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FULL BENCH—Appeals against decision of Commission—

2016 WAIRC 00699

APPEAL AGAINST A DECISION OF THE PUBLIC SERVICE ARBITRATOR IN MATTER NO. PSACR 20 OF 2013 GIVEN ON 10 MARCH 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2016 WAIRC 00699
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
HEARD	:	MONDAY, 23 MAY 2016, WEDNESDAY, 22 JUNE 2016
DELIVERED	:	THURSDAY, 11 AUGUST 2016
FILE NO	:	FBA 1 OF 2016
BETWEEN	:	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED Appellant AND THE MINISTER FOR HEALTH Respondent

ON APPEAL FROM:

Jurisdiction	:	**Public Service Arbitrator**
Coram	:	**Acting Senior Commissioner P E Scott**
Citation	:	**[2016] WAIRC 00135; (2016) 96 WAIG 390**
File No	:	**PSACR 20 of 2013**

CatchWords	:	Industrial Law (WA) - Appeal against decision of public service arbitrator - Doctor aggrieved by decision not to offer him a further contract following the expiry of a fixed term contract - Rules of procedural fairness that apply to decision by application of the principles of administrative law did not apply as any right of the doctor to a further contract derived from contract and not from a statutory power - The claim of procedural fairness as a part of industrial unfairness also considered - Employer had a right unfettered by procedural fairness to determine whether to offer a further contract - No industrial unfairness demonstrated as no special circumstances raised to displace this right

Legislation	:	*Industrial Relations Act 1979* (WA) s 7(1)(c), s 7(1)(ca), s 26(1)(a), s 44(9), s 49, s 80E, s 80E(1), s 80E(6), s 80F
		Hospital and Health Act 1927 (WA) (repealed) s 7, s 7A, s 7A(2), s 19, s 19(1)
		Interpretation Act 1984 (WA) s 5
		Public Sector Management Act 1994 (WA) s 21
		Administrative Decisions (Judicial Review) Act 1977 (Cth) s 3, s 13
		Australian National University Act 1946 (Cth) s 23, s 27(1)(g)
Result	:	Appeal dismissed

Representation:

Counsel:		
Appellant	:	Mr R L Hooker
Respondent	:	Mr R J Andretich
Solicitors:		
Appellant	:	Panetta McGrath Lawyers
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

Annetts v McCann [1990] HCA 57; (1990) 170 CLR 596

Attorney-General for the State of New South Wales v Quin [1990] HCA 21; (1990) 170 CLR 1

Australian National University v Burns (1982) 43 ALR 25

Australian National University v Lewins (1996) 138 ALR 1; (1996) 68 FCR 87

Baker v University of Ballarat (2005) 225 ALR 218; [2005] FCAFC 210

Breen v Amalgamated Engineering Union [1971] 2 QB 175

Byrne v The Owners of Ceresa River Apartments Strata Plan 55597 [2016] WASC 153

Cole v Cunningham (1983) 81 FLR 158

Director General Department of Justice v Civil Service Association of Western Australia Inc [2005] WASCA 244; (2005) 86 WAIG 231 (Jones)

Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; (2003) 77 ALJR 1088

Ex parte Wurth; Re Tully (1954) 55 SR (NSW) 47

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

Griffith University v Tang [2005] HCA 7; (2005) 221 CLR 99

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

Jarratt v Commissioner of Police for New South Wales [2005] HCA 50; (2005) 224 CLR 44; (2005) 221 ALR 95

John Fairfax & Sons Ltd v Australian Telecommunications Commission [1977] 2 NSWLR 400

Kioa v West [1985] HCA 81; (1985) 159 CLR 550

Malloch v Aberdeen Corporation [1971] 2 All ER 1278, 1282

Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11; (2002) 209 CLR 597

Plaintiff S10/2011 v Minister for Immigration and Citizenship [2012] HCA 31; (2012) 246 CLR 636

