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CEREMONIAL ADDRESSES—

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BEFORE THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

CEREMONIAL SITTING

CEREMONIAL SITTING TO FAREWELL CHIEF COMMISSIONER A R BEECH

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON THURSDAY, 12 MAY 2016, AT 10:31 AM

THE HONOURABLE J H SMITH, ACTING PRESIDENT

CHIEF COMMISSIONER A R BEECH

ACTING SENIOR COMMISSIONER P E SCOTT

COMMISSIONER S J KENNER

COMMISSIONER T EMMANUEL

COMMISSIONER D J MATTHEWS

MR P MILES MLA appeared on behalf of the Minister for Commerce

MS M HAMMAT appeared on behalf of Unions WA

MR P MOSS appeared on behalf of the Chamber of Commerce and Industry of Western Australia

MR N ELLERY appeared on behalf of the Law Society of Western Australia

SCOTT ASC: Good morning.

On behalf of my colleagues and myself, welcome to this special sitting of the Commission to mark the retirement of Chief Commissioner Anthony Richard Beech.

I extend a special welcome to Chief Commissioner Beech's wife, Dr Gail Phillips, to his daughters, Helen and Shauna and son-in-law, Cillian, his sister, Leslie and brother-in-law, Vic, his niece, Julianne, to Kathy Digwood and Claire and Miranda, to Ron Gordon and Renicia Vilensky, and other family and friends.

I also acknowledge and welcome those at the Bar table; Mr Paul Miles MLA, Parliamentary Secretary to the Minister for Commerce on behalf of the Minister; Ms Meredith Hammat on behalf of UnionsWA; Mr Paul Moss on behalf of the Chamber of Commerce and Industry of Western Australia; and Mr Nicholas Ellery on behalf of the Law Society.

It is also a delight to have with us their Honours Justice Rene Le Miere and Justice Michael Corboy. I understand that Justice Corboy is a good source of information regarding Chief Commissioner Beech's undergraduate days, but we'll say no more about that.

I also extend a warm welcome to former members of this Commission, President Mr Peter Sharkey, Acting President Mr Mark Ritter SC, Chief Commissioners Mr Bruce Collier AM and Mr Bill Coleman AM, Senior Commissioner Mr Jack Gregor and Commissioners Mr Owen Salmon, Dr Sally Cawley, Mr Steve Wood and Ms Stephanie Mayman and to former Registrar Mr John Spurling.

I note with pleasure too, the presence of his Honour Joe Cicchini, Fair Work Commissioners, Deputy President Binet, Commissioners Williams and Cloghan, and former Deputy President McCarthy.

Welcome to all those present and to those watching on the Web.

This is a very special occasion for Chief Commissioner Beech, but it's also an historic event in the life of this Commission; a tribunal of more than 100 years standing, that its longest serving member and Chief Commissioner of 12 years is retiring. Chief Commissioner Beech was first appointed as a Commissioner nearly 28 years ago and was Senior Commissioner for two and a half years, and then appointed as Chief Commissioner from 1 December 2004. For a period he had a dual appointment as the Deputy President of the Australian Industrial Relations Commission.

Chief Commissioner Beech is steeped in industrial relations. He is the son of Les Beech, a prominent gentleman of the union movement of this State. He is one of the generation of university graduates who entered the union movement in the early 1970s. He has Bachelor of Economics and Bachelor of Laws degrees from the University of WA. He became the leading advocate within the union movement and immediately prior to appointment to the Commission was Assistant Secretary of what I knew then as "the Miscos", where I first encountered him, and President of the Trades and Labor Council.

During his tenure as a member of the Commission he has dealt with the broadest range of industries. He is known for his integrity, cool head, good grace and fairness. He has conciliated and arbitrated all sorts of disputes, including one where he required train drivers to shave off their beards.

Chief Commissioner Beech's stewardship of the Commission has included a time of significant change in the industrial landscape, this includes arguably the most significant for the Commission's jurisdiction; the period following WorkChoices legislation in 2006, which was a time of great uncertainty and challenge.

He has been a tireless champion of the Commission. It is due in no small part to his personal skills and his involvement in promoting the Commission's role as a mediator under the Employment Disputes Resolution Act 2008 that a number of national system employers and unions still come to this Commission for mediation.

One of the challenges faced by many courts and tribunals is how to meet the needs of and deal with self-represented litigants. Chief Commissioner Beech has established a pro bono scheme to assist unrepresented litigants in matters before the Commission, making the Commission more accessible to them and making it easier for the Commission to deal with them.

Due to his interest in technology the Commission is one of the earliest of Australian courts and tribunals to webcast proceedings, with the annual State Wage Case hearing being webcast since 2006. That love of technology has combined with his dedication and his enthusiasm for his role. He could enjoy holidays on the beach in the Greek Isles and still check the Commission's website for court lists and read the decisions that it issued. There was one occasion where he was on Norfolk Island when internet and mobile phone access were very limited. Bad weather delayed his return to civilisation and I take that as being to internet access. I understand he nearly needed sedation to overcome the distress of not being in touch with the Commission at all times. I suspect too that Gail might request that his access to the Commission's website be blocked fairly soon.

Chief Commissioner Beech has spent considerable time helping students learn about the Commission and about industrial relations. He has lectured and has provided law and economics students in particular with work experience under his personal guidance. He has been a keen supporter of the Industrial Relations Society of Western Australia. His sense of fairness and good humour were on full display at the last annual general meeting, when in his capacity as Returning Officer he disallowed the candidacy of a particular candidate for the election to the Committee of the Society, but he helped that member to draft the resolution for the member's challenge to his own ruling. When the motion was put to the meeting I'm sure you know who prevailed.

Chief Commissioner Beech, you leave the Commission in a good state of health and organisation. We will greatly miss you, your leadership, advice, and good humour. So while we're here to celebrate with you, there is also some sadness at losing our highly esteemed colleague and friend. We wish you many clear, crisp mornings for rowing on the river and the very best of health and happiness for your retirement.

BEECH CC: Thank you very much.

SCOTT ASC: Mr Miles.

MILES, MR: Thank you.

And it does please me to appear on this side of the Commission and to represent my Minister for you, and also – who was unable to attend through other events up at Parliament House. And also, it's a great privilege for me, as the Parliamentary Secretary, to be able to do that and to come here not just to show my appreciation and my Minister's appreciation, but also the Government's appreciation and give you best wishes to you, Chief, on your retirement.

BEECH CC: Thank you, Mr Miles.

MILES, MR: The Commission has convened a special sitting to farewell the longest serving member, who has had the enviable and distinguished career in labour relations spanning more than four decades.

Chief Commissioner Beech was first appointed as Commissioner in September of 1988. He went on to appoint the Senior Commissioner in March of 2002, before becoming Chief Commissioner in December of 2004.

Prior to being appointed to the Commission, the Chief Commissioner worked for the union movement, serving as an industrial officer for several unions and then the Assistant Secretary of the then Federate Miscellaneous Workers' Union. He was also President of the then Trades and Labour Council from 1987 to 1988.

During this 28 year tenure of the Commission, the Chief Commissioner has established himself as one of the most respected and distinguished industrial relations practitioners in WA and has developed a reputation as a highly effective mediator whose services are regularly sought after.

While the list of functions that the Chief Commissioner has performed is far too extensive to recite in full, some of the roles he has undertaken include: serving on the National Occupational Health and Safety Commission; chairing the Government School Teachers' Tribunal; performing the role of the Public Service Arbitrator and chairing the Railways Classification Board; that must be where the whiskers come in.

The Chief Commissioner has also dealt with industrial matters covering the vast array of industries including the building, rail, transport, maritime, security, cleaning, health and prisons industries.

His career with the Commission has coincided with some of the most significant changes in the history of the WA Industrial Relations System. Changes to the wage setting procedures, to the formal adoption of enterprise bargaining, to the introduction of the statutory minimum conditions of employment and to the growth of mediation services has all transformed the industrial relations landscape in this state. And of course, changes to the jurisdiction of the Commission itself, as the result of the Commonwealth legislation have significantly altered the scope and nature of the Commission's business.

Despite being unable to deal with many matters concerning employers or employees in the federal jurisdiction, the Commission has adapted to those changes and have imposed developing new or enhanced services, such as alternative dispute resolution. Some of these services are still provided to the trading or financial corporations today, enhancing the value of the Commission's operations.

The Commission continues to play a key role in conducting the annual State Wage Case in WA and the Chief Commissioner has overseen a process in the exemplary manner for many years. And indeed, since he was first appointed the minimum adult wage has tripled in value, increasing from \$229.60 per week in 1988 to \$679.90 per week today.

It is a credit to the Chief Commissioner and the members of the Commission that in spite of all the changes that have taken place over the years, the Commission has maintained a strong, independent and contemporary role in the labour relations framework and continues to be held in high regard.

A further hallmark of the Chief Commissioner's passion for labour relations has been his ongoing involvement in the Industrial Relations Society of WA, as well as lecturing and supervising university students in advocacy and negotiation.

The Chief Commissioner has also gone to considerable effort to make the Commission accessible and user-friendly for its clients. This is demonstrated through the Commission's embrace of modern communications including the use of video conference technology, the live streaming of significant hearings on the internet and the Chief Commissioner himself appearing in various online videos explaining the role and functions of the Commission.

Chief Commissioner Beech's extensive knowledge and experience within the labour relations system and its governing legislation has been highly valued by the government and the practitioners alike, and his retirement will be greatly lost to that system.

Thank you.

BEECH CC: Thank you.

MILES, MR: I will close off.

In closing - I forgot the next page.

In closing, the Minister for Commerce, my Minister, would like to sincerely thank you personally, Mr Beech, for your tireless dedication to the important role of the Commission, as in maintaining the employment standards of WA employers most of all. And I am sure that everyone will agree that he is extremely well respected and admired by all those who have come before you, and well known for his formidable knowledge and sincere humour.

The Minister and I both wish you very well in your retirement and we thank you for your many years of service to WA.

SCOTT ASC: Ms Hammat?

HAMMAT, MS: Thank you.

Can I begin by acknowledging Chief Commissioner Beech, also Acting Senior Commissioner Scott, Acting President Smith, other members of the Commission and the distinguished guests that join us here today.

It is a great honour to rise on behalf of UnionsWA and the working people of this State to address the Commission on this very special occasion. And I am delighted, and perhaps a little saddened, to have this unique opportunity, but delighted to express the opportunity or express our appreciation for your contribution to this very important institution, but to the working people of this State as well.

Chief Commissioner, you have had an extended and distinguished service in the field of industrial relations spanning more than four decades. And while many of us at this table here this morning may have still be in nappies, or perhaps only recently out of them, you started work as an industrial officer with what was then called the Federated Engine Drivers' and Firemen's Union in 1973 and I understand you made your first appearance in this Commission in July of that same year.

And in preparing my comments for today I spent some time reflecting on what Australian work and society must have been like as you rose in this Commission to make your first appearance.

I note that average wages were \$7,600 per year and that the cost of a home on average in WA was a mere \$18,800. We recall that a spritely Gough Whitlam had only just become Prime Minister and we were very excited generally with newfangled technology, like video recorders, which had only just been released. And as you rose to make that first appearance in the Commission in 1973, of course, the nature of work was very different indeed and the WA economy and our society here was also fundamentally different.

Over 15 years in the union movement, you worked for the union I've already mentioned, but also the Electrical Trades Union and what was known as the Miscellaneous Workers' Union, or "the Miscos", where you were an Assistant Secretary. You were so esteemed by the wider union movement that you hold the office of President of the Trades and Labour Council and also represented the TLC in many test cases, including the State Wage Case.

However, in 1988 you were called to serve more broadly the State of Western Australia and you left the trade union movement to work in this institution as a Commissioner. And again, I reflect that in 1988, many things were different about the world of work and our society. Average wages had increased, but were still just an annual salary of \$24,000 a year. Mobile phones were the technology of the day when you came to this Commission, but with a cost of over \$5,000 each, it was unlikely that many of them were in the hands of industrial relations practitioners at the time.

And after extensive experience as a Commissioner, and also completing your law degree, you were appointed a Senior Commissioner in 2002 and then a Chief Commissioner in 2004.

Chief Commissioner, yours has been a career that has spanned four decades of dramatic changes in work, in society and in the economy. And since 1988 you have applied your wisdom and judgment to the work of this Commission while all around enormous change has occurred.

Technological change first heralded by VCRs and mobile phones has continued at a record pace and I think we understand, as we gather here today, that those new technologies have brought new jobs, new workplaces and new areas of contested terrain between employers and employees, and that those areas are not – that's a work in progress, that the technological change continues and will continue to transform work into the future.

During your time at this Commission you have witnessed significant change and restructuring in the WA economy, as we've moved from an economy based around mining, construction and manufacturing, to one that's based increasingly on services of one kind or another.

And it would of course be remiss of me not to mention that the other significant transformation that's occurred during your tenure is the increased numbers of women that are now in the workforce. And while I would say the quest for pay equity remains a work in progress, and something you've probably been working on since you first rose in this Commission as a union advocate, there is no doubt that women's participation in the workforce has grown significantly. And that has brought with it enormous change in how, when and where work is performed in – as workplaces have had to address the reality that increasingly all workers have family responsibilities and other commitments outside of the workplace. Industrial relations in particular perhaps once known for its particularly masculine culture can be no longer considered to be so. I note that today women now make up more than half of all union members in Western Australia and it's now women who are indeed our typical union member, if such a thing exists.

Chief Commissioner, during all of these years of tumultuous change, there have been substantial social, economic changes, but you have brought to this institution great wisdom, guidance and insight to its work. Throughout all of those monumental changes, you have demonstrated your commitment to remain overwhelmingly a respect in the broader community for the work of this institution. During such change the Commission has been sustained by consensus between employers, unions and the government that our unique industrial relations system is essential to building a good society. And that consensus may have been under pressure due to legislative changes that have already been referred to and by the substantial social and economic changes, but respect for this Commission has endured and performed its important work, always demonstrating its great value to the State, its great value to working people and its great value to employers.

No doubt not all of your decisions have been agreed with, but as an institution the Commission remains one of the most important vehicles for a fairer and more equal society.

It's an institution that's withstood those great changes, because I think it speaks about the sort of society that we want for Western Australia and it speaks about a fair go for all.

The Commission has evolved and you have played a significant and very positive part in that modern evolution. You have consistently demonstrated your commitment that the guiding principles of this Commission; that is to determine the matters before it based on equity, good conscience and the merits of the case, has always been the case, regardless of the broader context in which work has occurred.

I know that for many in the union movement our motivation and our satisfaction comes from knowing that the work that we do hopefully contributes to a better life for the working people that we represent. And if that's an aspiration that you have shared then I think there can be no doubt that over your long and distinguished career you have made a profound difference to the lives of so many working people in this state and that is an achievement you can be well satisfied with.

Can I close by also wishing you well for your retirement? It is clearly well deserved after so many years of service and I too want to wish you a retirement that is long, that is happy and always finds the weather is favourable for rowing.

If it please the Commission.

BEECH CC: Thank you.

SCOTT ASC: Mr Moss.

MOSS, MR: Thank you.

CCI is honoured to have the opportunity to farewell Chief Commissioner Beech as you retire from the Bench.

Since joining the Commission, there has been substantial changes to the State industrial relations system, which has redefined the role of the Commission and the manner in which both employers, employees and unions interact.

First starting in 1993 with the Court Government reforms and then again, in 2002 with the changes established by the Gallop Government. While both these reforms have reshaped the role of the Commission, the greatest challenge of recent history has arisen out of the 2006 amendments to the federal legislation. We saw the bulk of the private sector transfer from the state to the

national industrial relations system. However, under your stewardship the WA Industrial Relations Commission has continued to retain its relevance and significance within the industrial relations community. And this has occurred not only through formal mechanisms, such as the mediation services and resolving contractual benefits claims, but also the engagement that the Commission has had with the industrial relations community more broadly.

Chief Commissioner Beech, you have been a strong active supporter of the Industrial Relations Society and have been more than happy to share your experience and your knowledge with others.

CCI members have also benefited from this and I would like to take the opportunity to publicly thank yourself, Chief Commissioner, President Smith, Senior Commissioner Scott for their support of CCI in recent years in agreeing to speak and participate in some of our events and to take the opportunity to share the experiences of the Commission with the broader employer community as well.

Chief Commissioner, through this engagement and your welcoming nature, you have added a personable nature to the Commission and in doing so you've helped make it part of the community, as distinct from a body seen separate to it.

You have also set a leading example of the attributes sought in a tribunal member. In sitting on the Bench, Chief Commissioner, you are well known for your unbiased approach in dealing with matters, your firm hand in managing the proceedings before you, your genuine interest in the matters and claims that you are judging upon and your balanced approach in considering both practical and technical aspects of the claim. The obvious nature of these qualities has meant that you are equally well regarded by both the union and employment movements. The fact that UnionsWA and CCI – we don't usually agree with each other on many matters – can jointly acknowledge the positive role that you have played as Chief Commissioner is a testament to the qualities that you have brought to this institution.

On behalf of CCI I would like to wish you all the best for the future and congratulate you, as well as the other members of the Bench, your associates and the Registry staff for the continuing contribution that the WA Industrial Relations Commission makes.

If it please the Commission, CCI welcomes you to enjoy yourself now, as you depart the Bench and hopefully lots more rowing. Thank you.

BEECH CC: Thank you very much, Mr Moss.

SCOTT ASC: Thank you, Mr Moss.

Mr Ellery.

ELLERY, MR: Thank you.

May it please the Commission. It's a great privilege for me to appear today on behalf of the West Australian legal profession through the Law Society to farewell you, Chief Commissioner Beech.

Chief Commissioner Beech, I looked around the packed house before you arrived and I thought, I'm probably not the only one here who, as a fairly fresh faced young advocate, first appeared before you, in my case more than 20 years I would concede, less than 30 I would state, however, and nervously worked my way through the intricacies of the then industrial relations legislation before you in conciliations and arbitrations, and I forget what all the first cases were, but I certainly recall that you treated me as you treated all advocates with respect, with fairness, with courtesy.

You very quickly worked out what were my strong points, what were my weak points and disposed of those very quickly, but everybody left the conciliation or the arbitration with the perception and the view that they had been treated fairly, they had been heard and that you had properly and fairly considered the issues before you. And that was a positive experience for new advocates and I'm sure I'm not the only one in this room who has had that exact same experience.

Almost 30 years of outstanding service to the people of our State; it's a towering achievement, Chief Commissioner, and one to be very proud of. Being the last of the four speakers, I can skip some of the points I was going to make, because they have already been acknowledged previously, but it's worth just highlighting a few things that you dealt with or presided over in your time in the Commission.

Of course, you've dealt with numerous minimum wage cases and as we've heard already the nature of work and the nature of the value of work has changed enormously over the years and you have presided over those often contentious and difficult issues with fairness and with a sense of justice. Of course, you have dealt with a whole range of issues in challenging industries, particularly some of the major iron ore and oil and gas developments in the north of the State; vital, vital developments to our economy and to the wellbeing of the people of Western Australia. And of course, it was vital that industrial matters and disputes in those projects were dealt with fairly and well, and you had a significant role in many of those matters over the years. And of course, a whole range of matters in a lot of different industries throughout the whole breadth of the Western Australian economy.

So from that list it's plain to see that there is few parts of Western Australian industry or society at large that haven't in some way intersected with industrial relations and which you have not in some way had a guiding hand in relation to. And as has been acknowledged by the other speakers it is clear that whatever type of matter has come before you, and however experienced or inexperienced the advocates were who argued the matters, you have always maintained impartiality and dedication that is integral to insuring the enduring presence and success of the Commission as a viable arbitrator within our industrial relations system.

Those of us who practice in the industrial relations area know one of the, I guess, interesting and unique features of it is that the parties may have their disputes, they may have arbitrations, they may have their differences, but the employees will still turn up to work for the same employer the next day, the advocates, such as Mr Moss and Ms Hammat, from the UnionsWA, will continue to deal with each other and so mutual respect and a sense of fairness is very important in the way all of those parties are dealt with in this tribunal and in others. And the way you have conducted the matters that have come before you have always supported those values and left parties with that sense, which is very important.

Of course, industrial relations has seen enormous change over the years as we've already heard and there has been governments of different persuasions that have enacted in WA their own different reforms. There's many legal practitioners who make a point of voting for the opposition whichever the opposition is, because if there is a change of government there is a change of laws and there's more activity.

