd	Hadyn James Thomas T/as Haydn J Thomas	Kenner C	RFT 21/2015	30/11/2015	Dispute re outstanding payments	Discontinued