Quinn v Overland [2010] FCA 799; (2010) 199 IR 40

R v British Broadcasting Corporation; Ex parte Lavelle [1983] 1 All ER 241; [1983] 1 WLR 23

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6; (2003) 214 CLR 1

Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82

Whitehead v Griffith University [2002] QSC 153

Case(s) also cited:

Abbott v Women's and Children's Hospital [2003] SASC 145

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564

FAI Insurances Ltd v Winneke (1982) 151 CLR 342

Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319

State of Victoria v Master Builders Association of Victoria [1995] 2 VR 121

Reasons for Decision

SMITH AP:

Introduction

1 This is an appeal to the Full Bench by the Australian Medical Association (WA) Incorporated (the AMA) pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (the IR Act) against a decision of the Commission delivered on 10 March 2016 dismissing a matter referred for hearing and determination under s 44(9) of the IR Act in PSACR 20 of 2013: [2016] WAIRC 00135; (2016) 96 WAIG 390.

2 A dispute first arose out of an incident involving a member of the AMA, Dr James Savundra, at Royal Perth Hospital on 15 February 2013 which resulted in his suspension from work at the hospital (C 204 of 2013). The matter was in part resolved which resulted in Dr Savundra returning to work in June 2013. The AMA continued with the dispute by filing application PSAC 20 of 2013 in 25 June 2013 after agreement was reached for Dr Savundra to return to work and in 2014 Dr Savundra's contract of employment to work as a sessional consultant at Royal Perth Hospital was not renewed following the expiry of his contract for a fixed term. The matter was referred for hearing in June 2015. By that time, the dispute mainly concerned a decision made on behalf of the Minister for Health (the employer) to not renew Dr Savundra's contract of employment at Royal Perth Hospital.

3 The central issue raised in this appeal is whether Dr Savundra was entitled to procedural fairness during the process of the making of the decision in 2014 not to renew the Royal Perth Hospital contract.

4 When this matter came before the Public Service Arbitrator (the Arbitrator) for hearing the claim was opposed on a number of grounds, including a claim that the Arbitrator did not have jurisdiction to enquire into and deal with the matter. The AMA sought to amend the application. The employer opposed the amendments on grounds going to the jurisdiction of the Arbitrator to deal with the matters sought to be raised by the AMA. Following argument, amendments were allowed by the Arbitrator.

5 In reasons for decision delivered by the Arbitrator on 23 April 2015, the Arbitrator set out her reasons as to why she reached the view that there was no jurisdictional impediments to the application being amended: [2015] WAIRC 00333; (2015) 95 WAIG 590. Following the delivery of her reasons for decision, the Arbitrator issued a memorandum of matters referred for hearing and determination (PSACR 20/2013) on 8 June 2015 which set out the matters that had not been settled by agreement between the parties. The memorandum of matters referred for hearing and determination states as follows:

> The applicant says that:
>
> 1. Dr James Savundra, a member of the applicant, is a fully trained Plastic and Reconstructive Surgeon.
>
> 2. Dr Savundra was employed by the respondent at Royal Perth Hospital (RPH), working in RPH's Department of Plastic and Maxillofacial Surgery (the Department) under a fixed term contract of employment from 1 November 2009 to 1 November 2014 (the Royal Perth Hospital Contract).
>
> 3. On 12 March 2013, Dr Savundra received a letter on behalf of the respondent (the 12 March Letter) which, among other things:
>
> (a) told him that the Director General had directed the undertaking of a preliminary inquiry into what was described as Dr Savundra's conduct in connection with industrial action by medical staff of the Department;
>
> (b) told him that the respondent had determined that he was suspended from duty with full pay pending a decision on whether a formal disciplinary investigation is warranted (the suspension);
>
> (c) directed him:
>
> (i) not to attend for duty at RPH with immediate effect and until further notice; and
>
> (ii) not to communicate with Hospital staff on any matter pertaining to the operations of the Department.
>
> (the directions)
>
> 4. Dr Savundra was not heard, properly or at all, before the suspension and being given the directions.
>
> 5. Despite a course of correspondence between Dr Savundra's solicitors and the respondent in May 2013, the respondent:
>
> (a) denied having failed to accord Dr Savundra natural justice; and
>
> (b) declined to identify any power that it relied upon to source the suspension and the two directions.
>
> 6. On 6 June 2013 the Acting Director General of Health by letter to Dr Savundra through his solicitors found, amongst other things, that:
>
> (a) industrial action in the form of withdrawal of labour, occurred and further action was threatened; and
>
> (b) Dr Savundra failed to comply with a verbal direction given to him by Dr Frank Daly to the effect that he (Dr Savundra) was not to attend Royal Perth Hospital on 15 February 2013.
>
> (the adverse findings)
>
> 7. The adverse findings were made without:
>
> (a) according Dr Savundra any procedural fairness; or