No matter the government of the day, you have, Chief Commissioner, maintained the independence of the Commission and ensured that the Commission has discharged its duty fairly and is seen to discharge its duty fairly, and have judged each case on its merits in a fair way.

So, Chief Commissioner Beech, some twenty-something years after I first appeared before you, it's a great privilege to do so on your last appearance as a member of this tribunal to extend my sincere thanks on behalf of the legal profession and other industrial relations practitioners throughout the State, and to wish you a very successful and a fruitful retirement.

May it please the Commission.

BEECH CC: Thank you very much.

SCOTT ASC: Chief Commissioner.

BEECH CC: Can I thank you very much for attending. There is a larger crowd than I had anticipated.

When I attended the farewell sitting of President Geoff Giudice of the Fair Work Commission a few years ago in Melbourne, I noted that he thanked those appearing for kindly overstating his achievements and tactfully omitting to mention his shortcomings and I am delighted that that convention has been honoured here as well in the comments that have been made. Can I thank you most sincerely.

Mr Miles, my compliments to the Minister. I understand why he can't be here. I chose an inauspicious day from his point of view, but I thank him for his courtesies towards me in the issues that I have dealt with him.

And Ms Hammat, Mr Miles, and Mr Ellery, I have known each of you for some time in one way or another and I value your comments and I am very, very grateful to you.

And I also record here my thanks to those who have sent me emails and cards. It's very warming and somewhat humbling. It's difficult to see yourself how others see you and I am grateful to all of you for your comments and perhaps slightly embarrassed as well. When I did say to my daughters that this is what it was going to be this morning, Helen said to me something like: "Grab it with both hands, Dad, it'll only happen once".

As we were waiting outside before we came in, we could hear from the hubbub of you all this morning quite a bit of laughter and one of my colleagues was unkind enough to say, "Look, Tony, they're happy to see you go".

I have been fortunate, because I have worked for the last 28 years in a job I love doing. I used to complain that weekends interrupted my work until my wife, Gail, told me that seeing as I spend the weekends with her that's not very much of a compliment to her, and I stopped doing so. But it has been a job I love and a tribunal in which I've had an unshakeable faith regarding its value to our community. There are a number of former members here this morning and I asked for them to be invited, and I am very grateful they're here. They have played an important part in my time at the Commission and I would like to acknowledge them.

My strong faith began after I argued my first case in the Commission in July 1973, which was only nine years after it had been formed in 1964 out of the old Court of Arbitration and I presented it before Eric Kelly. I might interrupt myself to say that when I said something like this at another farewell a little time ago the person introducing me said, "Commissioner Beech argued his first case in 1973", and then she stopped and turned to the audience and said, "But that was before many of you were born", and I took that as being another sign that it's time to go.

My first appearance was before Eric Kelly, who with Don Cort had been appointed in 1964. And Eric was invited this morning. He has been in email contact with me and he regrets that he's not as mobile as he used to be, but he's sent me his best wishes. And similarly, Don Cort, who was also invited and was going to attend, but at the last minute I think the logistics were a difficulty. I am very grateful to them both for their compliments to me. And I appeared before Eric and Don so many times in those early years in the early seventies, that I was very impressed with their manner towards me as a young advocate. And I hopefully have picked up some of the things that they have spoken about – the manner in which they have treated me. It's been quite special to me to mention here this morning this link back to 1964.

Over the next 10 years or so, I appeared not just before them, but then also before Bruce Collier, who is here today, and Bruce, I'm very pleased to see you here and I am very, very grateful that you're able to be here. I understand you came here with Bill, but I noticed that John Collier is here in the room as well, your son, and it's very nice for me to welcome a Collier Snr and Collier Jnr in the room at the same time. Bruce was Commissioner, Senior Commissioner and Chief from '71 to '87, and can I thank you, Bruce, for your wise counsel to me from time to time when I have needed it. And of course I've known John, because until a few years ago, John worked in the Registry of the Commission.

Even now, I am impressed by Eric, Don and Bruce and their knowledge, their wisdom and their integrity in all of the matters that I had to deal with in those early years. And I do hope that I have done justice to the high standard that they set and I pay tribute to them, and they are largely responsible for the passion which I still have after 28 years. They did know me also as the son of Les Beech, as some of the others here do as well, who also appeared before them representing the Plumbers Union and the Building Trades Association and the Breweries Union. And on one or perhaps two occasions I appeared with my father in the Commission, being called Beech Snr and Beech Jnr as I now do to Bruce and John and I think that that's rather nice.

I was as enthusiastic about my appointment in 1988 as Commissioners Emmanuel and Matthews are today, which I also think is nice. And after I was appointed, I leaned very heavily on my good friend, Sally Cawley, who I can see here, who had been appointed a couple of years before me. And then also I learned a great deal from Bill Coleman, because Bill had been appointed to the Commission a few years before me. So I didn't appear before Bill much, but I worked with Bill a lot when he was Chief

Commissioner. And I owe you a lot as well, Bill, and I thank you here for the assistance that you gave me from time to time and the occasional lumpy times that they were, but I am very grateful to you and I want to say that here.

Can I also mention Owen Salmon, who is here.

Bob George, who spoke to me this morning; he was not able to be here.

Gavin also, who is an apology; he is in the Eastern States, I'm talking about Gavin Fielding.

Jack Gregor, I haven't seen him. I know Jack's been invited, I hope that Jack is here. The time that Jack and I spent together as Chief and Senior is a source of a great deal of pleasure to me.

And then also Peter Sharkey as President, he and I shared this love of military history and we've had some very laughable telephone calls from time to time as we spoke irreverently about some of the matters that came before us. And, Peter, I'm very, very grateful to you.

And also to those members here who have known me as Senior and Chief and who have worked with me.

I can see Steve Wood is here, as is Stephanie Mayman, as is Mark Ritter and I'm very, very grateful to you for being here. Each in your own way has assisted me and I have sorely needed it from time to time, I know.

From 2006 there was great uncertainty as to whether or not the State Commission would continue and whether or not it was going to, and the discussions that we had, each of you in your own way gave me help and assistance at times when I needed it in those difficult times.

I have maintained my enthusiasm, but I recognise also that the job in its own way is isolating and it can be lonely. And as Chief Commissioner I attended regular meetings of the Heads of Tribunals, which is the Fair Work Commission and its predecessors, and the other State Industrial Tribunals. And I record here the support and assistance I had from those members of the Heads of Tribunal and the opportunity to discuss matters with them.

Can I note my deep appreciation to Justice Geoff Giudice, who sent me an email this morning and I thought that was very kind of him.

And also to Justice Ross, who telephoned me last night.

Can I thank them for their friendship and support over the years as fellow Heads of Tribunal when I have needed it and also during my all too short time as a Deputy President, a dual appointment, in the Australian Industrial Relations Commission.

I have always sought a close working relationship with the Federal Commission in its various guises and one of my regrets is that I was never able to foster it in the later years, just due to the differences. I think, in legislation. But I am very pleased that Deputy President Melanie Binet, Commissioner Bruce Williams and Danny Cloghan are here.

And I also see Brendan McCarthy in the audience and I am very pleased to see him as well, he and I go back more years than it's polite to talk about. I don't think we've ever really agreed, Brendan, but there you go.

I have been pleased in my time that each of the Ministers with whom I've had to deal, and there have been a number of them, have recognised the independence of the Commission from the government and its policies. And the confidence that they have had in the Commission can be seen by the decisions made to retain the Commission and in the most recent amendments to the Act, where the obligation to observe government policy was only that; not an obligation to follow it. And that seemed to me to be a compliment to how the Commission was and is seen. And if I can use the language from the Yes, Minister programs we must be "doing all right".

I mention here too the professional relationship with the staff at Commerce. Kristen Berger is here and I'm pleased that Lorraine Field and Cara Bruder are here, and Mr Miles you have mentioned some of the issues that they and I have discussed on many occasions.

Can I thank in general terms the Commission staff over the many years that I have been here and the very positive and constructive relationship I've had first with John Spurling, the Registrar and now, with Sue Bastian, the Registrar and I thank them both before you all.

I have had a number of associates over the years, but for the purposes of this morning it has to be Jeanene Rodrigues-Smith, my associate for the last 11 years. Much more than an associate, because of the many administrative roles that the Chief Commissioner plays; it's not just being in court and not coming into court and so on, but other administrative matters as well. Jeanene comes into her own in such circumstances, including dealing with the many emails when I was Returning Officer of the Industrial Relations Society and I'm grateful to observe that there are times when I wasn't quite sure who was the Returning Officer; it was either Jeanene or me, and I could never quite work out which one it was. So, Jeanene, I thank you here before you all for your honesty and work ethic, your common sense and for your assistance to me throughout the years.

But all good things come to an end and I'm pleased to be farewelled from here in the presence of Gail and my two daughters, Helen and her husband Cillian, and Shauna, and my sister and husband, Leslie and Vic, and my niece, Julianne. And it's important to acknowledge the family, because sometimes they don't see me for times on end and I very rarely talk about what I do, but I'm pleased that they're here to hear this.

And also some friends who have known me from some very early years at the University of WA and who I still see on a regular basis and whose friendship means a lot to me. Kathy Digwood, who is here with her daughters, Claire and Miranda, both of whom I see smiling at the back and who have been in here on work experience from time to time and I well remember them.

And in fact I've – if I interrupt myself, I just remember Julianne, you came here on work experience once and locked the door, so we couldn't get out of the courtroom. I'm pleased that I remembered that.

Can I also then acknowledge Michael Corboy, who now must be referred to as his Honour Justice Corboy from the WA Supreme Court. But, Michael, I'm very, very pleased that you're here.

I'm delighted Rene Le Miere wanted to be here from my past as well. Now, his Honour Rene Le Miere, Justice of the WA Supreme Court. But he, and Ray Andretich, now Senior Assistant State Solicitor, we go back a long, long way to that university campus in the seventies.

I knew David Jones back then, and Ken Trainer and Russell Allen probably just as long, even if not from that particular connection. And it's at times like this that I think one values the long friendships that we've had.

It's been an enormous privilege to have been appointed to the Commission to deal with workplace disputes that we have in all workplaces. Most of us spend a substantial part of our lives in workplaces and I have thoroughly enjoyed the insight into people's lives and their workplaces in the last 28 years. I hope I have done well and I am heartened by your comments here today. It's true I have lived by the mandate that one must decide matters according to equity, good conscience and the substantial merits of the case.

But I am grateful to Meredith Hammat for restating this on the last occasion she was here, when she said "it's far more likely to be the important work of finding elegant solutions to the complex problems that we face" and I hope, Meredith, that some of my decisions met that test as well.

The last thing I want to refer to is to deal with a question that I am asked, about what I intend to do and can I answer it this way; most of you know that rowing is something of a passion for me. I came to it somewhat late in life and I am delighted to have here this morning my rowing partner of 18 years, Ron Gordon, and his partner, Renicia. Both of us, Ron and I, happen to be of a similar build and were just thrown into a double scull together by the coach, because we had similar physical size. And out of this has come this very enduring friendship.

Ron has this excellent quality of having absolutely nothing whatever to do with industrial relations and it's one of those reasons why I value the friendship. And I suspect that him hearing this morning about all of this other life that I have led is indeed, a revelation to him, but it's pleasing to me that he's there. So nevertheless, Ron, I am pleased that you're here.

Can I conclude by thanking you all again, for your comments.

Ron, it's time we went rowing.

And with that I conclude my comments.

SCOTT ASC: The Commission is now adjourned.

AT 11.15 AM THE MATTER WAS ADJOURNED ACCORDINGLY

INDUSTRIAL MAGISTRATE—Claims before—

2016 WAIRC 00305

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2016 WAIRC 00305
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 4 MAY 2016
DELIVERED : WEDNESDAY, 18 MAY 2016
FILE NO. : M 61 OF 2015
BETWEEN : KIERAN COUSENS

CLAIMANT

AND

CONSOLIDATED ICE HOLDINGS PTY LTD ATF THE WATSON FAMILY TRUST
 NO 2 T/A PERTH ICE WORKS

RESPONDENT

Catchwords : Alleged non-payment of pro-rata long service leave entitlement upon termination – Whether respondent had the obligation to pay pro-rata long service leave – Whether the respondent was a 'transmittee' within the meaning of section 6(4) of the *Long Service Leave Act 1958*

Legislation : *Long Service Leave Act 1958*

Result : Claim proven

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

Representation

Claimant : Mr A. Dzieciol (counsel) and with him Mr M. J. Collier instructed by the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

Respondent : Mr R. A. Watson, director, Consolidated Ice Holdings Pty Ltd

REASONS FOR DECISION

- 1 Mr Kieran Cousens (the claimant) alleges that his former employer Consolidated Ice Holdings Pty Ltd as Trustee for the Watson Family Trust No 2 T/A Perth Ice Works (the respondent) owes him pro-rata a long service leave entitlement in the amount of \$4,574.04. He asserts that he was not paid that entitlement upon his employment with the respondent ending in January 2011 and accordingly brings this claim pursuant to s 11 of the *Long Service Leave Act 1958* (LSL Act) in order to recover that amount.
- 2 The respondent denies that it is liable to pay the claimant pro-rata long service leave. It says that it employed the claimant only for a short period and that a pro-rata long service entitlement did not accrue to the claimant for the period of that employment. It says that the claimant's recourse (if any) is against some other entity and not the respondent.

Undisputed Facts

- 3 The business known as Perth Ice Works manufactures and supplies ice in Western Australia. On 2 July 2008 the respondent entered into an agreement to purchase that business from Perth Ice Works Pty Ltd. Settlement of the purchase occurred on or about 1 September 2008 at which time the respondent took over the business which it continues to run.
- 4 The claimant commenced working at Perth Ice Works in late October 2003 and continued in that employment until on or about 7 January 2011. He was working at Perth Ice Works when respondent took it over. During his employment at Perth Ice Works, the claimant variously worked as a 'bagger' and 'bagger and truck driver' and at the end of his employment was performing some administrative functions. When his employment ended his pay rate was \$19.29 per hour (see exhibit 1)
- 5 The claimant's employment by Perth Ice Works from 27 October 2003 until 7 January 2011 was for the uninterrupted period (save for authorised leave) of seven years and 73 days equating to 7.2 years.

Burden and Standard of Proof

- 6 Although the claimant carries the legal burden of proof for his claim, the respondent carries the legal burden of proving those things which it asserts.
- 7 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 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 [374].
- 8 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.

Contentious Factual Issues

- 9 The respondent's director, Mr Robert Athol Watson (Mr Watson), asserts that the claimant's performance in the months leading up to his employment ending was generally unsatisfactory and substandard. He says that the claimant did not turn up to work as required and that he claimed to have worked hours which he did not in fact work. Mr Watson asserts that the claimant was reprimanded about his conduct and performance.
- 10 The claimant denies each of those assertions.
- 11 It is unclear as to why Mr Watson has raised those issues given that he was unprepared to say that the claimant's employment was terminated by reason of serious misconduct. If termination had occurred by reason of serious misconduct, then that would have been a disentitling event (see s 8(3)(b) of the LSL Act) that would have precluded the entitlement to pro-rata long service leave.
- 12 The respondent has failed to produce any direct evidence that is capable of establishing those things which it asserts. Mr Watson's testimony concerning such issues was based entirely on hearsay. There was no documentary evidence produced to support his assertions.
- 13 I accept the claimant's evidence that the termination of his employment with the respondent was a planned event. Further, I accept that the claimant used his annual leave period in late 2010 to train and acquire skills which ultimately led him to securing alternate employment. Having secured that alternate employment, he resigned his employment with Perth Ice Works.
- 14 Acceptance of the claimant's evidence is supported by the fact that it is common ground that when the claimant's employment with the respondent ended the respondent held a 'send-off BBQ' for him. That contraindicates any notion of dismissal for serious misconduct.
- 15 I am satisfied that the claimant's employment came to an end in circumstances other than by his employer for serious misconduct.

The Issue

- 16 The issue to be determined in this matter is whether between 27 October 2003 and 11 January 2011 the respondent, for the purposes of the LSL Act, continuously employed the claimant.

The Law

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

8. Long service leave

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

- 18 The entitlement to long service leave is set out in s 8(2) of the LSL Act which states:
- (2) *An employee who has completed at least 10 years of such continuous employment, as is referred to in subsection (1), is entitled to an amount of long service leave as follows —*
- (a) *in respect of 10 years so completed, 8²/₃ weeks;*
- (b) *in respect of each 5 years' continuous employment so completed after such 10 years, 4¹/₃ weeks; and*
- (c) *on the termination of the employee's employment —*
- (i) *by his death;*
- (ii) *in any circumstances otherwise than by his employer for serious misconduct,*
- in respect of the number of years of such continuous employment completed since the employee last became entitled under this Act to an amount of long service leave, a proportionate amount on the basis of 8²/₃ weeks for 10 years of such continuous employment.*
- 19 Pro-rata long service leave is available to an employee who has not met the criteria in s 8(2) of the LSL Act, but has otherwise completed at least seven years' continuous employment.
- 20 Relevantly, s 8(3) of the LSL Act provides:
- (3) *Where an employee has completed at least 7 years of such continuous employment since the commencement thereof, but less than 10 years, and the employment is terminated —*
- (a) *by his death; or*
- (b) *for any reason other than serious misconduct,*
- the amount of leave to which the employee is entitled shall be a proportionate amount on the basis of 8²/₃ weeks for 10 years of such continuous employment.*
- 21 What constitutes continuous employment is set out in s 6 of the LSL Act. Of particular relevance to this case are s 6(4) and s 6(5) of the LSL Act which provide:
- (4) *Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called **the transmitter**) to another employer (herein called **the transmittee**) and an employee who at the time of such transmission was an employee of the transmitter in that business becomes an employee of the transmittee — the period of the continuous employment which the employee has had with the transmitter (including any such employment with any prior transmitter) 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.*

Determination

- 22 It is not in dispute that, as a result of the purchase agreement entered into on 2 July 2008, Perth Ice Works Pty Ltd (the transmitter) transferred its business known as Perth Ice Works to Consolidated Ice Works Holdings Pty Ltd (the transmittee). That occurred on or about 1 September 2008.
- 23 In accordance with what is provided by s 6(4) of the LSL Act, any employee of the transmitter at that time became an employee of the transmittee and any period of continuous employment that an employee had with the transmitter was deemed to be employment of the employee with the transmittee. In this instance the claimant's continuous employment with Perth Ice Works Pty Ltd was deemed to be employment of him by Consolidated Ice Holdings Pty Ltd.
- 24 At the time that the transmission of the business occurred, the claimant did not have any entitlement to pro-rata long service leave. That entitlement accrued much later. It accrued because all of the time the claimant had worked with Perth Ice Works Pty Ltd was deemed to have been worked for the respondent. Accordingly, for the purpose of s 8(1) of the LSL Act, the claimant is deemed to have been in continuous employment with one and the same employer, being the respondent.
- 25 I find that the claimant had, at termination, been in continuous employment with the respondent (as deemed by s 6(4) of the LSL Act for the purpose of s 8(1) of the LSL Act) for a period of at least seven years. Accordingly, at termination of his employment, the claimant was entitled to the pro-rata long service leave entitlement provided by s 8(3) of the LSL Act.
- 26 I accept that the amount that the claimant is entitled to in that regard is \$4,574.04 as calculated by Mr Joshua Dalliston (Mr Dalliston).
- 27 Mr Dalliston, an Industrial Officer of the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australia Branch (TWU), was called by the claimant. He produced a document (exhibit 5) which contains calculations he has made with respect to this matter. I accept that his calculations are accurate. I adopt his calculations.
- 28 I find that the claimant's pro-rata long service leave entitlement consists of 0.8667 weeks of long service leave for each year of service. Having accumulated 7.2 years of service his proportionate long service leave entitlement is 6.24 weeks (0.8667 weeks x 7.2 years).
- 29 Given that at termination, the claimant was paid \$19.29 per hour, amounting to \$733.02 per week (\$19.29 x 38 hours) it follows that he is entitled to \$4,574.04 (6.24 weeks x \$733.02 per week).

Sale Agreement and Deed of Variation

- 30 Before concluding it will be appropriate to make comment as to why the respondent defends this claim.
- 31 Mr Watson testified that when the respondent purchased the business, it ensured that Perth Ice Works Pty Ltd had paid all employees of Perth Ice Works all their entitlements, including wages, superannuation, annual leave and pro-rata long service leave. It appears that cl 20.1(a) of the Sale Agreement expressly provided that to be the case (see exhibit 6). Indeed it is clear that the settlement of the purchase of the business was delayed to ensure that such requirement was met. Further a deed of variation was entered into on 1 September 2008 (see exhibit 6), in which Perth Ice Works Pty Ltd and another covenanted that they would indemnify the respondent with respect to claims arising from the seller's failure to pay employee entitlements.
- 32 Mr Watson testified that prior to entering into any agreements, he liaised with an officer of the TWU to ensure that all workers' entitlements were known and paid by the seller. Mr Watson said that he also received professional advice about such issues. That is why he is now dumbfounded by this claim.
- 33 It is his belief that Perth Ice Works Pty Ltd had paid all existing employees their entitlements and that when the respondent took over the running of the business it did not have any carry over liabilities or contingent liabilities with respect to those employees who had worked for Perth Ice Works Pty Ltd.
- 34 Mr Watson says that the respondent cannot be held accountable for anything that occurred prior to the respondent taking over the business. His position is that, given that the claimant had only worked for the respondent for less than two years, the respondent cannot be liable to the claimant with respect to pro-rata long service leave. The respondent suggests that if there is a liability, then that should be met in whole or in part by the vendor. In his response lodged on 26 May 2015, Mr Watson asserted that the claimant sued 'the wrong person'. He believes that the vendor is responsible.
- 35 Mr Watson impressed as being an honest and forthright man. I accept that, at all material times, he honestly believed that Perth Ice Works Pty Ltd had paid up all of Perth Ice Works' employee liabilities and that the respondent would not assume any liability with respect to those employees.
- 36 It seems somewhat regrettably that Mr Watson's attention may not have been drawn to s 8(1) and s 6(4) of the LSL Act. Those provisions make it quite clear that the contingent qualification of an employee with respect to long service leave is transferred from the transmitter to the transmittee of a business.
- 37 When the respondent purchased the business there was no long service leave liability with respect to the claimant. There was only a contingent liability which would crystallise if the claimant remained in continuous employment for the qualifying period as is stated in s 8(2) or s 8(3) of the LSL Act. It was only when the claimant met the qualifying criteria for entitlement to pro-rata long service leave that the respondent's liability arose by virtue s 8(1) and s 8(3) of the LSL Act.
- 38 Mr Watson failed to appreciate, at the time that the respondent purchased the business, that the respondent could not, because of s 6(4) of the LSL Act, sever the claimant's previous service with the transmitter. The claimant's service for the purposes of long service leave qualification carried over and had to be taken into account for the purpose of the qualification required by s 8(3) of the LSL Act. Having met the criteria required by s 8(3) of the LSL Act, the claimant became entitled to the payment of pro-rata long service leave upon the termination of his employment. The respondent was obligated to make that payment.

Conclusion

- 39 It follows that the respondent must pay the claimant his pro-rata long service leave entitlement of \$4,574.04.

G. CICCHINI**INDUSTRIAL MAGISTRATE****2016 WAIRC 00308****WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT**

CITATION : 2016 WAIRC 00308
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 4 MAY 2016, THURSDAY, 5 MAY 2016
DELIVERED : WEDNESDAY, 18 MAY 2016
FILE NO. : M 62 OF 2015
BETWEEN : ANDREW TRICHET

CLAIMANT

AND

CONSOLIDATED ICE HOLDINGS PTY LTD ATF THE WATSON FAMILY TRUST
 NO 2 T/A PERTH ICE WORKS

RESPONDENT

Catchwords	:	Alleged non-payment of long service leave entitlement upon termination – Whether obligation to pay long service leave is that of the respondent or a previous owner of the business – Whether the respondent is a ‘transmittee’ within the meaning of section 6(4) of the <i>Long Service Leave Act 1958</i>
Legislation	:	<i>Long Service Leave Act 1958</i> <i>Industrial Relations Act 1979</i>
Result	:	Claim proven
Representation:		
Claimant	:	Mr A. Dzieciol (counsel) and with him M. J. Collier instructed by the Transport Workers’ Union of Australia, Industrial Union of Workers, Western Australian Branch
Respondent	:	Mr R. A. Watson, director, Consolidated Ice Holdings Pty Ltd

REASONS FOR DECISION

- 1 Mr Andrew Trichet (the claimant) alleges that his former employer Consolidated Ice Holdings Pty Ltd as Trustee for the Watson Family Trust No 2 T/A Perth Ice Works (the respondent) owes him \$5,430.71.
- 2 He says that the respondent failed to pay him his long service leave entitlement when his employment ended on 24 June 2011. He brings this claim pursuant to s 11 of the *Long Service Leave Act 1958* (LSL Act).
- 3 The respondent denies that it owes the claimant the amount claimed and says that if the claimant is owed anything what is owed is payable by the respondent’s predecessor in the business.

Facts

- 4 The business known as Perth Ice Works manufactures and supplies ice in Western Australia. On 2 July 2008 the respondent entered into an agreement to purchase that business from Perth Ice Works Pty Ltd. Settlement of the purchase occurred on or about 1 September 2008 at which time the respondent took over the business which it continues to run.
- 5 The claimant commenced working at Perth Ice Works in about October or November 2000 and continued in that employment until 24 June 2011. It is axiomatic that the claimant was working at Perth Ice Works when respondent took it over.
- 6 The respondent’s purchase of the business did not affect the business’ operation and it continued to operate normally without interruption. There was no disruption or interruption to the claimant’s employment by reason of the transmission of the business.
- 7 During his employment at Perth Ice Works the claimant variously worked as a ‘bagger’, ‘bagger and truck driver’ and at the end of his employment with the respondent was working at its Jandakot branch predominantly as a truck driver.
- 8 The claimant’s employment with Perth Ice Works ended on 24 June 2011 when he resigned. At termination the claimant was paid all of his entitlements, with the exception of his long service leave entitlement. His pay rate at that time was \$16.49 (see exhibit 2).
- 9 The claimant’s employment with Perth Ice Works was never interrupted other than by the taking of leave in the form of annual leave, sick leave (less than 15 days per year), and public holidays.

Is the Respondent Liable for the Claimant’s Long Service Leave Entitlement?

- 10 Section 8(1) and s 8(2) of the *Long Service Leave Act 1958* (LSL Act) provide:

8. *Long service leave*

- (1) *An employee is entitled in accordance with, and subject to, the provisions of this Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer, or with a person who, being a transmittee, is deemed pursuant to section 6(4) to be one and the same employer.*
- (2) *An employee who has completed at least 10 years of such continuous employment, as is referred to in subsection (1), is entitled to an amount of long service leave as follows —*
 - (a) *in respect of 10 years so completed, 8²/₃ weeks;*
 - (b) *in respect of each 5 years’ continuous employment so completed after such 10 years, 4¹/₃ weeks; and*
 - (c) *on the termination of the employee’s employment —*
 - (i) *by his death;*
 - (ii) *in any circumstances otherwise than by his employer for serious misconduct,*
in respect of the number of years of such continuous employment completed since the employee last became entitled under this Act to an amount of long service leave, a proportionate amount on the basis of 8²/₃ weeks for 10 years of such continuous employment.

- 11 What constitutes continuous employment is set out in s 6 of the LSL Act and includes periods of authorised leave taken.

- 12 More relevantly, with respect to this claim, s 6(4) and s 6(5) of the LSL Act provide:

- (4) *Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called **the transmitter**) to another employer (herein called **the transferee**) and an employee who at the time of such transmission was an employee of the transmitter in that business becomes an employee of the transferee — the period of the continuous employment which the employee has had with the transmitter (including any such employment with any prior transmitter) shall be deemed to be employment of the employee with the transferee.*
- (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.*
- 13 The pivotal issue in this matter is whether, for the purpose of determining eligibility for an entitlement to long service leave, the claimant was in continuous service of the respondent for a period of at least 10 years.
- 14 As indicated earlier it is not in dispute that by agreement entered into on 2 July 2008 Perth Ice Works Pty Ltd (the transmitter) transferred its business, Perth Ice Works, to the respondent (the transferee) on or about 1 September 2008.
- 15 Consequently, in accordance with what is provided in s 6(4) of the LSL Act, any employee of the transmitter at that time (which includes the claimant) became an employee of the respondent as transferee. Further, any period of continuous employment that the claimant had served for the transmitter was deemed to be employment of the claimant by the respondent. In other words, the respondent is deemed to have employed the claimant for the period leading up to the respondent taking over the business.
- 16 At the time that the transmission occurred, the claimant did not have an entitlement to long service leave. He accrued that entitlement later after he completed 10 years' service with Perth Ice Works. Even though he did not actually work for the respondent for 10 years he was nevertheless deemed to have done so.
- 17 In the circumstances, the respondent's employment of the claimant was deemed to have begun in October or November 2000 (s 6(4) of the LSL Act). Given that the claimant had worked for Perth Ice Works without interruption from that time until he resigned, he was deemed to have been in continuous employment for a period of at least 10 years with one and the same employer, being the respondent. When the claimant's employment ended the respondent was, by virtue of s 8(2) of the LSL Act, required to pay the claimant his long service leave entitlement.
- 18 Mr Joshua Dalliston, an Industrial Officer employed by the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (TWU), gave evidence concerning how the claimant's claim is calculated. He produced calculations that he made in that regard (see exhibit 1). I find his calculations to be accurate.
- 19 The claimant worked for the respondent (as deemed) for more than 10 years, but less than 11 years. He therefore had accrued a long service leave entitlement of 8.667 (8 2/3) weeks. When his employment ended, because he had not taken that leave, such entitlement became payable as a lump sum benefit.
- 20 His lump sum entitlement must be calculated based on his final pay rate which was \$16.49 per hour. I conclude that the claimant's weekly wage was \$626.62 (\$16.49 x 38 hours). It follows that the claimant is owed \$5,430.71 (8.667 weeks x \$626.62 per week).

Sale Agreement and Deed of Variation

- 21 The respondent's director, Mr Robert Watson (Mr Watson), testified that when the respondent purchased Perth Ice Works he insisted as part of the purchase agreement that the vendor pay, prior to the transmission of the business, all employees of Perth Ice Works their entitlements including wages, superannuation, annual leave and long service leave. Clause 20.1(a) of the sale agreement expressly provided for that (see exhibit 4). Indeed, settlement of the purchase of the business was delayed to ensure that was or would be done.
- 22 Mr Watson testified that, before entering into the sale agreement, he sought advice from lawyers and from the TWU so as to ensure that the vendor had or would meet the payment of all existing employee liabilities. As far as the respondent was concerned it was not assuming any liability with respect to employee entitlements incurred by the vendor prior to its sale of Perth Ice Works.
- 23 It is against that background that Mr Watson is now flabbergasted that this and other claims have been made against the respondent. To his mind, the respondent did not assume any of the vendor's employee liabilities or contingent liabilities. He therefore maintains that the respondent is not liable for any entitlements that have their genesis in the period prior to the respondent taking over the business.
- 24 He argues that because the claimant has only worked for the respondent for a period of about three years, the respondent cannot be held liable to pay his long service leave entitlement. Mr Watson says that if the claimant has a claim it is against Perth Ice Works Pty Ltd and not the respondent. He further says in the alternative, that if it is found that the respondent is liable to pay the claimant his long service leave entitlement, then Perth Ice Works Pty Ltd should be ordered to contribute to its payment.
- 25 Mr Watson impressed as being an honest and forthright man. I accept that he honestly believed that the respondent took over the business without any liability or contingent liabilities attaching to it with respect to the business' employees. Regrettably for him, he did not appreciate that s 8(1) and s 6(4) of the LSL Act, by operation of the law, deemed the claimant's prior service, and that of others, to be employment with the respondent for the purpose of long service leave entitlements. So as soon as the claimant and others attained the qualification required by s 8 of the LSL Act, the liability to pay them their long service leave entitlements became the respondent's obligation. That was the case irrespective of anything contained in the contract of sale or the deed varying that contract. Those documents could not exclude the respondent's liability for long service leave.

- 26 The claimant's prior service with Perth Ice Works Pty Ltd carried over when the respondent purchased the business and it must be taken into account for the purpose of calculating the claimant's qualification for long service leave. The respondent's liability with respect to the claimant's long service leave entitlement only arose when the claimant completed 10 years of service for Perth Ice Works. Thereafter, the respondent's obligation to pay out that entitlement crystallised when the claimant's employment ended. That obligation was the respondent's alone.
- 27 The claim for contribution from the Perth Ice Works Pty Ltd cannot succeed for three reasons. Firstly, because this court is not empowered to make such an order, secondly because the court cannot make an adverse order against someone not a party to these proceedings and thirdly because even if it was so empowered there is no legal foundation for it. Whether the respondent can seek indemnification from the vendor, pursuant to the terms of the Sale Agreement as varied by the Deed of Variation thereto is a matter with respect to which the respondent will need to seek legal advice.

Delay

- 28 Finally, the respondent complains that the claimant has taken an inordinate amount of time to bring his claim. I observe that there is no limitation period set in either the LSL Act or the *Industrial Relations Act 1979* with respect to the bringing of a claim pursuant to s 11 of the LSL Act.

Conclusion

- 29 I find that the respondent owes the claimant \$5,430.71.

G. CICCHINI

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2016 WAIRC 00316

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2016 WAIRC 00316
CORAM	:	COMMISSIONER D J MATTHEWS
HEARD	:	ON THE PAPERS
DELIVERED	:	FRIDAY, 20 MAY 2016
FILE NO.	:	B 169 OF 2015
BETWEEN	:	KASHLYN BRENNAN
		Claimant
		AND
		DOCUMENT MANAGEMENT EXPERTS PTY LTD
		Respondent

CatchWords	:	Application to amend application - Respondent objects - Amendments potentially matters outside jurisdiction - Application allowed - Jurisdictional issues to be dealt with at substantive hearing
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) section 6(c) & 26(1); <i>Industrial Relations Commission Regulations 2005</i> (WA) regulations 17(1) & 17(2); <i>Business Equipment Modern Award 2010</i> ; <i>Fair Work Act 2009</i> (Cth); <i>Superannuation Guarantee Charge Act 1992</i> (Cth)
Result	:	Application to amend allowed
Representation:		
Agent:		
Applicant	:	Mr C Sharpe
Respondent	:	Ms J Beeson

Reasons for Decision

- 1 On 9 October 2015 the claimant lodged a Notice of Claim of Entitlement to a Benefit Under a Contract of Employment with the Western Australian Industrial Relations Commission.
- 2 The Notice particularised the benefit under the contract of employment allegedly denied as "payment of remaining 3 months of my employment contract (13 July to 12 October 2015)."
- 3 The particularisation was predicated on the claimant's contention that he was employed on a fixed term contract for a six month period.
- 4 On 16 October 2015 the respondent lodged its Notice of Answer which contended, as its sole ground in opposition to the claim, that the claimant was not an "employee" as that term is defined by the *Industrial Relations Act 1979*.

- 5 That issue was litigated within the Western Australian Industrial Relations Commission and on 9 March 2016 Commissioner S J Kenner declared that at all material times the claimant was an employee of the respondent.
- 6 A conciliation conference was held before me on 20 April 2016. The matter did not settle and at that conference the claimant indicated that he would apply to amend his claim.
- 7 On 26 April 2016 a Notice of Application was lodged with the Western Australian Industrial Relations Commission attaching an "Amended Application".
- 8 Regulation 17(1) *Industrial Relations Commission Regulations 2005* provides as follows:
"A party to proceedings may apply to amend any document filed."
- 9 Regulation 17(2) *Industrial Relations Commission Regulations 2005* provides as follows:
"The application must be in writing to the Commission citing the distinguishing number of the proceedings to which it relates and must include —
(a) a statement setting out the amendment sought to be made; and
(b) the grounds for seeking leave to amend; and
(c) where the time for filing the document in accordance with these regulations has expired, reasons why leave should be granted."
- 10 The application does not strictly comply with regulation 17(2) but no objection is taken to this and it is clear from a review of the application lodged on 26 April 2016 that the claimant wishes to amend the claim to:
(1) Include additional contractual benefits alleged to have been denied if the claimant was employed on a fixed term contract; and
(2) Include an alternative claim for denied contractual benefits if the claimant was not employed on a fixed term contract.
- 11 In relation to the additional matters the proposed amended claim alleges that not only were wages not paid but also that payments for annual leave and superannuation arose as benefits under the contract and that these also have not been paid.
- 12 In relation to the claim in the alternative the alleged benefits under the contract which it is said have not been paid are a "termination payment in lieu of notice, accrued annual leave and employer superannuation guarantee contributions".
- 13 The application to amend is opposed by the respondent. By email dated 16 May 2016 the respondent opposes both the further particularisation of the claim which is predicated on there having been a fixed term contract, and the proposed alternative claim, on the grounds that the alleged benefits which are intended to be added (ie payment in lieu of notice, accrued annual leave and superannuation) do not arise under the contract of employment but rather arise under, variously, the *Business Equipment Modern Award 2010*, the *Fair Work Act 2009* (Cth) and the *Superannuation Guarantee Charge Act 1992* (Cth).
- 14 The email also opposes the proposed amendments on the basis that there was no fixed term contract and therefore there can be no claim for payment of the balance of the contract. As that has always been the claim of the applicant, and such a claim is not proposed to be introduced as a new matter by the amendments, that ground of opposition is misconceived and, for that reason, I do not need to deal with it.
- 15 That leaves the opposition to the proposed amendments on the ground that they seek to include as alleged contractual benefits matters which cannot be properly characterised as benefits arising under a contract because they are, at law, benefits arising under an award or a piece of Commonwealth legislation. This is essentially, and as the submissions of the respondent make clear, an objection to the amendments on the basis that the Western Australian Industrial Relations Commission has no jurisdiction to hear and determine the claims the proposed amendments seek to include.
- 16 There are three options open to me:
(1) Reject the application to amend on the papers before me;
(2) Hold a formal hearing on the question of whether the proposed amendments are within the jurisdiction of the Western Australian Industrial Relations Commission; or
(3) Allow the application to amend on the papers before me and reserve consideration of the jurisdictional issues to the substantive hearing of the claim.
- 17 In relation to (1) above I could not dismiss the application to amend, and the claims the subject of the proposed amendments, on the basis of the papers before me. This would amount to a summary dismissal of the claims. The issues have not been sufficiently ventilated in those papers for me to fairly do this.
- 18 In relation to (2) above I consider that it is inappropriate for 2 reasons as follow:
(1) it will cause delay in a jurisdiction where, pursuant to section 6(c) *Industrial Relations Act 1979*, matters not settled by consent are supposed to be determined with "the maximum of expedition"; and
(2) questions of jurisdiction, except in the clearest of cases, are best dealt with when there is an established evidential substratum and that either will not occur at a preliminary hearing or, if it does, this will potentially have to be done again at the substantive hearing.
- 19 I consider that, consistent with the objects of the *Industrial Relations Act 1979* and the guiding principles set out in section 26(1) *Industrial Relations Act 1979*, the best course is (3) above. That is, I consider that the application to amend should be allowed and the respondent should include its objections in its Amended Notice of Answer (with an Amended Notice of Answer being required in any event as the sole ground of the original Notice is no longer available to the respondent) and raise

and rely upon them at the substantive hearing. The substantive hearing will not be a long or overly complex one in my assessment. At the substantive hearing I will receive all the argument and evidence I need to decide any jurisdictional objections. Deciding them now, instead of at that time, would only add to the overall expense and inconvenience for the parties given that, even if the amendments were disallowed, there will still be a hearing on the original application.