(b) informing Dr Savundra under what source or sources of power the respondent purported to be acting in making the adverse findings and conducting any investigation or inquiry which preceded the adverse findings.

8. On 10 June 2013 Dr Savundra was permitted by the respondent to, and did, return to work at Royal Perth Hospital.

9. Dr Savundra, and accordingly the applicant, are aggrieved about:

(a) the failure of the respondent to accord Dr Savundra procedural fairness with respect to the suspension, the directions, and the adverse findings;

(b) the impact of the suspension on Dr Savundra's professional standing and reputation;

(c) the impact that the suspension had on the welfare of Dr Savundra's patients at RPH;

(d) the attempt of the respondent, through the directions, to impair Dr Savundra's freedom of communication on matters pertaining to his profession and his employment with RPH;

(e) the absence of any clarity or structure to any preliminary or substantive inquiry or investigation that the respondent conducted into Dr Savundra;

(f) the impact of the adverse findings on Dr Savundra's professional standing and reputation, including him being placed in peril of further adverse action by the Medical Board; and

(g) the peril of further disciplinary proceedings being taken against Dr Savundra if it be asserted that he breached either or both of the two directions.

10. A lengthy, ongoing course of communication was undertaken between Dr Savundra and his representatives and the respondent since 12 March 2013.

11. Despite that course of correspondence the respondent appeared to maintain that:

(a) Dr Savundra was lawfully and fairly suspended;

(b) the directions were lawful and reasonable, and were therefore capable of binding Dr Savundra in his employment with the respondent; and

(c) Dr Savundra denied those two propositions at the time and continues to deny them.

12. By letter of 28 July 2014 Alex Smith on behalf of the respondent told Dr Savundra that his RPH Contract would not be renewed beyond its expiry on its own terms on 1 November 2014 (the RPH Contract Decision). The letter did not express any of the reasons for that decision.

13. The RPH Contract did in fact expire on its own terms on 1 November 2014 and he has not since undertaken any work at RPH.

14. The respondent's employment records for Dr Savundra include a 'Termination Form' which reflects an understanding by the respondent that there was a termination of part of Dr Savundra's employment with the respondent.

15. The reasons which caused, or alternatively contributed to, Dr Savundra not being offered by the respondent any more employment at RPH after 1 November 2014 were, or included:

(a) the adverse findings;

(b) allegations by the respondent (the allegations) that Dr Savundra:

(i) had bullied or intimidated other staff members of the respondent; and

(ii) has a polarising effect on people he works with and needs to learn to work with management in a more cohesive way.

16. The allegations have not been put to Dr Savundra or the applicant at all, or with any particularity, nor has either of them been invited to respond to the allegations.

17. The RPH Contract Decision was made without the adverse findings or the allegations being put to Dr Savundra or the applicant, nor has the respondent provided a fair hearing (or any hearing at all).

18. The RPH Contract Decision was accordingly made:

(a) in a manner devoid of natural justice;

(b) in a manner that took into account considerations which were based solely on assumptions made, or conclusions drawn, by the respondent on allegations or other material which are unknown to Dr Savundra or the applicant and thus which relevantly were irrelevant considerations;

(c) manifestly unreasonably;

(d) unfairly to Dr Savundra and numerous other doctors employed by the respondent at RPH;

(e) unlawfully.