2016 WAIRC 00315

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KASHLYN BRENNAN **CLAIMANT**

-v- **RESPONDENT**

DOCUMENT MANAGEMENT EXPERTS PTY LTD

CORAM COMMISSIONER D J MATTHEWS

DATE MONDAY, 23 MAY 2016

FILE NO/S B 169 OF 2015

CITATION NO. 2016 WAIRC 00315

Result Application to amend allowed

Representation (by correspondence)

Applicant Mr C Sharpe

Respondent Ms J Beeson

Order

HAVING heard Mr C Sharpe, for the applicant, and Ms J Beeson, for the respondent, on the papers;
AND HAVING given Reasons for Decision in which I determined to allow the application to be amended;
NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby;
ORDER that the claimant's application to amend the application be allowed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2016 WAIRC 00329

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JAKE CURNOW **APPLICANT**

-v- **RESPONDENT**

PET MAGIC CANNINGTON

CORAM COMMISSIONER T EMMANUEL

DATE TUESDAY, 31 MAY 2016

FILE NO/S U 56 OF 2016

CITATION NO. 2016 WAIRC 00329

Result Application dismissed

Representation

Applicant No appearance

Respondent No appearance

Order

WHEREAS on 31 March 2016 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 31 May 2016 for mention to show cause;

AND WHEREAS at the hearing on 31 May 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 dismissed for want of prosecution.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2016 WAIRC 00353

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2016 WAIRC 00353
CORAM : COMMISSIONER D J MATTHEWS
HEARD : THURSDAY, 2 JUNE 2016
DELIVERED : WEDNESDAY, 7 JUNE 2016
FILE NO. : U 73 OF 2016
BETWEEN : JOAN GOERLING
 Applicant
 AND
 DERBARL YERRIGAN HEALTH SERVICE
 Respondent

CatchWords : Termination of employment - Harsh, oppressive and unfair dismissal - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should be exercised - Acceptance of referral out of time allowed

Legislation : *Industrial Relations Act 1979* (WA) section 29(1)(b)(i), 29(2), 29(3)

Result : Application allowed

Representation:

Applicant : Mrs V Loveridge and with her Mr T Matsford

Respondent : Mr D Chibale

Reasons for Decision

- 1 The applicant filed her notice of claim of harsh, oppressive or unfair dismissal on 27 April 2016, which was 33 days after her employment had come to an end.
- 2 The applicant's application for the Western Australian Industrial Relations Commission to accept her claim out of time, pursuant to s 29(3) of the *Industrial Relations Act 1979*, was heard by me on 2 June 2016.
- 3 At the conclusion of the hearing I indicated that I would be making an order that the applicant's claim be accepted even though it was filed out of time. These are my reasons for that order, which I now make.
- 4 The applicant commenced work as a registered nurse with the respondent on 26 October 2009.
- 5 On 16 February 2016 the respondent wrote to the applicant informing her that there was to be a restructure of the respondent's operations at its Maddington site (where the applicant worked) and her position of registered nurse was to be replaced by a nurse practitioner position. The letter went on to inform the applicant that her employment would end on 24 March 2016. The applicant worked until this date.
- 6 Two affidavits were filed by the applicant in support of her application for the claim to be accepted out of time being an affidavit of the applicant herself affirmed 27 May 2016 and an affidavit of Thomas Christopher Matsford, an industrial officer with the applicant's union, the Australian Nursing Federation, Industrial Union of Workers Perth, sworn 27 May 2016.
- 7 A summary of the evidence contained in those affidavits is that the applicant raised concerns with the ANF about the genuineness of her redundancy but that those concerns did not become actionable, in the union's view, until the applicant became aware, on or about 26 April 2016, that the respondent had advertised for registered nurses at its Midland and East Perth sites on 5 April 2016.

- 8 It is plain from the notice filed by the applicant the day after, that is on 27 April 2016, that the discovery of the advertisement had prompted the unfair dismissal claim and was relied upon as a basis for the claim. The notice refers to the advertisement and states that, as a result of it, "I can see that Derbarl Yerrigan Health Service is recruiting registered nurses and I have discovered that my redundancy was not genuine".
- 9 At the hearing the applicant relied on the two affidavits referred to above.
- 10 The respondent at the hearing explained that the main opposition to the application for the claim to be accepted out of time was that the claim had little or no merit.
- 11 In answer to questions from me the respondent's representative, Mr Davies Chibale, explained that the respondent did not consider that the period of delay in filing the application was adequately explained by the affidavits filed but that, in any event, the respondent's main contention was that, if the facts were properly understood, the applicant's claim was misconceived.
- 12 Mr Chibale commenced explaining the facts as the respondent saw them from the bar table but once invited by me to do so had no hesitation in giving evidence in the box.
- 13 Mr Chibale's testimony was to the effect that the respondent had, as it had said it was going to, replaced the applicant with a nurse practitioner at the Maddington site. Exhibit 1, a chain of emails, certainly seems to establish that Wahida Ul Haq had commenced employment in the nurse practitioner role on 23 May 2016. Exhibit 1 also seems to establish that, while a registered nurse had continued to perform duties at the Maddington site from 24 March 2016 to 23 May 2016, this only occurred to cover for a later than expected start date for Ms Ul Haq.
- 14 I put to Mr Chibale for comment that part of the applicant's case was that the advertisement dated 5 April 2016 gave rise to a claim that, as at 24 March 2016, the last day of the applicant's employment with the respondent, the respondent must have known it needed registered nurses, even if they were to be employed at a different site than Maddington and on different terms to those upon which the applicant had been employed. I put it to Mr Chibale that the closeness of the dates was significant and asked for any evidence he could provide in relation to the issue.
- 15 Mr Chibale gave evidence that he thought the advertisement was necessitated by the resignation of registered nurses employed by the respondent and that he thought those resignations had occurred after 24 March 2016.
- 16 Mr Chibale did not give evidence of any particular prejudice that would be suffered by the respondent if the application was allowed.
- 17 At the completion of his evidence in chief I indicated that I was not intending to allow cross-examination of Mr Chibale as I was only required to make a rough and ready assessment of the merits and I had not been intending to invite the respondent to cross-examine the applicant or Mr Matsford. Mrs Loveridge was, appropriately in my view, content with this and there was no cross-examination.
- 18 The submissions of the parties focussed on the issue of the merits of the claim, which was appropriate given the way the hearing had progressed.
- 19 Mrs Loveridge stated that the applicant was not asserting that her registered nurse position at the Maddington site had not, in truth, been abolished (and replaced by a nurse practitioner position) but there was a claim, arguable on the material before me, that there was, as at 24 March 2016, other registered nurse positions available at other clinics run by the respondent and that it may have been unfair to not offer those positions to the applicant.
- 20 In response Mr Chibale said that he had been guarded in his evidence about the circumstances leading to the placement of the advertisement on 5 April 2016 because he did not have the supporting documentation to hand.
- 21 I said, and remain of the view, that this was appropriate but explained to Mr Chibale that it was difficult for me to decide the applicant's claim had little or no merit if the best evidence I had before me was that he "thought" the advertisement was placed as a result of resignations that occurred after 24 March 2016.
- 22 Mr Chibale sought an adjournment of the hearing at this stage to give him an opportunity to provide further documentary evidence. I refused that application, after an exchange between myself and Mr Chibale, on the basis that Mr Chibale had failed to present that evidence, at a clear opportunity to do so, because the respondent had failed to appreciate the basis of the applicant's claim rather than because there was not enough time for the respondent to have gathered the evidence. I held that the matter should not be further delayed because the respondent had not come prepared to meet a case that was plainly revealed by the notice and the two affidavits, having had time to do so.
- 23 In the result I indicated to the parties, and now hold, that the application be granted.
- 24 My reasons for doing so are as follows:
1. The delay was not great and has been adequately explained. The applicant only became aware on or about 26 April 2016 that the respondent had, as at a date soon after her employment ended, advertised vacancies in positions for which she was qualified. The notice was filed the day after. The applicant had been in contact with her union since a date soon after she received the letter from the respondent on 16 February 2016. The respondent would not have known about that contact but, in terms of the length of the delay in filing the notice, there can be no assertion made that the applicant at any relevant time "sat on her hands".
 2. There is no prejudice to the respondent if the claim is accepted out of time, beyond the usual prejudice of having to face a claim that a respondent in the ordinary event, would not have to face. I do not discount that prejudice is real prejudice, but in this case, given the other circumstances, something more would be needed for prejudice to impact on my decision.
 3. It cannot be said that the applicant's claim has little or no merit. The applicant's employment as a registered nurse ended, after seven years, on 24 March 2016. Less than two weeks later the respondent advertised vacant positions for registered

- nurses. In the absence of compelling evidence that the advertisement was only placed after the respondent had become aware of resignations of registered nurses on dates after 24 March 2016 I could not hold that the claim is without merit.
- 25 In all of the circumstances, taking into account the applicant's desire to have an arguable claim dealt with by the Western Australian Industrial Relations Commission a short time after that would have been her entitlement, and the respondent's failure to present compelling reasons why I should not allow that to occur, I consider that it would be unfair not to accept the claim out of time.
- 26 I will issue orders that the applicant's referral under s 29(1)(b)(i) be accepted out of time and that the notice filed 27 April 2016 stand as the notice of claim of harsh, oppressive or unfair dismissal.

2016 WAIRC 00355

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	JOAN GOERLING	APPLICANT
	-v-	
	DERBARL YERRIGAN HEALTH SERVICE	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	WEDNESDAY, 8 JUNE 2016	
FILE NO/S	U 73 OF 2016	
CITATION NO.	2016 WAIRC 00355	

Result	Application allowed
Representation	
Applicant	Mrs V Loveridge, as agent, and with her Mr T Matsford, as agent
Respondent	Mr D Chibale

Order

HAVING heard, Mrs V Loveridge, as agent, and with her Mr T Matsford, as agent, on behalf of the applicant and Mr D Chibale, for the respondent, on 2 June 2016;

AND HAVING given Reasons for Decision in which I determined to allow the applicant's referral under the *Industrial Relations Act 1979* section 29(1)(b)(i) be accepted out of time;

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

- 1) ORDER that the applicant's referral under the *Industrial Relations Act 1979* section 29(1)(b)(i) be accepted out of time.
- 2) ORDER that the notice filed 27 April 2016 stand as the notice of claim of harsh, oppressive or unfair dismissal.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2016 WAIRC 00356

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2016 WAIRC 00356
CORAM	: COMMISSIONER D J MATTHEWS
HEARD	: TUESDAY, 31 MAY 2016
DELIVERED	: WEDNESDAY, 8 JUNE 2016
FILE NO.	: B 62 OF 2016
BETWEEN	: NICHOLAS LIYANAGE
	Claimant
	AND
	JOHN KEVIN FLYNN
	Respondent

CatchWords	:	Claim for denied contractual benefits – No opposition to claim – Payment by instalment requested – Claimant amenable to instalments – Payment by instalment ordered
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) section 29(1)(b)(ii)
Result	:	Claim allowed, payment by instalments ordered
Representation		
Claimant	:	In person
Respondent	:	In person

Reasons for Decision

- 1 On 31 May 2016 I made an order in favour of the claimant in this matter. These are my short reasons for having done so.
 - 2 On 13 April 2016 the claimant lodged a claim for unpaid wages in the Western Australian Industrial Relations Commission. The amount particularised was “approx \$35,000”.
 - 3 By Notice of Answer and Counter Proposal lodged in the Western Australian Industrial Relations Commission on 10 May 2016 the respondent stated that he did not oppose the claimant’s claim.
 - 4 By subsequent correspondence the parties were able to agree that the correct amount of denied contractual entitlements was \$37,509.14.
 - 5 A hearing was necessary however because the parties were not able to agree matters relating to the payment of the amount of \$37,509.14. Absent such agreement it was necessary for the Commission to make an order and to hear the parties before making the order.
 - 6 At the outset of the hearing I explained to the respondent that the usual order would be that the entire amount be paid to the claimant forthwith or in a short period of time and that if an order in such terms was not to be made the onus was upon him to show cause.
 - 7 The respondent then gave evidence about his financial position. It is not necessary to record that evidence in these reasons in any detail. The respondent’s evidence that the only asset of any value that he held was the dental business in which the claimant had worked was not placed in issue by the claimant. Nor did the claimant dispute that the respondent’s earnings from month to month were not a great deal more than his reasonable expenditure. The claimant, much to his credit in my view given the way the respondent had treated him, expressed the view that the respondent had given him no reason to believe that he was not an honest man.
 - 8 The point of contention between the parties related to the sale of the dental business.
 - 9 The respondent is currently trying to sell the business and appears to have been making efforts to do so for some time.
 - 10 The respondent wants a certain price for the business based upon his desire to, out of the sale proceeds, clear his debts, which, including the debt to the claimant, total around \$200,000, and have \$100,000 left over for his retirement, which will commence upon the sale of the business. That is, the respondent is trying to achieve a sale price of \$300,000 for the business.
 - 11 The claimant expressed concern that the price the respondent wanted for the business was unrealistic and gave unfair primacy to the respondent’s desire to have funds available for his retirement over the settlement of his debts. That is, the claimant thought that a realistic sale price was a lower amount than \$300,000 and that if the respondent was prepared to sell at a realistic price this could happen, and happen soon, and he would then be paid the money he was owed.
 - 12 There was a clear basis in the evidence for the claimant’s position. The respondent admitted that the business had been professionally valued at a lower amount than the one he was seeking. However, the respondent gave evidence that he believed his strategy was not unrealistic and then revealed that negotiations with a potential buyer, at something close to his asking price, were well advanced.
 - 13 I could have made an order that \$37,509.14 be paid forthwith. The respondent could hardly have argued that this was unfair given that he has not paid the claimant for work done going back to March 2015. I note that it is particularly unfair that the claimant has not been paid as his pay was calculated at 40% of gross earnings. That is, the respondent has had the benefit of the gross earnings produced by the claimant’s labour without paying the claimant for the work done in producing those earnings.
 - 14 However, I have to accept that if I had made an order for payment forthwith, and had the respondent decided to comply with the order, this would have obviously required him to sell the dental business quickly, and that this would weaken his position in the current or other negotiations.
 - 15 In the event, and largely because of the generous attitude of the claimant for which I commend him, I decided not to go down that path and I made orders that the claimant receive some money now, further money over the next couple of months and the balance in September 2016, when the respondent says he will have completed the sale of his business. These orders mean that the claimant starts to receive some money from the respondent now with the entire amount being paid relatively soon and the respondent is not forced into a “fire sale” that could affect his retirement plans.
 - 16 I make my orders having every expectation that, of course, they will be complied with, as in any case, however I wish to add that the form of the order extends indulgences to the respondent that he had no right to ask for and which the claimant had no obligation to be accommodating in relation to. The claimant’s attitude, which has been important in the form of the order made, involves understanding for and trust in the respondent. It is to be hoped that that understanding and trust will not be abused.
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2016 WAIRC 00330

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION NICHOLAS LIYANAGE	CLAIMANT
	-v- JOHN KEVIN FLYNN	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	TUESDAY, 31 MAY 2016	
FILE NO/S	B 62 OF 2016	
CITATION NO.	2016 WAIRC 00330	

Result	Claim granted; payment ordered
Representation	
Applicant	In person
Respondent	In person

Order

HAVING heard Mr N Liyanage, on his own behalf, and Mr J K Flynn, on his own behalf, on 31 May 2016;

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

THAT the respondent pay to the claimant the sum of \$37,509.14 by instalments of \$3,500 with the first instalment to be paid on 1 June 2016, the second instalment to be paid on 1 July 2016, the third instalment to be paid on 1 August 2016 and the balance to be paid on or before 15 September 2016.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2016 WAIRC 00309

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CATALINA MARIA OSSA RUIZ	APPLICANT
	-v- DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	THURSDAY, 19 MAY 2016	
FILE NO/S	U 2 OF 2016	
CITATION NO.	2016 WAIRC 00309	

Result	Application dismissed
Representation	
Applicant	Mr R Ozario as agent
Respondent	Ms E McAdam and Ms K Johnson

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 parties agreed that the respondent would seek alternative employment for the applicant; and
 WHEREAS by email dated 13 May 2016 the applicant advised that the matter had been finalised;
 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 00337

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CRAIG RUMBLE	APPLICANT
	-v-	RESPONDENT
	STONE ECHO PTY LTD	
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 3 JUNE 2016	
FILE NO/S	B 8 OF 2016	
CITATION NO.	2016 WAIRC 00337	

Result	Application dismissed
Representation	
Applicant	Mr C Rumble on his own behalf
Respondent	Mr K Boyland

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on 4 April 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 letter on 25 May 2016 the Commission directed the applicant to advise the Commission of his intentions regarding the application by 15 June 2016; and
 WHEREAS by email on 31 May 2016 the applicant advised that he would “not be pursuing (his) claim” through the Industrial Relations Commission and he would be “pursuing the claim through other entities”;
 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 00320

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	ANTONINO TATI	CLAIMANT
	-v-	
	CORNELIUS CURTIN AT CANDY CUSTOM MEDIA P/L	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	THURSDAY, 26 MAY 2016	
FILE NO/S	B 101 OF 2015	
CITATION NO.	2016 WAIRC 00320	

Result	Claim granted; payment ordered
Representation	
Applicant	In person and on the papers
Respondent	In person and on the papers

Order

HAVING heard Mr A Tati, on his own behalf, and Mr C Curtin, for the respondent, on 6 November 2015 and 7 January 2016 and on the papers;

AND WHEREAS the parties reached agreement by consent in respect of the claim and that the agreement be reflected in an order;

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

THAT the respondent pay to the claimant the sum of \$7,072.04 by fortnightly instalments of \$300 with the first payment to be made on or before 3 June 2016 and the final instalment to be an amount of \$172.04

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Adam Cumalkovs	SGS Australia Pty Ltd	B 57/2016	Commissioner D J Matthews	Discontinued
Aeron Blundell-Camden	Director General, Department of Education	U 196/2015	Chief Commissioner A R Beech	Discontinued
Bianca Dawson	Graeme Booth	U 41/2016	Commissioner D J Matthews	Discontinued
Gregory Victor Kohlen	C.J. Beltrama and G.T. Ross (ABN 64 979 650 072) Trading as: Albany 4x4 Accessories	U 55/2016	Commissioner D J Matthews	Discontinued
Ingrid Jansen-Neeling	Spirit of Play Community School Incorporated ABN 88 445 425 948	B 39/2016	Commissioner D J Matthews	Discontinued
Maria Esther Moreno Pantoja	Yu Cockerill Dentist	U 35/2016	Commissioner D J Matthews	Discontinued
Maria Esther Moreno Pantoja	Yu Cockeril Dentist	B 34/2016	Commissioner D J Matthews	Discontinued
Sharon Mears	Douglas Cooper DC Plastic & Tooling	U 45/2016	Commissioner D J Matthews	Discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation Industrial Union of Workers Perth	Jason Whiteaker CEO Shire of Northam	Beech CC	C 33/2015	29/09/2015	Dispute re roster changes	Discontinued
Health Services Union of Western Australia (Union of Workers)	Minister for Health The Minister for Health is incorporated as the WA Country Health Service under section 7 of the Hospitals and Health Services Act 1927 (WA) and has delegated all the powers and duties as such to the Chief Executive Officer of the Department of Health, known as the Director General of Health	Scott A/SC	PSAC 27/2015	7/12/2015	Dispute re treatment of union member	Discontinued
Independent Education Union of Western Australia, Union of Employees	The Roman Catholic Archbishop of Perth, Loreto Education Council (The Institute of the Blessed Virgin Mary), The Roman Catholic Bishop of Bunbury	Beech CC	C 32/2015	13/10/2015 25/11/2015	Dispute re alleged breach of clause 23 of Catholic Schools Teacher Enterprise Bargaining Agreements	Discontinued
United Voice WA	The Director General of the Department of Parks and Wildlife	Scott A/SC	C 39/2014	18/12/2014 24/12/2014	Dispute re entitlements	Discontinued
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Irwin	Matthews C	C 8/2016	N/A	Dispute re bargaining	Withdrawn

PROCEDURAL DIRECTIONS AND ORDERS—

2016 WAIRC 00307

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

YVONNE ROGERS

APPLICANT

-v-

SHARYN O'NEILL

DIRECTOR GENERAL OF EDUCATION

RESPONDENT**CORAM**

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

WEDNESDAY, 18 MAY 2016

FILE NO.

U 96 OF 2015

CITATION NO.

2016 WAIRC 00307

Result	Direction issued
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Direction

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

WHEREAS the parties agree to Directions issuing for the conduct of the hearing of the matter and the Commission is of the opinion that the issuing of the Directions will assist in the conduct of the hearing;

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

1. THAT the matter be listed for a two day hearing on dates to be fixed.
2. THAT the parties file a Statement of Agreed Facts 7 days prior to the date of the hearing.
3. THAT the applicant file and serve any witness statements including supporting documents constituting the whole of the evidence in chief of the witnesses upon which she intends to rely 28 days prior to the date of the hearing.
4. THAT the respondent file and serve any witness statements including supporting documents constituting the whole of the evidence in chief of the witnesses upon which she intends to rely 21 days prior to the date of the hearing.
5. THAT the applicant file and serve an Outline of Submissions and a List of Authorities 14 days prior to the date of the hearing.
6. THAT the applicant file and serve an Outline of Submissions and a List of Authorities 7 days prior to the date of the hearing.
7. THAT there be liberty to apply.

[L.S.]

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Shire of Harvey (Meat Inspectors) Union Collective Agreement 2015 AG 22/2016	3/06/2016	Western Australian Municipal Administrative, Clerical and Services Union of Employees	The Shire of Harvey	Commissioner T Emmanuel	Agreement registered
Waikiki Private Hospital and United Voice WA Industrial Agreement 2016 AG 21/2016	23/05/2016	United Voice WA	Anthony James Robinson	Commissioner D J Matthews	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2016 WAIRC 00328

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 10 DECEMBER 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED ON BEHALF OF CHRISTOPHER GRIFFIN

APPELLANT

-v-

CHIEF EXECUTIVE, INSURANCE COMMISSION OF WESTERN AUSTRALIA

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
MR D PARKER - BOARD MEMBER
MR G BROWN - BOARD MEMBER

DATE

FRIDAY, 27 MAY 2016

FILE NO

PSAB 13 OF 2015

CITATION NO.

2016 WAIRC 00328

Result	Appeal dismissed
Representation	
Appellant	Mr A Jones as agent
Respondent	Mr R Wade of counsel and Ms S Beaman 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 on 16 February 2016 the Board convened a Directions/Scheduling hearing for the purpose of preparing for the hearing of the substantive appeal; and

WHEREAS on 25 May 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.

2016 WAIRC 00311

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 10 DECEMBER 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED ON
BEHALF OF SIMON LESKE

APPELLANT

-v-

CHIEF EXECUTIVE OFFICER, INSURANCE COMMISSION OF WESTERN AUSTRALIA

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
MR DAVID PARKER - BOARD MEMBER
MR GEORGE BROWN - BOARD MEMBER

DATE FRIDAY, 20 MAY 2016

FILE NO PSAB 11 OF 2015

CITATION NO. 2016 WAIRC 00311

Result	Appeal dismissed
Representation	
Appellant	Ms K Boey of counsel
Respondent	Mr R Wade of counsel and Ms S Beaman 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 on 16 February 2016 the Board convened a Directions/Scheduling hearing for the purpose of preparing for the hearing of the substantive appeal; and

WHEREAS on 18 May 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.

2016 WAIRC 00310

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 29 JANUARY 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER CORNELIUS

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD

ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN

MS C BARNARD - BOARD MEMBER

MR G LEE - BOARD MEMBER

DATE

FRIDAY, 20 MAY 2016

FILE NO

PSAB 3 OF 2015

CITATION NO.

2016 WAIRC 00310

Result

Appeal dismissed

Representation**Appellant**

Ms K Hagan of counsel

Respondent

Mr D Anderson 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 on 30 March 2015 the Board convened a Directions hearing for the purpose of preparing for the hearing of the substantive appeal; and

WHEREAS on 16 May 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.

RECLASSIFICATION APPEALS—

2016 WAIRC 00332

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2016 WAIRC 00332
CORAM : PUBLIC SERVICE ARBITRATOR
 COMMISSIONER S J KENNER
HEARD : WEDNESDAY, 11 NOVEMBER 2015, TUESDAY, 15 MARCH 2016
DELIVERED : WEDNESDAY, 1 JUNE 2016
FILE NO. : PSA 2 OF 2015
BETWEEN : ROBERT THOMAS
 Applicant
 AND
 DEPARTMENT OF RACING, GAMING AND LIQUOR
 Respondent

Catchwords : *Industrial Relations Law (WA) - Reclassification appeal - Whether significant net addition to work value - Principles applied - No significant change in work value on the evidence to warrant a reclassification of the position - Appeal dismissed - Order made*

Legislation : *Industrial Relations Act 1979 (WA)*

Result : Appeal dismissed

Representation:

Counsel:

Applicant : In person

Respondent : Mr L. Sgro and with him Ms S. Jovanou

Case(s) referred to in reasons:

United Voice WA v The Minister for Health [2014] WAIRC 01098; (2015) 95 WAIG 178

Reasons for Decision

- 1 Mr Thomas commenced employment with the Department of Racing, Gaming and Liquor in October 2012 in the position of Contracts, Procurement and Grants Officer (L5). The position is in general terms, responsible for the administration of the Department's contracts, grants and other procurement processes. It is also responsible for contributing to the management of the Department's contractual risk.
- 2 In November 2012, with the decommissioning of the Office of Shared Services, which was intended to provide a centralised administrative support service to government departments and agencies, a "Cluster" arrangement was formed between the Department of Racing, Gaming and Liquor, the Department of Local Government, the Heritage Council of Western Australia and the Equal Opportunity Commission. This involved these organisations sharing some administrative support resources. One aspect of this involved Mr Thomas performing some contract services for these other organisations in the Cluster. Mr Thomas maintained that this and other associated work, has since led to an increase in his responsibilities not recognised in the JDF for his position, and involves an increase in work value.
- 3 Mr Thomas sought an internal review of his position in July 2014. Following work done on this in late 2014, in February 2015 the internal review concluded that there was insufficient change in Mr Thomas's position to warrant a reclassification. As a consequence of the commencement of this appeal, by which Mr Thomas seeks a reclassification of his position from Level 5 to Level 6, through conciliation proceedings, the Department agreed to commission an independent evaluation of Mr Thomas's claims.
- 4 A Classification Review Report was completed by Dillinger Group Development on 28 August 2015. It recommended no change to Mr Thomas's classification at Level 5. In short, whilst acknowledging the key claim of Mr Thomas related to the formation of the Cluster in late 2012, and his contention that this has involved significant additional workload and responsibilities for his position, the changes in work value were insufficient to warrant a change in the classification of the position.
- 5 Accordingly, Mr Thomas now challenges both the internal and external assessments undertaken and seeks an order in his favour.

Contentions of the parties

- 6 First and foremost, Mr Thomas contended that it was the formation of the Cluster in late 2012 that primarily lead to an increase in responsibilities for his role. The consequence of this was that Mr Thomas has been required to provide contract management services to the Cluster as a group. Amongst other things, this involves the provision of ongoing advice. According to Mr Thomas, this has added a level of complexity to his responsibilities in that as previously intended he would only be dealing with one external body, the OSS. Instead he has been required to deal with several. Mr Thomas contended that the level of complexity added to his position has not been properly reflected in the JDF for his position.
- 7 Additionally, Mr Thomas contended that in submissions to both the internal and external assessments of his position, he maintained that he is now required to provide advice to the Cluster organisations on contract management and related matters. Furthermore, other aspects, such as the oversight of the subordinate position of Facilities and Procurement Officer involved additional work, for example the processing of credit card acquittals. In terms of other developments, Mr Thomas maintained that he is now required to liaise with two new system vendors. These are "Technology One" in relation to the Department's Financial Management Information System (FMIS) and "Aurion" in relation to the Human Resource and payroll system (HRIS).
- 8 As evidence of the contribution made in connection with the Cluster, Mr Thomas drew attention to the additional funding provided to his position on the formation of the Cluster arrangement.
- 9 In relation to the Dillinger Report, Mr Thomas contended that on the one hand there was recognition of the additional level of complexity in Mr Thomas's role, but on the other, there was a failure to regard it as a significant change. Part of the complexity, according to Mr Thomas, was the change to a more strategic approach to contract management and procurement. This has included significant savings in areas such as telephone systems and other office equipment used by the Department. Mr Thomas also made reference to his contribution to the Crown Towers project and to more efficient airline travel arrangements, such as the "Best Fare of the Day" policy of the Department.
- 10 One further aspect referred to by Mr Thomas was his overall leadership role and the failure of the external review to properly take these matters into account.

- 11 For the Department, it was contended that there was nothing put by Mr Thomas in the course of both the internal and external reviews, that established that the position occupied by him performed duties or has responsibilities, beyond those identified in the JDF for his position. Whilst acknowledging the importance of the tasks performed by Mr Thomas to the Department's operations, it maintained that Mr Thomas had not established that the work value assessment for his position had changed sufficiently, to warrant other than a Level 5 classification. The Department maintained that the revised JDF for Mr Thomas's position, endorsed by the Director-General of the Department on 7 September 2015, following the Dillinger Report, is a true reflection of the duties and responsibilities of Mr Thomas's position.

Principles to apply

- 12 The principles applicable to reclassification appeals in this jurisdiction are now well settled. As I said in *United Voice WA v The Minister for Health* [2014] WAIRC 01098; (2015) 95 WAIG 178 at pars 11-12:
- 11 The Commission has, in many cases, set out the relevant principles to apply in applications to reclassify positions, based on work value. Recently, in *Francis v WA Police* (2013) 93 WAIG 437 I said at par 38:
- 38 It is well settled in this jurisdiction, that in order to obtain a reclassification of a position, an appellant needs to demonstrate a significant net addition to the value of the work attached to a position, such as to warrant the creation of a new classification. Work value in this respect, embraces changes in the nature of the work, the skills and responsibility required or the conditions under which the work is performed. This fundamental principle is set out in the Commission's Wage Fixing Principles 2012 at Principle 7.2. A reclassification appeal, involves an assessment by the Commission of the work value of a position, at the time the appeal is lodged: *Health Services Union of Western Australia (Union of Workers) v Director General of Health in Right of the Minister for Health as the Metropolitan Health Service at PathWest Laboratory Medicine WA* (2008) 88 WAIG 475; *Wall v Department of Fisheries* (2004) 84 WAIG 3895.
- 12 The approach of the Commission has been to apply the test strictly. This means a substantial burden falls on an applicant in such matters. In relation to the requirement of "'significant' change, 'significant' does not necessarily mean 'major', but 'to a meaningful degree, not insignificant, not immaterial, not trivial'. To be significant a factor does not have to be dramatic, sudden or eye-catching. A change, as in this case, may occur subtly, gradually, even covertly but on examination prove to be significant": *In re Mineral Sands (State) Award* [1980] AR (NSW) 107. Significant change may be either evolutionary or revolutionary. Evolutionary change can be just as substantial and significant as revolutionary change: *Hospital Salaried Officers Association of Western Australia (Union of Workers) v Royal Perth Hospital and Others* (1987) 67 WAIG 554 at 557. Further, "Incremental or cumulative change, when taken as a whole, may constitute such a level of change that developments have exceeded those which would reasonably be expected": *Hospital Salaried Officers Association of Western Australia (Union of Workers) v Royal Perth Hospital* (2002) 83 WAIG 23.
- 13 For the purposes of this appeal, I will proceed in accordance with these settled principles.

Consideration

- 14 The Dillinger Report was Attachment 1 to the Department's documents filed in relation to this appeal. The reclassification report was prepared by Mr Radici, the Managing Director of Dillinger. Mr Radici gave evidence as to his background and experience which included work in the Public Sector Commission in the 1980s and human resources roles including for the Water Corporation. Mr Radici undertakes classification reviews for a range of large organisations in the public sector in this State. He outlined the general method in relation to the process of classification reviews. In this case, Mr Radici said he examined the history of the appellant's position. He considered the move from the proposed shared services model to the Cluster arrangement involving the work undertaken by Mr Thomas.
- 15 Furthermore, Mr Radici said that he undertook a review of the internal classification report conducted by the Department in early 2015. This included an examination of the original JDF for the position from March 2012. Mr Radici took into account the views expressed by Mr Thomas and also others, including senior officers of the Cluster agencies, to obtain an assessment of the nature of the work undertaken for those other agencies and what they require Mr Thomas to do. Additionally, Mr Radici said that the internal review undertaken by the Department did not update the JDF. He did so, resulting in the current 2015 JDF.
- 16 Mr Radici said that in his discussions with the representatives of the Cluster organisations as to the requirements placed on Mr Thomas's position, the focus is on contract administration rather than contract management. In terms of the types of contracts dealt with by Mr Thomas, it was Mr Radici's conclusion having examined the nature of the contracts concerned, that they were generally low to medium risk rated. The risk rating of contracts is a measure of the impact of the particular contract on an organisation and its complexity.
- 17 Overall, it was Mr Radici's view, having undertaken a detailed assessment of Mr Thomas's position, that in work value terms, although there had been some changes since 2012, they were not substantial. His overall assessment was that the basic role was the same and that the present Level 5 classification remained appropriate. Furthermore, in the Dillinger Report, a BIPERS assessment was undertaken, which led to an overall score of 325 over the ten relevant factors. This is towards the lower end of the range for a Level 5 classification.
- 18 A number of other issues were identified in the Dillinger Report. It was noted that in relation to Mr Thomas's Cluster activities, the work entails the two types of contracts they being the HRIS and the FMIS. The focus of the Cluster responsibilities is on the administration of contracts, the preparation of performance reports and the provision of advice to relevant Cluster personnel. The Dillinger Report noted that the provision of advice and support has always been a feature of the position as a key responsibility to the Department. There has however been an extension of this work to Cluster personnel.

- 19 The Dillinger Report identified that in terms of the management of contractual risk, there had been some change by way of the identification of risk, and informing the responsible manager of the Department or the Cluster agency. However, the Dillinger Report noted that the overall responsibility to deal with any risk, once identified, is the responsibility of the relevant manager.
- 20 In terms of leadership, the Dillinger Report concluded none was demonstrated. Rather, Mr Thomas's position entails supervision of the subordinate position. In terms of the procurement function, the Dillinger Report observed that there has been some change in focus from "development" to "drafting" of procurement policies which may involve some lesser work value, but this matter was not of any great significance. The education role remains the same.
- 21 In terms of overall experience, skills and competencies, the Dillinger Report concluded that there had been no change in these areas identified for the purposes of the work value review. As to working with other agencies and external providers, again the Dillinger Report concluded that Mr Thomas's position has always been required to develop relationships with external providers and other personnel and to this extent, no change had been demonstrated. There was however, an acknowledgement that there was some increased complexity in the task of providing advice and support to Cluster agencies in addition to the Department. That change was not deemed to be a significant change.
- 22 In terms of the overall level of autonomy and responsibility of the position, as I have already noted, the Dillinger Report concluded that in general terms, the contracts with which Mr Thomas's position deals can be identified as in the low to moderate risk category. Given that the Dillinger Report identified, from an assessment of comparable positions across the public sector in relation to contract management, low to moderate risk contracts generally attracting a Level 4 classification, and moderate risk contracts generally attracting a Level 5 classification, Mr Thomas's position was seen to be in the appropriate range.
- 23 As to the question of the additional resourcing referred to by Mr Thomas of .5 FTE on the position's creation, this factor was not regarded as a matter relevant to the assessment of the work value of the position. This is plainly correct.
- 24 There was a further matter identified by Mr Thomas as a part of his case, that being financial management. In particular, Mr Thomas emphasised the preparation and monitoring of a budget for the facilities and procurement cost centre. This included checking due diligence, and approval of payments etc. In response to this the Department contended that the preparation of budgets is a responsibility undertaken by the Deputy Director General, the Chief Financial Officer and the Director of Corporate Governance. It was contended that Mr Thomas's position does not prepare the budget or allocate funds to the cost centre. Rather, the responsibility of the position is to monitor budget expenditure and oversee individual financial transactions. It was further contended that these responsibilities are consistent with the JDF for Mr Thomas's position. In this respect, reference was made to the work related requirement to "demonstrate an ability to monitor financial information and provide reports on significant variation and trends". I note that this was in both the March 2012 and the September 2015 JDFs. I also consider this to be correct.
- 25 Furthermore, in relation to Mr Thomas's contention that in the performance of his position he has identified savings to the Department, it was submitted that whilst these results were very positive, they are consistent with both the former and current JDF's and are not matters relevant to an assessment of work value. This was also the view of Mr Radici when undertaking the Classification Review. Likewise I agree with these conclusions.
- 26 I have carefully considered all of the evidence and materials placed before the Arbitrator, both in support of and in opposition to the reclassification appeal by Mr Thomas. I have reviewed the bundle of documents filed by Mr Thomas in support of his appeal, but I have only referred to those matters material to work value considerations.
- 27 Having carefully considered the Dillinger Report, in light of the evidence relied on in these proceedings, in my opinion it was a comprehensive review of Mr Thomas's position and took into account all material considerations. The work value assessment undertaken by Mr Radici was consistent with established classification principles. Whilst recognising some change in work value, insufficient change was identified to warrant the reclassification of Mr Thomas's position. This was supported by the BIPERS assessment. Although this is only a tool to be used in the classification and reclassification process and is not of itself determinative, it adds to the overall information available from which judgments can be made.
- 28 Having regard to the matters raised by the Department, in response to Mr Thomas's appeal, whilst the work which he has undertaken and undertakes in relation to contract management and procurement is important and of significance to the Department, the onus is on him to establish there has been such a significant change, and a nett increase in work value, to warrant the creation of a new classification. I am not persuaded that this burden has been discharged by Mr Thomas. As I have mentioned above, I do not cavil with the general conclusions reached in the Dillinger Report which in my opinion, are fair and balanced and properly reflect a considered assessment of the work value attached to Mr Thomas's position as the Level 5 Contracts, Procurement and Grants Officer role within the Department.
- 29 Additionally, having reviewed the comparative positions taken into account by Mr Radici in his review, they appear to me to provide an appropriate basis for a comparative assessment with Mr Thomas's position. They are generally consistent with the confirmation of his position as correctly classified at Level 5.
- 30 In summary, there were two key aspects of the position relied upon by Mr Thomas in connection with his appeal. The first related to the development of the Cluster and the second related to what he regarded as enhanced financial management skills. As to the Cluster, it is to be acknowledged that no reference was made to this in the original JDF because of the decommissioning of the OSS for the public sector. The issue however is not the formation of the Cluster itself, but rather, whether as a consequence of it, Mr Thomas's position has undergone a significant change in work value. His submission that with the decommissioning of the OSS his position has become in effect "the OSS for the Department and for Cluster agencies" cannot be sustained.
- 31 First it is relevant to observe that the responsibility for Mr Thomas's position in relation to contracts and procurement is limited to the two systems, HRIS and FMIS. It was accepted by the Department that the position provides a valuable source of advice and guidance on contract and procurement for the Department and the Cluster. However, the conclusion of the Dillinger Report that the work primarily is involved in the administration of contracts is significant. From a review of both the March

2012 JDF and the revised JDF, the work of Mr Thomas in providing support and advice to the Department and the Cluster in relation to this, remains within the responsibilities of the JDF. This work forms part of the overall responsibility of the position to provide a centralised point of contact and to provide advice and support.

- 32 As to this factor too, it is within the responsibilities of the position to form and maintain relationships with “contractors and key stakeholders”. From the materials in evidence this has always been an important aspect of Mr Thomas’s position. This includes the required skills in order to achieve this objective.
- 33 It was recognised in the Dillinger Report that the Cluster did add some complexity to the requirements of the position. Naturally, the sphere of operation of the position has been widened somewhat. In this regard it was said in the Report at p 6:
- o The administering and monitoring aspects have been broadened to include the department's cluster partners but primarily focusing on financial and human resource management contracts. In discussions with a representative from the Department of Local Government and Communities and Department of The State Heritage Office, it was clearly indicated that they require the position under review to administer these two contracts and in this context be the primary contact point on issues such as ensuring financial commitments are met and providing performance reports. In terms of other contracts, both of these agencies use in-house staff to manage contracts. Their use of the position under review in contract and procurement processes has been in seeking advice on related matters. Having considered these comments and those provided by staff within DRGL I do not believe this is a significant change in responsibilities and duties.
- The position continues to be responsible for providing advice and support as related to contractual and procurement matters. Whether this is within the Department of Racing Gaming and Liquor or to other cluster partners, the type of advice and support is the same and is focussed on the administrative aspects associated with contractual and procurement processes.
- 34 I agree with this view. The requirement to perform an existing responsibility for a larger group of external stakeholders does not necessarily mean that the nature of the work has fundamentally changed, giving rise to work value considerations. As recognised in the Dillinger Report, this extension of work also has applied to the contract management aspect of Mr Thomas’s position. As contract management has always been and remains a key responsibility of the position, this extension of existing duties to the activities of the Cluster agencies, in the two areas of Mr Thomas’s responsibility, does not represent an increase in work value. It is rather a matter of work volume.
- 35 Thus, Mr Thomas’s submission that these aspects of the position have not been adequately recognised in the Dillinger Report or by the Department’s internal review is not correct. They were recognised but they were not considered to represent a change in work value sufficient to support reclassification. The change needs to be substantial. As noted above, it is also the case that these aspects of the position have been taken into account in the BIPERS assessment, which overall, indicated that the Level 5 classification for Mr Thomas’s position remains appropriate.
- 36 Finally, a further factor advanced by Mr Thomas in support of his contention to have his position reclassified, was a reference to “strategic procurement”. At the outset I note that in both the 2012 JDF and the revised JDF, there was no reference to “strategic” in relation to the procurement responsibilities. The change from 2012, where reference is made to “develop” to “draft” in the 2015 JDF does reflect change but is not of great significance. In other respects, this aspect of the position appears to be largely the same.

Conclusion

- 37 Whilst Mr Thomas performs an important role for both the Department and the Cluster, I am not persuaded that a significant change in work value has been demonstrated to warrant a reclassification of his position. I would therefore dismiss the appeal.

2016 WAIRC 00333

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ROBERT THOMAS	APPELLANT
	-v-	
	DEPARTMENT OF RACING, GAMING AND LIQUOR	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 1 JUNE 2016	
FILE NO	PSA 2 OF 2015	
CITATION NO.	2016 WAIRC 00333	

Result	Appeal dismissed
Representation	
Applicant	In person
Respondent	Mr L Sgro and with him Ms S Jovanou

Order

HAVING heard the appellant on his own behalf and Mr L Sgro and with him Ms S Jovanou on behalf of the respondent the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby dismissed.

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

[L.S.]

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2016 WAIRC 00334

REFERENCE OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION : 2016 WAIRC 00334
CORAM : COMMISSIONER S J KENNER
HEARD : WEDNESDAY, 20 APRIL 2016, TUESDAY, 31 MAY 2016
DELIVERED : TUESDAY, 31 MAY 2016
FILE NO. : OSH 2 OF 2016
BETWEEN : ANDRIES LUCAS HOFFMAN
 Applicant
 AND
 PALADIN ENERGY LTD
 Respondent

Catchwords : *Industrial Relations Law (WA) - Referral to Occupational Safety and Health Tribunal - Whether Tribunal has jurisdiction - Whether legislation has extra-territorial effect - Principles applied - Application dismissed for want of jurisdiction*

Legislation : *Industrial Relations Act 1979 (WA)*
Mines Safety and Inspection Act 1994 (WA)
Occupational Safety and Health Act 1984 (WA)

Result : Dismissed for want of jurisdiction

Representation:

Applicant : In person

Respondent : Mr T French of counsel and with him Mr J Cockerell of counsel

Case(s) referred to in reasons:

Andries Lucas Hoffman v Paladin Energy Ltd (2015) 95 WAIG 1436

Andries Lucas Hoffman v Paladin Energy Ltd (2016) 96 WAIG 121

Ray Douglas Parker v Mark Anthony Tranfield (2001) 81 WAIG 2505

Case(s) also cited:

Balfour v Travelstrength Ltd (1980) 60 WAIG 1015

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

Mr Darrin Grant v BHP Coal Pty Ltd (2014) FWCFB 3027

Reasons for Decision

Ex Tempore

- 1 The applicant Mr Hoffman was employed by the respondent Paladin Energy as its Engineering Manager at its Kayelekera Mine in Malawi. The respondent corporation, according to the earlier proceedings which I will come to shortly, has headquarters in Western Australia, but it seems to be common ground its mining operations for uranium are in overseas countries, including in Africa. Mr Hoffman was engaged on a contract ostensibly for a fixed term to run to January 2016 and a copy of that contract is an annexure to his written submissions which he has filed in these proceedings. That contract was brought to an end in February 2015 and as has been confirmed by the applicant before the Tribunal today, he seeks, effectively, the recovery of benefits to which he says he should have been entitled to up until January 2016, in addition to what he describes as a failure by the respondent to provide a medical examination.

- 2 This application has some background as I have mentioned. The applicant originally commenced proceedings for a denied contractual benefit before the Commission and by decision of 10 August 2015 that application was dismissed on jurisdictional grounds: *Andries Lucas Hoffman v Paladin Energy Ltd* (2015) 95 WAIG 1436; (2015) 95 WAIG 1439. A subsequent appeal to the Full Bench of the Commission by the applicant was dismissed on 10 February this year: *Andries Lucas Hoffman v Paladin Energy Ltd* (2016) 96 WAIG 121.
- 3 The applicant now brings the present matter before this Tribunal. As filed, the applicant's claim, as I have indicated and as has been confirmed by Mr Hoffman, seeks effectively the recovery of his denied benefits in addition to the additional matter I have referred to. The Tribunal had listed the application for mention at an earlier stage at which it expressed doubts as to its jurisdiction to deal with the applicant's claim. Accordingly, the matter was listed for show cause why it should not be dismissed today on jurisdictional grounds.
- 4 As I have already mentioned, the applicant filed a detailed written submission with annexures on 26 April 2016 which I have read. The applicant has also been given the opportunity today to make further oral submissions in support of his claim. The respondent was not required to file written submissions but has made brief oral submissions today, to the effect that the application should be dismissed, given the applicant's failure to identify a particular claim falling within the jurisdiction of the Tribunal.
- 5 For the following reasons, which I can relatively shortly state, in my view, the Tribunal has no jurisdiction to deal with this matter and the applicant's claim must be dismissed.
- 6 The applicant has made general submissions to the effect that the Tribunal's jurisdiction extends to common law entitlements of an employee and in the exercise of its general powers, in relation to the objects and application of the *Mines Safety and Inspection Act 1994* (WA) and the *Occupational Safety and Health Act 1984* (WA), the Tribunal can deal with his claim in relation to pay and other benefits. The applicant has referred to the objects of this legislation and also the powers of the Governor to make various regulations. Reference is also made in the written submissions to various discrimination provisions of the OSH Act. Also, reference has been made to relevant provisions of the Commonwealth constitution in connection with the contention that the respondent is a constitutional corporation. However, I do not apprehend that matter to be in dispute for the purposes of these proceedings.
- 7 Turning to the legislation specifically, that is the MSI Act and the OSH Act. First and foremost, the observation the Tribunal makes is whether that legislation can be regarded as having any extra-territorial effect, given the general presumption that legislation is not to operate extraterritorially. In that respect I refer to the learned authors Pearce DC and Geddes RS, *Statutory Interpretation in Australia*, (6th ed, 2006) at pars 5.5 to 5.7 inclusive. I also refer to a decision of the Industrial Appeal Court in *Ray Douglas Parker v Mark Anthony Tranfield* (2001) 81 WAIG 2505. Simply put, just because the applicant's contract of employment may refer to its terms being governed by the laws of Western Australia, is not the answer to the issue I have just posed.
- 8 On the face of it, both the MSI Act and the OSH Act apply to mining operations and workplaces in the State of Western Australia, unless the presumption against extra-territorial operation is to be rebutted. There is nothing in the MSI Act to suggest that it could apply, for example, to the applicant's former employment in Malawi. Therefore, I have some difficulty in seeing how the Tribunal can have jurisdiction in relation to occupational safety and health matters in the applicant's former workplace in Africa.
- 9 However, it is not necessary for the Tribunal to finally decide that question because even if the jurisdiction did extend to the applicant's former workplace, I am simply not satisfied that the applicant's claim or any specific aspect of it falls within the Tribunal's jurisdiction. It is important to recognise that the Tribunal's jurisdiction under both the MSI Act and the OSH Act is specific and is not general. That is, the Tribunal only has jurisdiction and power in relation to those specific matters set out in the legislation that the Parliament has determined that the Tribunal may deal with. The Tribunal does not have general jurisdiction to deal with everything contained in the legislation. The Tribunal may only deal with matters referred to it under s 51G(1) of the OSH Act and s 102(1) of the MSI Act.
- 10 Specifically in relation to the MSI Act, s 102(1) sets out the matters which can be brought before the Tribunal. In relation to s 31BA, that deals with matters such as reviews of decisions of the State Mining Engineer in relation to improvement and prohibition notices. In relation to s 55(6), that deals with matters in relation to consultation on safety and health issues for safety and health representatives. In relation to s 55A(4), that deals with an election scheme for safety and health representatives. In relation to s 56(11), that deals with other election matters for safety and health representatives. Section 59(1) of the legislation deals with disqualification of health and safety representatives. Section 62(1) deals with entitlements for safety and health representatives in relation to their performance and functions as such, or in relation to occupational health and safety training. Furthermore, ss 67F(1), (2) and (3) deal with disputes as to occupational safety and health committees.
- 11 Under s 74(2) disputes as to entitlements of employees, where they refuse to work in circumstances where their health and safety may be at imminent risk, is prescribed. Section 102AA deals with reviews of decisions by the State Mining Engineer made under the Regulations, as reviewable decisions. Section 68C deals with discrimination against safety and health representatives and, I add, as employee representatives, because they are representatives performing safety and health representative functions. Section 52 deals with appeals in relation to certificates of competency and s 86 deals with appeals in relation to mine survey matters. The relevant provisions of the OSH Act, in section 51G, set out a similar jurisdictional scheme in relation to these specific matters that may be referred to the Tribunal, which should be taken into account for the purposes of the determination of this matter.
- 12 What is very clear from a summary of the legislation is that the Tribunal's jurisdiction is specific. The Tribunal does not have a general and all-embracing jurisdiction under either statutory scheme.

- 13 So therefore, in my view, having considered the terms of the legislation and having regard to the specific matters that are before the Tribunal as confirmed by Mr Hoffman the applicant, in the proceedings today, it is difficult to see any basis on which he has established that his claim falls within any head of power under either statutory scheme in relation to the Tribunal's jurisdiction. In the absence of the applicant establishing that his claims fall within the specific matters that may be referred to the Tribunal, the Tribunal has no jurisdiction to deal with them.
- 14 The application must be dismissed for want of jurisdiction. There will be an order in those terms.

2016 WAIRC 00335

REFERENCE OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES

ANDRIES LUCAS HOFFMAN

APPLICANT

-v-

PALADIN ENERGY LTD

RESPONDENT**CORAM**

COMMISSIONER S J KENNER

DATE

TUESDAY, 31 MAY 2016

FILE NO/S

OSHT 2 OF 2016

CITATION NO.

2016 WAIRC 00335

Result Dismissed for want of jurisdiction**Representation****Applicant** In person**Respondent** Mr T French of counsel and with him Mr J Cockerell of counsel*Order*

HAVING heard the applicant on his own behalf and Mr T French of counsel and with him Mr J Cockerell of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984 hereby orders –

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

(Sgd.) S J KENNER,
Commissioner,

[L.S.]

The Occupational Safety and Health Tribunal.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2015 WAIRC 01083

DISPUTE RE ALLEGED TERMINATION OF CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESRICHARD VAN DONGEN AS TRUSTEE FOR THE F.R.A.C FAMILY TRUST, T/A L AND R
CARTAGE CONTRACTORS;

GRAEME SMITH, TRADING AS MARANATHA TRANSPORT;

VAN DONGEN HAULAGE PTY LTD;

CHANG TRANSPORT AND SCRAP METAL PTY LTD;

LARK HILL TRANSPORT PTY LTD

APPLICANTS

-v-

SIMS METAL MANAGEMENT LTD

RESPONDENT**CORAM**

COMMISSIONER S J KENNER

DATE

THURSDAY, 10 DECEMBER 2015

FILE NO.

RFT 16 OF 2015, RFT 17 OF 2015, RFT 18 OF 2015, RFT 19 OF 2015, RFT 20 OF 2015

CITATION NO.

2015 WAIRC 01083

Result	Direction issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr P Fisher and with him Mr D Brackstone

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicants and Mr P Fisher and with him Mr D Brackstone on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby directs –

- (1) THAT each party shall give an informal discovery by serving its list of documents by 31 January 2016.
- (2) THAT the parties file and serve an outline of the witness evidence upon which they intend to rely by no later than 29 February 2016. Copies of documents referred to in the outline should be annexed.
- (3) THAT the applicants and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 3 days prior to the date of hearing.
- (4) THAT the matter be listed for hearing for 2 days.
- (5) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2016 WAIRC 00130

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

PARTIES	THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL	
	RICHARD VAN DONGEN AS TRUSTEE FOR THE F.R.A.C FAMILY TRUST, T/A L AND R CARTAGE CONTRACTORS; GRAEME SMITH, TRADING AS MARANATHA TRANSPORT; VAN DONGEN HAULAGE PTY LTD; CHANG TRANSPORT AND SCRAP METAL PTY LTD; LARK HILL TRANSPORT PTY LTD	APPLICANTS
	-v- SIMS METAL MANAGEMENT LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	TUESDAY, 8 MARCH 2016	
FILE NO/S	RFT 16 OF 2015, RFT 17 OF 2015, RFT 18 OF 2015, RFT 19 OF 2015, RFT 20 OF 2015	
CITATION NO.	2016 WAIRC 00130	

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr N Mony de Kerloy of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicants and Mr N Mony de Kerloy on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby orders –

THAT applications RFT 16 of 2015, RFT 17 of 2015, RFT 18 of 2015, RFT 19 of 2015 and RFT 20 of 2015 be and are hereby joined and be heard and determined together.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2016 WAIRC 00327

DISPUTE RE ALLEGED TERMINATION OF CONTRACT
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION : 2016 WAIRC 00327
CORAM : COMMISSIONER S J KENNER
HEARD : TUESDAY, 8 MARCH 2016, WEDNESDAY, 9 MARCH 2016
DELIVERED : THURSDAY, 26 MAY 2016
FILE NO. : RFT 16 OF 2015, RFT 17 OF 2015, RFT 18 OF 2015,
RFT 19 OF 2015, RFT 20 OF 2015
BETWEEN : RICHARD VAN DONGEN AS TRUSTEE FOR THE F.R.A.C FAMILY TRUST, T/A L
AND R CARTAGE CONTRACTORS;
GRAEME SMITH, TRADING AS MARANATHA TRANSPORT;
VAN DONGEN HAULAGE PTY LTD;
CHANG TRANSPORT AND SCRAP METAL PTY LTD;
LARK HILL TRANSPORT PTY LTD
Applicants
AND
SIMS METAL MANAGEMENT LTD
Respondent

Catchwords : *Industrial Law (WA) - Owner-driver contracts - Request for competitive tenders - Whether respondent engaged in unconscionable conduct - Whether respondent failed to negotiate in good faith - Whether respondent misused its bargaining power in forcing applicants to reduce their rates - Principles applied - Parties were seeking to act in accordance with their commercial interests - Applicants in no different position to all owner-drivers seeking contracts - No obligation to offer fresh engagements - Respondent was not in a superior bargaining position - Not persuaded that respondent engaged in unconscionable conduct or contravened the obligation to negotiate in good faith - Applications dismissed*

Legislation : *Industrial Relations Act 1979 (WA)*
Owner-Drivers (Contracts and Disputes) Act 2007 (WA)
Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010 (WA)
Trade Practices Act 1974 (Cth)
Competition and Consumer Act 2010 (Cth)

Result : Applications dismissed

Representation:

Counsel:

Applicants : Mr A Dzieciol of counsel
Respondent : Mr N Mony De Kerloy of counsel

Case(s) referred to in reasons:

ACCC v Leelee Pty Ltd [1999] FCA 1121
ACCC v Simply No-Knead (Franchising) Pty Ltd (2000) 104 FCR 253
ACCC v 4WD Systems Pty Ltd (2003) 200 ALR 491
ASIC v National Exchange Pty Ltd [2005] FCAFC 226
Hughes Aircraft Systems International v Air Services Australia (1997) 146 ALR 1
Louisville Holdings Pty Ltd v Sims Group Australia Holdings Ltd t/as Sims Metal Management [2015] WAIRC 00178; (2015) 95 WAIG 408
Meudell v Mayor of Bendigo (1900) 26 VLR 158
Pratt Contractors Ltd v Palmerston North City Council [1995] 1 NZLR 469
Qantas Airways Ltd v Cameron (1996) 66 FCR 246
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234
South Sydney District Rugby League Football Club Ltd v News Ltd (2000) 177 ALR 611
Spencer v Harding (1870) LR 5 CP 561

Supaworld Pty Ltd (trading as Cousins Transport) v LN Price Partners Pty Ltd (ACN 053 962 299) (trading as Busselton Freight) [2015] WAIRC 00203; (2015) 95 WAIG 649

Case(s) also cited:

Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor [2002] WASC 286

Bitumen Transport Pty Ltd v Logiwest Express [2014] WAIRC 1369

Murphy v Overton Investments Pty Ltd (2004) 204 ALR 26

Reasons for Decision

- 1 The Tribunal has before it five applications against the respondent Sims Metal Management Ltd. The applications each concern owner-drivers who have, over a number of years, performed services for Sims in the cartage of scrap metal.
- 1 The claims as originally commenced, maintained that Sims breached the owner-driver contracts between it and the applicants by failing to provide reasonable notice of termination of the contracts. Furthermore, the applicants alleged that Sims, in relation to the request for a tender for the provision of scrap metal cartage services, engaged in unconscionable conduct under s 30 of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) and failed to negotiate in good faith as required by s 6 of the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* (WA). The applicants originally sought damages for the wrongful termination of the owner-driver contracts and additionally, damages for the alleged unconscionable conduct and failure to negotiate in good faith.
- 2 The applicants do not press the claim for damages for wrongful termination of the contracts. Whilst recognising that the Tribunal has previously found that the owner-driver contracts between owner-drivers and Sims for the provision of similar services, were not ongoing and each contract stood alone, the applicants maintained there are some distinguishing features in the present cases: *Louisville Holdings Pty Ltd v Sims Group Australia Holdings Ltd t/as Sims Metal Management* [2015] WAIRC 00178; (2015) 95 WAIG 408. Nonetheless, the wrongful termination claims were abandoned. The applicants each claimed damages for the loss of one years' earnings. L & R Cartage Contractors claimed \$87,400. Maranatha Transport claimed \$123,340. Van Dongen Haulage Pty Ltd claimed \$135,000. Chang Transport and Scrap Metal Pty Ltd claimed \$145,800 and Lark Hill Transport Pty Ltd claimed \$150,500 in damages. The total in damages claimed against Sims was \$642,040.
- 3 In brief, the applicants maintained that they have engaged in the provision of services as owner-drivers to Sims for many years, generally carting scrap metal to wharves for shipment overseas. In April 2015, Sims invited the applicants to submit tenders for the provision of services in the cartage of scrap metal. The applicants did so in about May 2015. The applicants were then advised that their tenders were not successful. Revised further tenders for services were submitted by the applicants to Sims in June 2015. It was contended that following some advice from Sims to at least one of the applicants, a further revision of the tenders by reducing rates by 10% was submitted. However, ultimately, the applicants were not successful in securing ongoing work.
- 4 As a result of these events, the applicants contended that Sims acted unconscionably. The unconscionable conduct was said to be by reason of the fact that the applicants had been providing services to Sims over many years and Sims had misused its bargaining power in forcing the applicants to reduce their rates. It was further contended in this regard, that Sims, in forcing the applicants to reduce their rates in the tender process, exerted undue pressure and engaged in unfair tactics as the rates required by Sims were not safe and sustainable rates, and were not rates at which the services could be provided, whilst meeting legal requirements.
- 5 Furthermore, the applicants contended that the conduct of Sims breached its obligation of good faith in relation to negotiations for the variation and/or renewal of the owner-driver contracts, as in effect, Sims required the applicants to bid against themselves in the tender process. Furthermore, Sims refused and/or failed to enter into meaningful negotiations with the applicants in relation to the tenders, whilst engaging in such discussions with other parties. This was a further basis on which the applicants alleged Sims' conduct was unconscionable and unfair.
- 6 Sims wholly denied the applicants' claims. It did not dispute that the applicants were owner-drivers for the purposes of the *OD Act* and that they have been engaged in the provision of services to Sims for a number of years. Sims however noted, consistent with the Tribunal's decision in *Louisville Holdings*, that the owner-drivers have provided these services on a stand-alone contract basis only. Sims further contended that during the course of the time over which the applicants have provided services to Sims, the applicants were able to undertake other work.
- 7 In late April 2015, Sims decided to engage in a competitive tender process for all of its transport service providers. The intention of Sims was to award contracts for services for a period of three years, rather than ad hoc arrangements as had been the case previously. The reason Sims embarked on a competitive tender process was in order to improve the efficiency of its services and also to reduce costs.
- 8 Sims denied that the tender process was in any way unconscionable or unfair. It maintained that the process was open and transparent and all owner-drivers were provided the opportunity to tender on a competitive commercial basis. Sims further said that the tenders were assessed against the criteria set out in the tender documents, and the successful tenderers were more competitive than the applicants. Sims therefore maintained that the applications should be dismissed in their entirety.

Unconscionable conduct and breach of good faith

9 As this case involves consideration of s 30 of the *OD Act* I set it out as follows:

30. Unconscionable conduct by hirers

- (1) A hirer must not engage in conduct that is, in all the circumstances, unconscionable with respect to an owner-driver in relation to the acquisition or possible acquisition by the hirer of services from the owner-driver under an owner-driver contract.

- (2) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether a hirer has contravened subsection (1), the Tribunal may have regard to the following —
- (a) the relative strengths of the negotiating positions of the hirer and owner-driver;
 - (b) whether, as a result of conduct engaged in by the hirer, the owner-driver was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the hirer;
 - (c) whether the owner-driver was able to understand any documents relating to the acquisition or possible acquisition by the hirer of services from the owner-driver under an owner-driver contract;
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the owner-driver (or a person acting on behalf of the owner-driver) by the hirer or a person acting on behalf of the hirer in relation to the acquisition or possible acquisition by the hirer of services from the owner-driver under an owner-driver contract;
 - (e) the amount for which, and the circumstances under which, the owner-driver could have provided identical or equivalent services to a person other than the hirer, including as an employee;
 - (f) the extent to which the hirer's conduct towards the owner-driver was consistent with the hirer's conduct in similar transactions between the hirer and other similar owner-drivers;
 - (g) the requirements of the code of conduct;
 - (h) the extent to which the hirer unreasonably failed to disclose to the owner-driver —
 - (i) any intended conduct of the hirer that might affect the interests of the owner-driver; and
 - (ii) any risks to the owner-driver arising from the hirer's intended conduct that are risks that the hirer should have foreseen would not be apparent to the owner-driver;
 - (i) the extent to which the hirer was willing to negotiate the terms and conditions of the acquisition or possible acquisition by the hirer of services from the owner-driver under an owner-driver contract;
 - (j) the extent to which the hirer acted in good faith;
 - (k) whether or not the owner-driver contract provides for the payment of any increases in the owner-driver's fixed and variable overhead costs (as defined in section 27(4)).

10 Furthermore, it is also convenient at this point to refer to s 6 of the Code which is as follows:

6. Parties to negotiate in good faith

- (1) In the negotiation of an owner-driver contract, or the variation or termination of a contract, the parties have a duty to negotiate fairly and in good faith but that does not prevent hirers and owner-drivers from acting in their own commercial interests.
- (2) In subsection (1) —

party means —

 - (a) the hirer; or
 - (b) an owner-driver or a group of owner-drivers,

that is involved in the negotiations, and includes any negotiating agent that is so involved.
- (3) This section in its application to a group of persons that is acting as a negotiating agent applies to each member of the group individually.

- 11 In *Supaworld Pty Ltd (trading as Cousins Transport) v LN Price Partners Pty Ltd (ACN 053 962 299) (trading as Busselton Freight)* [2015] WAIRC 00203; (2015) 95 WAIG 649, the Tribunal considered, for the first time, the unconscionable conduct provisions of the *OD Act*. In that case, the Tribunal referred to the comparable provisions of the former *Trade Practices Act 1974* (Cth) Part IVA and Part 2-2 of Schedule 2 – *The Australian Consumer Law* of the *Competition and Consumer Act 2010* (Cth) as guidance in the application of s 30 of the *OD Act*. Reference was also made to the relevant common law principles in relation to unconscionability and the leading cases.
- 12 For the purposes of these claims, I expand upon and develop these matters in more detail. I remain of the view that the terms of the *ACL* provide guidance to the Tribunal on the approach to the application of ss 30 and 31 of the *OD Act*. In this respect, ss 21 and 22 of the *ACL* are most apposite and the combined effect of these provisions is to not limit the concept of unconscionable conduct to what might be regarded as unconscionable for the purposes of the common law. By s 22 of the *ACL*, a number of considerations are set out that a court may take into account in assessing whether a corporation has engaged in unconscionable conduct. A comparison with ss 30(2) and 31(2) of the *OD Act* shows that these provisions are drafted in many respects, in almost identical terms, to those of the *ACL*.
- 13 Whilst ss 30(1) and 31(1) of the *OD Act* do not say, as does s 21(4)(a) of the *ACL*, that they are “not limited by the unwritten law relating to unconscionable conduct” (which means the Australian common law), given the expansion of the concept of unconscionability by the factors to be considered in ss 30(2) and 31(2) and its correspondence with s 22(1) of the *ACL*, I also consider that the *OD Act* provisions are not to be limited to the common law concepts of unconscionability. I therefore accept the submissions made by the applicants in this regard: *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253. I also consider, as for ss 21 and 22 of the *ACL*, that the concept of “unconscionable” in both ss 30(1) and 31(1) is not to be read down in accordance with equitable principles. However, the relevant conduct must still be characterised as unconscionable and

based on intentional or reckless acts: *ACCC v 4WD Systems Pty Ltd* (2003) 200 ALR 491. As was said by Selway J in discussing the scope of the former s 51AC of the *TPA* in *4WD Systems* at para 184-185:

[184] The ordinary or dictionary meaning of the word “unconscionable” was explained in *Hurley v McDonald's Australia Ltd* (2000) ATPR 41-741 at [22]:

For conduct to be regarded as unconscionable, serious misconduct or something *clearly unfair or unreasonable*, must be demonstrated — *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 179. Whatever “unconscionable” means in s 51AB and s 51AC, the term carries the meaning given by the *Shorter Oxford English Dictionary*, namely, actions *showing no regard for conscience*, or that are *irreconcilable with what is right or reasonable* — *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term “unconscionable” import a *pejorative moral judgment* — *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 283–4 and 298.

[185] In order to find that conduct is “unconscionable” it is necessary to do more than merely show that the behaviour is misleading or deceptive, or otherwise in breach of some other provision of the *TPA*. What is necessary is to show that the conduct is so unacceptable that it can properly be described as “unconscionable”. Normally it might be expected that behaviour would only be “unconscionable” if some moral fault or responsibility is involved. Normally it might be expected that this would involve either a deliberate act, or at least a reckless act. Mere unreasonableness or unfairness may not be sufficient, at least in the absence of some moral fault. This is why it was critical to the conclusion he reached in *Simply No-Knead* that Sunberg J was able to find an “overwhelming case of unreasonable, unfair, bullying and thuggish behaviour”. Of course, those words are not a definition of “unconscionable”. But having made that finding it is quite apparent that the behaviour could properly be characterised as “unconscionable”.

- 14 Taking appropriate guidance from the *TPA* and *ACL* cases, it is first necessary for a hirer under s 30(1) to “engage in conduct”. Unlike in the former *TPA*, in s 4(2)(a) of the *CCA* there is a definition of “engage in conduct” which includes “doing or refusing to do any act”. I consider that such a definition provides some assistance and is generally consistent with the ordinary and natural meaning of the phrase to “engage in conduct”. I therefore propose to adopt this approach for present purposes. Also, for the purposes of ss 30(2) and 31(2) of the *OD Act*, the Tribunal “may have regard to”, without in any way being limited by them, the various factors set out. This simply means the Tribunal may consider or take these matters into account: *ACCC v Lelee Pty Ltd* [1999] FCA 1121.
- 15 For the purposes of s 30, I also take guidance from the *TPA* and *ACL* cases as to the general notion of “unconscionable” as referring to conduct or behaviour that is not done in good conscience: *ASIC v National Exchange Pty Ltd* [2005] FCAFC 226. The courts have, in applying the terms of ss 21 and 22 of the *ACL*, attempted to describe unconscionable conduct in various ways. In Lexis Nexis *Halsbury's Laws of Australia* (at 7 January 2015) “(C) Unconscionable Conduct” [100-263] it is observed that:

Judges have described unconscionable conduct under section 21 of the *ACL* as ‘serious misconduct, something clearly unfair or unreasonable’,¹⁷ ‘[s]howing no regard for conscience; irreconcilable with what is right and reasonable’,¹⁸ revealing ‘a high level of moral obloquy’,¹⁹ being conduct ‘of such a type as to be deserving of significant moral opprobrium’.²⁰ It follows that mere unreasonableness or unfairness is unlikely to be sufficient, at least in the absence of some moral fault.²¹ Mere reliance on the terms of a contract,²² or a mere breach thereof,²³ cannot, without something more, therefore constitute unconscionable conduct; a contravention requires some circumstance other than the mere terms of the contract itself that renders reliance on, or breach of, those terms unconscionable.²⁴ Similarly, debt collection processes, including the threat of proceedings, are not of themselves unconscionable (including when carried out by a debt collector), but may traverse into unconscionability where they involve false assertions.²⁵

In each case, the relevant conduct against conscience must be assessed by reference to the norms of the society in issue,²⁶ which conduct is not divorced from the context wherein it occurs.²⁷

- 16 Additionally, whilst it is made in relation to s 20(1) of the *ACL*, I consider some regard can be had to the following commentary in Lexis Nexis *Halsbury's Laws of Australia* (at 7 January 2015) “(C) Unconscionable Conduct” [100-260] when considering the conduct of the parties in this case. It is said:

In any event, consistent with the ‘unwritten law’, there can be no finding of unconscionable conduct in this context where the parties are experienced operators, accustomed to making commercial judgments, and acutely aware of their own interests and how to advance them.¹² A distinction exists between parties who adopt an opportunistic approach to strike a hard bargain and those who act unconscionably.¹³

- 17 As to the requirement imposed on the parties to negotiate “fairly and in good faith” under s 6 of the Code, no definition is included in the Code in relation to these concepts. However, given that s 6 applies to the negotiation, variation or termination of an OD contract, I consider that the relevant contractual principles in relation to what has become regarded as the “duty of good faith” can provide some assistance. In short, in appropriate cases, this principle imposes a general obligation on parties to a contract to act fairly and reasonably: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 per Priestley JA at 268. Importantly, and as is recognised in s 6(1) of the Code itself, this does not mean that a party cannot act in its own self-interest: *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611.
- 18 In terms of remedies, on a finding of unconscionable conduct by a hirer or an owner-driver under ss 30 or 31 of the *OD Act*, the Tribunal has a broad range of powers available to it under s 47(4). These include damages (including exemplary damages), and orders in the nature of mandatory or prohibitory injunctions.

19 Having set out what I consider to be the approach to s 30 to adopt in this case, I now turn to consider the evidence.

The tender

20 Tenders in both commercial and government enterprises are common place and a normal part of doing business in the acquisition of goods and services. In contractual terms a tender is generally no more than an offer by the tenderer to the person who called for tenders, as offeree, which the offeree may accept, but is not generally obliged to do so: *Meudell v Mayor of Bendigo* (1900) 26 VLR 158; *Spencer v Harding* (1870) LR 5 CP 561. As to whether a particular tender process itself gives rise to contractual obligations will turn on its own facts: *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 citing *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469. It was not argued by the applicants in this case and I am not in any event persuaded that the tender process resulted in contractual obligations as part of that process, prior to the award of cartage contracts. It also appeared to not be in dispute that the applicants are experienced operators in the transport industry and the tendering process was not something foreign to them.

21 Mr Della was a contractor to Sims for about 12 years. He operates the business Lark Hill Transport Pty Ltd. Mr Della described the system of contracting between him and Sims based on loading scrap metal onto ships and various locations throughout the State. A subcontract agreement was prepared for each ship. Its terms specified the ship to be loaded, the approximate tonnages and the date of the start and finish of the loading operations. It seemed to be common ground that the work involved long working days with an early start and often a late finish to ensure a ship was loaded prior to sailing. Whilst Mr Della testified that he signed the first few subcontract agreement documents, he did not sign them all the time. The same system of work continued however. Mr Della did understand that this system, following a case heard by this Tribunal, meant that each ship loading operation represented a separate contract and that Sims was able to terminate the engagement after each ship loading job.

22 Mr Della referred to a meeting with Mr Brackstone of Sims, in about March 2015. Mr Brackstone told the drivers present that Sims was looking to tender all of the transport services work out. He referred to the fall in the price of scrap metal and Mr Della acknowledged this was clearly a factor for Sims. Mr Brackstone also referred to the need to look for better ways to undertake the work. Mr Della said that some safety issues were raised by some of the drivers in the course of the meeting. Also raised and discussed, was Sims' proposal to relocate a loading point from Fremantle to the Kwinana Bulk Terminal. This presented some issues in relation to access by "pocket road trains" in particular.

23 A little later in April 2015, Mr Della testified that he received a request for tender document from Sims. Mr Della said that he prepared a tender based on the invitation that he received. A copy of the request for tender was exhibit A2. Mr Della said that he still saw some problems with the operation in relation to demurrage; possible overloading and some other safety concerns, which he considered had not been resolved by that time with Mr Brackstone. Also, Mr Della noted that under the request for tender, Sims was no longer going to be responsible for damage to owner-drivers' plant and equipment or tyres. He accepted however, as did all of the applicants, that part of the tender approach they adopted was to lodge tenders on the same terms and based on their current rates.

24 The current rates were set out in exhibit A1. This was said by Mr Della and others, to be because of some of the problems previously mentioned to Mr Brackstone regarding access to the Kwinana Bulk Terminal and other issues. A copy of Mr Della's tender was exhibit A3. In addition to the current rates for haulage of scrap, Mr Della also included costs for demurrage and price escalation by CPI movements, in addition to a fuel levy to apply from time to time. Mr Della understood that Sims intended to award contracts for three years, which was better than the ship by ship arrangements then in place.

25 After submitting his tender, Mr Della testified that Sims requested he tender again, but on the basis of cartage rates per tonne only. This time, Mr Della said he made no provision for demurrage or damage to equipment and removed the reference to the transporting of empty bins from Bunbury to Perth, which was in his first tender. In other respects, after discussing the matter with the other applicants, Mr Della decided to leave the quoted rates the same as in the first tender. His second tender dated 29 June 2015, was exhibit A5. The letter of request from Sims for contractors to re-tender was exhibit A4. Mr Della's second tender was attached to an email he sent to Mr Brackstone which in part said:

Hi David, please find attached rates as requested ,based on current operational procedures and no rate rises in the past 12 yrs. I am happy to leave rates as they are and review them when the new yard is operational.

Based on figures of the last six boat (sic) that we have done these rates are only marginal when you take into account of the hours spent doing them, damage to trailers and tyres ,the last damage bill to my truck that was damaged by DODDS was \$24,000 which they payed (sic)

I can understand that cost (sic) have to be cut to make a profit these days, but there is a bottom line to every thing and talking for myself i can not justify working and sleeping in a truck for 24 hrs a day and see nothing for it is just not good business in my book

So if 12 years of reliable service doesn't count for any thing then i don't know what is

thank you for reading this any way

26 Shortly after submitting the second tender, Mr Della testified that he heard from another applicant, who he thought was Mr Ninnis, that Mr Brackstone had mentioned that if those owner-drivers who had yet to be successful in being awarded a contract, reduced their cartage rates by 10%, they would "be in the ballpark" with their tenders. Some discussion took place amongst the drivers, including the other applicants. On the strength of this comment said to have been made by Mr Brackstone, Mr Della testified that he did drop his rates "a bit" but not by a full 10%.

27 Mr Della submitted his revised third tender on rates of cartage only, by email of 2 July 2015, a copy of which was exhibit A6. After this revised tender was lodged with Mr Brackstone, Mr Della said that he did not hear further from Sims. No one from the company spoke to him about his revised prices in particular. Not long after this, Mr Della received a letter from Sims dated 16 July 2015, informing him he was not successful in the award of a contract. A copy of this letter was exhibit A7. In relation

- to his third tender, Mr Della testified that he put in what he regarded as his “best price”. He did say however, that there was room for discussion with Sims if necessary.
- 28 Mr Leonardus Van Dongen operates Van Dongen Haulage Pty Ltd and has performed services for Sims for about eight years. He testified that in initial meetings with Mr Brackstone in March and April 2015, Mr Brackstone made the point to those present that because of the economic situation facing the business, Sims had to seek a reduction in rates for its transport services. In these discussions, Mr Van Dongen confirmed, as was stated by Mr Della, some ongoing safety issues were raised. Additionally, Mr Van Dongen also confirmed that access issues to the Kwinana Bulk Terminal by road trains was also a topic of discussion. Mr Van Dongen was of the view that because of this issue in particular, Mr Brackstone seemed to agree with the owner-drivers then present that it may be best to resolve the access issue to the Kwinana Bulk Terminal prior to Sims going out to tender for transport services.
- 29 When the request for tender was received not long after, Mr Van Dongen said he discussed it with the other owner-drivers. Mr Van Dongen proposed to submit the existing prices, as set by Sims, in his tender. He said that the decision by Sims to go to tender and the tender process was not new to him, as he saw it as a part of doing business. Mr Van Dongen testified that his tender was based on what he considered to be safe and sustainable rates. He acknowledged that the owner-drivers had an option not to tender for work, if he considered this was not so. Mr Van Dongen also testified that he did not seek any clarification from Sims as to aspects of the tender itself.
- 30 As with Mr Della, Mr Van Dongen referred to receiving exhibit A4 from Sims, being the request for a revised tender on rates per tonne only. Again Mr Van Dongen discussed this development with Mr Ninnis and others. A decision was taken, according to Mr Van Dongen, to maintain the existing rates. A little later, when Mr Van Dongen heard the same rumours referred to by Mr Della about price, and following a discussion with his brother, who is the principal of L & R Cartage Contractors, another applicant in these proceedings, Mr Van Dongen decided to put in a revised tender to reduce his rates. This was based on what he was told by his brother that a 10% reduction was “about where tenderers needed to be”.
- 31 Subsequently Mr Van Dongen confirmed also receiving a letter from Sims, informing him that his tender was not successful.
- 32 Mr Smith is the principal of Maranatha Transport. It has provided services to Sims for about 13 years. The business operates a pocket road train with a bogie, two trailers and a dolly. Mr Smith confirmed the rates provided by Sims in accordance with the contract document (exhibit A1) but said that he had not signed these documents on each occasion over the last six months or so. Reference was made by Mr Smith in his evidence to a meeting between the owner-drivers and Mr Brackstone at the “Blackpatch” at the wharf. Mr Brackstone told the group that there was a need for some changes including a reduction in prices. In relation to a tender proposed, Mr Smith said Mr Brackstone told those present that the lowest tender would not necessarily get a contract. According to Mr Smith, Mr Brackstone also said that he wanted to keep existing drivers.
- 33 As with the other applicants, Mr Smith said that access issues for pocket road trains at the Kwinana Bulk Terminal were a topic of discussion, as were some safety and loading issues.
- 34 A further meeting took place shortly after, between the applicants and Mr Brackstone, after which Mr Smith thought that the tender may not go ahead until later, possibly in July 2015, because of the matters that had been raised earlier. However, Mr Smith then received the request for tender from Sims. He submitted his tender (exhibit A17) based on the then existing rates. A request for a re-tender was received by Mr Smith as for the others (exhibit A4). Mr Smith responded with his second tender (exhibit A18) as with the others, Mr Smith included the same rates per tonne as in his first tender. While Mr Smith testified that he did discuss his tender responses with the other applicants, he said he did not know what rates they had proposed. Mr Smith agreed that based on the rates submitted, it would be reasonable for Sims to conclude that they were his most competitive rates for the work to be performed. Despite this, Mr Smith also accepted that because of the first two tenders, he may have been in trouble. He should put in a revised third tender, containing a reduction of rates by about 10%, as was suggested by Mr Brackstone, so he could be more competitive.
- 35 The final witness for the applicants was Mr Ninnis. He has conducted business with Sims for about six or seven years as Chang Transport and Scrap Metal Pty Ltd. Mr Brackstone informed him along with the other owner-drivers of the need for a “cut” and that there would be a tender. A little later, Mr Ninnis spoke to Mr Brackstone and requested a meeting between him and the other applicants, which included another owner-driver. Mr Ninnis confirmed that a range of issues were discussed with Mr Brackstone including some safety matters and access to the Kwinana yard by pocket road trains. The proposed tender process was also mentioned, including whether there would be guaranteed tonnages and what the situation was with respect to demurrage. Mr Ninnis said that he thought, along with the other applicants, that the proposed tender might be delayed. Mr Ninnis also made reference to the contract document for each ship loading job (exhibit A1). Mr Ninnis said that he used to sign these each time but stopped doing so after the *Louisville Holdings* case.
- 36 Once the Sims tender document was received (exhibit A2), Mr Ninnis said that he considered there was not sufficient information provided on which to properly base his proposal. He referred to there being no minimum tonnages specified; the issue of the problem of access to the Kwinana Bulk Terminal and whether one or two trailers were to be used, amongst other matters. He discussed the request for tender with the other owner-drivers. It was decided because of these various concerns, to submit tenders based on the current rates paid by Sims. This was so despite Mr Ninnis accepting that no minimum tonnages were specified under the previous ship by ship system. Under the former arrangements, no demurrage was payable either. As to this, Mr Ninnis also accepted that by the inclusion of matters such as demurrage in Sims’ request for tender, that this did represent an improvement. Mr Ninnis did lodge his tender which was exhibit A22. In doing so, he also noted that Sims would no longer be responsible for damage caused to equipment such as tyres etc. Mr Ninnis did however accept that in total terms, the rates that he proposed, plus other charges would represent an overall greater cost to Sims than under the existing rate per tonne system.
- 37 As with the other drivers, Mr Ninnis said he received a request for a second tender from Sims, but on a rate per tonne only. He spoke to Mr L Van Dongen who informed him that based on a previous discussion Mr Van Dongen had had with

- Mr Brackstone, Sims wanted the owner-drivers to submit an “all in” rate, including an allowance for demurrage etc. Mr Ninnis did so and revised his tender, which was in fact higher than his first tender, to take into account the inclusion of demurrage.
- 38 A short time later, Mr Ninnis said he spoke with Mr Brackstone in Sims’ yard. Mr Brackstone told him that he was awarding tenders at about 10% less than current rates. According to Mr Ninnis, Mr Brackstone told him that he was doing “round table deals” with other people. Mr Brackstone told him that if he dropped his rates by 10% he could possibly get a contract. About six to eight jobs were left to be awarded. Mr Ninnis did so and submitted his further revision as exhibit A23. He was then informed by Sims by letter that he was not awarded a contract.
- 39 Mr Brackstone is the Western Australian Operations Manager for Sims. He is responsible for owner-drivers and Sims transport operations. He outlined the background to the tender process undertaken by Sims. A central factor in its decision to put its transport services out to tender, was the significant fall in the price of scrap metal and a need for Sims to reduce its costs. Sims wanted to “test the market” on price, but also to introduce greater continuity for the work of owner-drivers, by offering contracts on a three year basis.
- 40 Mr Brackstone referred to the first meeting that he called with the owner-drivers on the wharf. He told those present that it was Sims’ plan to put the transport work out to tender and explained the reasons for it. A few weeks later Mr Brackstone said that he met again with some owner-drivers which included the applicants. Some issues were raised with new sites being developed by the company and in particular also, access to the Kwinana Bulk Terminal by road trains as this location is single trailer access only. Mr Brackstone said he understood that all of the applicants did have a single trailer. The drivers raised with him the issue of pricing for tenders, given that there were at that time several unknowns. They also raised some safety issues involving matters such as fatigue management, as was commented on by the previous witnesses.
- 41 As to these particular matters, Mr Brackstone acknowledged that there were some areas of uncertainty, but took the view that all of the owner-drivers were facing the same situation, not just the applicants. He further said that other owner-drivers also spoke to him about some of these issues at other times. Mr Brackstone said that some of those particular drivers, who did raise these issues with him, subsequently were awarded contracts. In relation to the possible deferral of the tender process, Mr Brackstone said he considered the issues raised by the owner-drivers including the applicants. After he had met and discussed the matters with them, he had a meeting with the general manager of Sims and discussed the issues at some length with him. On the basis that all of the owner-drivers would have the same information on which to base their tenders, Mr Brackstone said a decision was taken by the company to proceed with the tender process.
- 42 In response to the initial 29 invitation to tenders sent out, Mr Brackstone said the company received 29 responses. All those who responded received exactly the same information. In particular, Mr Brackstone referred to the option available for owner-drivers to tender on the basis of multi-truck contracts as one that Sims was keen to consider. Mr Brackstone confirmed that Sims had no problems with the work of the existing owner-drivers and was quite happy for them to continue providing services under the revised arrangements.
- 43 In the case of the first round of offers, Mr Brackstone testified that 10 contracts were awarded at that stage. These contracts were won on the basis of lowest price. These prices set a benchmark for subsequent tenders. One comment Mr Brackstone made at the time of receiving the applicants’ tenders, apart from pricing, was they were all virtually identical. These tenders followed his separate meeting with them as a group. From this, Mr Brackstone formed the view that this particular group may be colluding on their bids.
- 44 As to the second tenders, Mr Brackstone testified that given the information Sims had provided to the owner-drivers and the invitation to tender on price only, he expected the applicant’s tender prices to be lower. However, their tender prices remained unchanged. Mr Brackstone testified that he noticed that the applicants’ second tenders were also largely the same.
- 45 Some time later, Mr Brackstone said that he spoke to Mr Ninnis in the car park at the Sims Spearwood yard. He said that Mr Ninnis asked him what the applicants had to do to be successful in their tenders. Mr Brackstone indicated to Mr Ninnis that they were about “10% off the current rates”. This was said to provide a “ball park” where the rates needed to be but that no guarantees were able to be given. Mr Brackstone said that he then received the third tender from the applicants. In the case of Mr Della and Mr Smith, with one minor exception, as set out in exhibits A6 and A19, again, both were the same. This applied to the other applicants’ tenders as well. Mr Brackstone took the fact that all of the tenders from the applicants were the same, demonstrated to him that they were not prepared to differentiate themselves on price. Whilst he acknowledged that the applicants did largely reduce their rates by 10%, he said this had occurred very late in the tender process.
- 46 In terms of the overall process, Mr Brackstone said that only a certain number of contracts were able to be awarded. There were not enough positions available to appoint all 29 owner-drivers. When it was put to him that one of the successful tenderers had rates in their tender substantially the same as for Mr Smith (see exhibits A19 and R2), Mr Brackstone said while this was the case, he considered that the successful tenderer had shown a greater willingness to negotiate than any of the applicants had. He said he reached this conclusion as a result of the dealings he had with both groups of drivers and individual owner-drivers, throughout the tender process.
- 47 Mr Brackstone denied that one of the purposes of Sims was to no longer have the applicants as part of its business. He said at one point, he offered Mr Ninnis a position as an employed driver to operate Sims’ trucks. Mr Brackstone was not sure whether this was before or after the tender process took place. He also testified that Sims would have no difficulty in re-engaging any of the applicants at some time in the future.

Consideration

- 48 Based on the evidence, the Tribunal is satisfied that each of the applicants was an owner-driver for the purposes of s 4 of the *OD Act* in that they, as either natural persons or as officers of a body corporate, carried on the business of transporting goods in one or more heavy vehicles (as defined in s 3 of the *OD Act*) supplied by that person or body corporate as the case may be. I

am also satisfied on the evidence that the arrangements between the applicants and Sims constituted owner-driver contracts for the purposes of s 5 of the *OD Act* and therefore the Tribunal has jurisdiction to deal with the applications.

- 49 Whilst it might be said, as was indeed conceded by counsel for Sims, that aspects of the tender process could have, in retrospect, been done differently, for the following reasons, I am not persuaded that it has been established that Sims engaged in unconscionable conduct as claimed. Nor am I persuaded that Sims acted contrary to the Code obligation to negotiate with the applicants in good faith.
- 50 The invitation to tender of 20 April 2015, issued to the owner-drivers by Sims (exhibit A2) set out in some detail the conditions of the proposed tender. Importantly, in the first paragraph, owner-drivers were informed of the request by Sims for “competitive pricing for contract transport services for Sims Metal Managements (Sims MM) Western Australian Operations”. It is clear that the tender was based on competitive principles. The invitation to tender also needs to be considered in the context of the evidence as to pre-tender discussions held between Mr Brackstone and the owner-drivers. There is no doubt on the evidence, that the owner-drivers, including the applicants, were informed by Mr Brackstone, that a key requirement of Sims, because of the downturn in the scrap metal market, was reducing costs. An obvious corollary of this was reduced pricing by the owner-drivers.
- 51 Secondly, in the second paragraph of the invitation to tender, it was also made clear that pricing is to be based on an owner-driver’s capability. Importantly, it was specified that “suppliers are not obliged or required to submit pricing on the full scope of works.” Thus, it was open to all owner-drivers to submit tenders based on their operational structure. This could include only tendering on part of the scope of works, if that was most suitable to their operations. Furthermore, there was no limitation on the extent to which any proposed tender could be qualified, having regard to some of the unresolved issues prior to the submission of tenders, which was the subject of evidence. Indeed, the applicants did qualify their tenders in relation to the issue of access to the Kwinana Bulk Terminal.
- 52 In relation to both the first and second tenders, despite the very clear indication both in the tender documents themselves and in direct discussions with Mr Brackstone as to competitive pricing, the applicants maintained the then existing rates in their tenders. Additional proposed charges for demurrage and other matters were also specified. On the evidence, it is open for the Tribunal to conclude that the applicants considered this course to be in their commercial interests. What they respectively submitted as their bids was based on what they viewed as safe and sustainable rates, in the context of their business operations. In a competitive tender process, that was entirely their prerogative and no criticism is suggested by this observation.
- 53 Whilst some of the owner-drivers, including the applicants, expressed reservations about the extent of information available upon which to base tender proposals, at that stage of the process, the applicants were in no different position to all of the owner-drivers tendering for services to be provided to Sims. There could be no suggestion that at that point the applicants were being singled out or being treated differently to any other group of drivers who were seeking contracts through the tender process.
- 54 In relation to the significant issue of price, the fact that Sims was seeking to reduce the cost of transport services, in the context of prevailing economic conditions in the scrap metal market, was again, no more than Sims seeking to act in accordance with its commercial interests. In my view, there can be no suggestion that in doing so, Sims was seeking to act unfairly or unconscionably, or that it failed to act in good faith. On the contrary, on all of the evidence before the Tribunal, Sims made it abundantly clear both in the written tender material and in the pre-tender discussions with owner-drivers, that pricing would be an important issue.
- 55 By the time that the applicants, along with other owner-drivers, were invited to submit a third tender, the process was very well advanced and nearing its conclusion. In relation to the applicants specifically, it was quite clear on the evidence that by about this time, the applicants were concerned that they had not been competitive in the tender process up to that time. They thought they would miss out on contracts. Given that they had not been prepared up until that time to alter their prices, that conclusion would seem almost self-evident, when taken in the context of all of the evidence.
- 56 In my view, in the context of a competitive tender process, there was no obligation on Mr Brackstone to tell the applicants that to be “in the ballpark” their rates needed to be reduced by approximately 10%. Sims could simply have had no further communication with the applicants and invited them to again tender on the basis of their best prices per tonne. In giving such an indication, Sims was providing the applicants a very clear signal as to the competitiveness of their position at that time. Mr Brackstone’s evidence was that whilst he acknowledged that at that third and final stage of the tender process the applicants had indicated some willingness to negotiate with Sims, he regarded it as very late in the day and at the end of the process. In my opinion, based on the previous approach of the applicants, that conclusion was reasonably open.
- 57 Simply because the applicants had elected to take up Mr Brackstone’s suggestion and, in an endeavour to not miss out on contracts completely, finally reduce their rates, did not oblige Sims to award any or all of the applicants with a contract. Mr Brackstone plainly provided that assistance to at least give the applicants a competitive opportunity. As Mr Brackstone said, there were not enough contract positions on offer for all of the owner-drivers to be successful.
- 58 As to the issue of the relative strengths of the positions of the parties, for the purposes of s 30(2)(a) of the *OD Act*, I am not persuaded that such a factor is positively in favour of the applicants in this case. Whilst there was evidence that four of the five applicants did not continue to sign the individual contracts for each ship loading operation, following the *Louisville Holdings* case, in substance, the nature of the contracting arrangements was no different to those found by the Tribunal to apply in *Louisville Holdings*. In my view, the act of simply not signing a document, after initially doing so, but with no change in the modus operandi, would be a victory of form over substance. I maintain the view that the conclusions reached in *Louisville Holdings*, would apply in the circumstances of these matters.
- 59 I therefore do not consider there was any obligation on Sims to offer fresh engagements to the applicants. Taking everything into consideration, whether or not the applicants were successful in the tender process, would have put them in the same position as if Sims had not offered any further engagements under the former contracting system. I therefore do not consider

that the applicants were in any position of disadvantage or that Sims was in any superior bargaining position. This may have been a factor, if the evidence established that the applicants were engaged on long term or ongoing contracts, and Sims was merely exercising its bargaining power unreasonably to reduce its rates. This however, was not the case.

- 60 Moreover, the contracts being offered were of material advantage to the owner-drivers, they being contracts providing for some stability over a three year term. Additionally, the tender process involved somewhat of a reversal of the usual order of working in the past. Under the former arrangement, the owner-drivers were price takers. In the case of the tenders, they were price setters and were invited to submit competitive bids in accordance with their operations.
- 61 As already noted earlier in these reasons, it is also not to be disregarded in the context of the bargaining positions of the parties, that the applicants are experienced transport operators. They have been conducting their own transport businesses in some cases, for many years. It was clear that the steps taken by the applicants in relation to the tender process were very much based on the applicants' assessments of their respective commercial interests. This involved what they considered were safe and sustainable rates in the provision of services.
- 62 Whilst the applicants raised the issue of multiple contracts being considered favourably by Sims, and submitted that this was not made entirely clear at the commencement of the process, again the applicants were in no different position to any other owner-driver in this regard. This criticism I consider falls into the same category as my earlier observations as to the provision of relevant information to proposed tenderers at the commencement, and whether the process itself could have been done differently. Again, unless the applicants can establish that they were in some way singled out and treated less favourably, and manifestly unfairly, it is difficult to see how a conclusion can be reached that on the strength of a factor such as this, Sims engaged in unconscionable conduct. Similar observations may be made in relation to the suggestion that demurrage costs be included in the all up per tonne rate.
- 63 As to the contention of the applicants that they were in some way "singled out" because they had raised safety issues in the past, in my view, such an inference cannot be reasonably drawn on all of the evidence. Mr Brackstone's testimony that he had no difficulties with the work performance of any of the applicants was not in any way seriously challenged. Moreover, his offer to employ Mr Ninnis directly is inconsistent with any suggestion that Sims were intending to "get rid" of the applicants for any particular reason, including this reason.
- 64 Furthermore, the contention of the applicants that despite their willingness to negotiate, Mr Brackstone treated them unfavourably cannot be sustained in my opinion. Mr Brackstone's evidence was that it was only in the final stages of the tender process, after he had informed Mr Ninnis that to be competitive the applicants' rates needed to be reduced by about 10%, that the applicants did so. Mr Brackstone testified that he had regard to the approach of individuals and groups throughout the entire tender process in making his decisions on the awarding of contracts. In the context of a competitive tender, Sims was entitled to take these matters into account. Importantly also, despite there being no obligation on Mr Brackstone to provide the indication he did to Mr Ninnis, it could only be regarded as fair dealing that he did. However, this was done on the proviso that there were no guarantees and it may only lead to a possibility of the award of a contract.
- 65 Given that on two out of the three opportunities to tender, the applicants had declined to adjust their rates at all, and submitted what were essentially identical tenders, it was in my opinion, open for Mr Brackstone to weigh this factor in the balance as to whether contracts should be awarded or not. In terms of ss 30(2)(g) and (j) of the *OD Act*, Sims was well able to conclude at an advanced stage in the tender process, that the applicants were acting in their own commercial interests. They continued to submit proposals on the basis of what they saw as safe and sustainable rates. In a competitive tender process, in my view it was open for Sims to select those bids from bidders considered most advantageous from Sims' perspective.
- 66 Whilst Sims were criticised for engaging with Mr Ebbett in relation to his tender, and suggested that this showed bad faith, I am not persuaded to this view. This allegation may, in addition to the heads of s 30(2) referred to above, involve consideration of s 30(2)(f). While I accept that Mr Brackstone did say that he did engage with Mr Ebbett and offered him a contract, he formed the view that he was more willing to negotiate on price. Based on the previous tenders submitted by the applicants, Mr Brackstone preferred to engage with Mr Ebbett. This does not mean that in doing so, Sims acted without any regard for moral behaviour or engaged in serious misconduct, in the sense in which those phrases are referred to in the authorities dealing with unconscionable conduct. Mr Brackstone was not obliged to engage with the applicants with a view to awarding them a contract.
- 67 I also note in relation to Mr Ebbett, that he had provided some 31 years of service to Sims and his son had some 11 years of service. This is not consistent with Sims trying to remove older owner-drivers through the tender process, even if this could be regarded as a relevant consideration, which, for the reasons I have stated above as to the status of the contracts, it is not.
- 68 While each case will necessarily turn on its own facts, the circumstances of this case can be distinguished from one where, for example, there are only two major bidders in a contractually binding tender process and the conduct of the party seeking the bids engages in a breach of that contract by failing to evaluate in accordance with strict methodologies; by failing to observe strict confidentiality provisions of tenderers' proposals; and accepting out of time changes by the successful party all to the significant detriment of the losing bidder; along with various contraventions of the TPA: *Hughes Aircraft Systems* at 118-119.

Conclusion

- 69 Having regard to all of these factors, and all of the evidence, whilst I readily appreciate that the applicants were disappointed in not receiving contracts, I am not persuaded that Sims engaged in unconscionable conduct or contravened its obligation to negotiate in good faith. I do not consider that Sims' approach to the applicants' tenders demonstrated "serious misconduct" or conduct involving some "moral fault" or "overwhelmingly unreasonable behaviour".
- 70 Accordingly, the applications must be dismissed.
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2016 WAIRC 00322

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

PARTIES	THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL RICHARD VAN DONGEN AS TRUSTEE FOR THE F.R.A.C FAMILY TRUST, T/A L AND R CARTAGE CONTRACTORS	APPLICANT
	-v- SIMS METAL MANAGEMENT LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	THURSDAY, 26 MAY 2016	
FILE NO/S	RFT 16 OF 2015	
CITATION NO.	2016 WAIRC 00322	

Result	Application dismissed
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr N Mony De Kerloy of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr N Mony De Kerloy 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, hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2016 WAIRC 00323

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

PARTIES	THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL GRAEME SMITH, TRADING AS MARANATHA TRANSPORT	APPLICANT
	-v- SIMS METAL MANAGEMENT LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	THURSDAY, 26 MAY 2016	
FILE NO/S	RFT 17 OF 2015	
CITATION NO.	2016 WAIRC 00323	

Result	Application dismissed
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr N Mony De Kerloy of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr N Mony De Kerloy 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, hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2016 WAIRC 00324

DISPUTE RE ALLEGED TERMINATION OF CONTRACT
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL
VAN DONGEN HAULAGE PTY LTD

PARTIES

-v-
SIMS METAL MANAGEMENT LTD

APPLICANT

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 26 MAY 2016
FILE NO/S RFT 18 OF 2015
CITATION NO. 2016 WAIRC 00324

Result	Application dismissed
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr N Mony De Kerloy of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr N Mony De Kerloy 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, hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2016 WAIRC 00325

DISPUTE RE ALLEGED TERMINATION OF CONTRACT
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL
CHANG TRANSPORT AND SCRAP METAL PTY LTD

PARTIES

-v-
SIMS METAL MANAGEMENT LTD

APPLICANT

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 26 MAY 2016
FILE NO/S RFT 19 OF 2015
CITATION NO. 2016 WAIRC 00325

Result	Application dismissed
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr N Mony De Kerloy of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr N Mony De Kerloy 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, hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2016 WAIRC 00326

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

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

LARK HILL TRANSPORT PTY LTD

APPLICANT

-v-

SIMS METAL MANAGEMENT LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE THURSDAY, 26 MAY 2016

FILE NO/S RFT 20 OF 2015

CITATION NO. 2016 WAIRC 00326

Result	Application dismissed
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr N Mony De Kerloy of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr N Mony De Kerloy 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, hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 10/2011	Mr Andrew Dujmovic	Director General of Health as delegate of the Minister of Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Employer	Harrison C	Discontinued	1/06/2016
PSA 11/2011	Mr Wade Duncan	Director General of Health as delegate of the Minister of Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Employer	Harrison C	Discontinued	1/06/2016