19. The applicant seeks that the Public Service Arbitrator (the Arbitrator):

(a) review the RPH Contract Decision and the circumstances which preceded it;

(b) nullify the RPH Contract Decision with the effect that:

(i) Dr Savundra is afforded an opportunity to understand and respond to any adverse allegations the Respondent wishes to make against him;

(ii) Dr Savundra has an opportunity to be offered more employment with the respondent at Royal Perth Hospital; and

(iii) a decision is made by the respondent about Dr Savundra's employment at Royal Perth Hospital lawfully, fairly and transparently.

The respondent says:

1. In relation to the suspension, the directions and the adverse findings:

(a) Dr Savundra was not allowed by the respondent to perform duties, but was paid, from 12 March 2013 to 6 June 2013;

(b) the respondent wrote to the applicant by letter dated 12 July 2013 admitting that a claim that Dr Savundra was not afforded procedural fairness in connection with the matter could not be contested and that the adverse finding against him was abandoned, the formal warning imposed withdrawn and the matter discontinued;

(c) the events took place two years ago; and

(d) taken in isolation, there is nothing more that the Arbitrator can or should do in relation to it given the length of time since the events occurred and the contents of the letter of 12 July 2013.

2. In relation to the circumstance in which the employment at RPH ended, it came to an end by agreement between Dr Savundra and the respondent, set out in a letter headed 'RENEWAL OF FIVE YEAR CONTRACT' signed by Dr Savundra on 17 December 2009.

3. Dr Savundra's employment ended by way of the ordinary operation of an agreement between the respondent and Dr Savundra and did not involve any matter affecting or relating or pertaining to the work, privileges, rights or duties of an employee or employer.

4. It is denied that any 'privilege', 'right', 'duty' or matter of 'work' is in any way affected by the situation where a contract expires by the effluxion of time as a result of the genuine agreement of the parties that this occur.

5. Even if there were an industrial matter the respondent says that the Arbitrator may only intervene to address issues of industrial unfairness relating to a matter affecting or relating or pertaining to the work, privileges, rights or duties of an employee.

6. There cannot be an issue of industrial fairness relating to the ending of the employment of the applicant's member at RPH as that employment ended as a result of an agreement between the applicant's member and the respondent with neither party taking any action nor invoking any right or privilege.

7. The respondent was not required to do anything and did not do anything in relation to the purported matter. The contract expired on its own terms and according to the genuine agreement of the parties. The respondent could act neither fairly nor unfairly in relation to the matter.

8. Even if the applicant's allegations, including an alleged connection between the suspension, the directions and the allegations on one hand and the circumstances in which the employment came to an end on the other hand, were entirely true, which is denied, they could not possibly, in the context of the matter complained about (being the ending of the employment of Dr Savundra at RPH), evidence relevant unfairness given that the employment ended by the effluxion of time according to a genuine agreement between Dr Savundra and the respondent that this occur.

9. The respondent maintains that the Arbitrator cannot, or in the alternative should not, make any order which has the effect that a genuine fixed term contract does not have the result intended by both parties to it and that, rather, a term in a genuine contract that certain employment ends at a certain time is, in fact, subject to various unformulated terms such as that the employer must accord the employee procedural fairness before forming negative assessments of the employee, the employer must give consideration to offering the employee further employment and the employer must successfully complete a process, as formulated by the Arbitrator, before deciding whether or not to offer the employee further employment.

10. Although the respondent accepts that findings have been made allowing this matter to proceed to hearing, the respondent maintains all of its jurisdictional challenges to any order being made which has the effect that a genuine fixed term contract does not operate according to its terms.

11. The respondent also notes that, in terms of 'remedy', the parties to the present proceedings have agreed that what should happen where 'upon expiry of a fixed term contract, [the applicant's member] is unsuccessful in seeking a new contract' and have further agreed that 'no other termination, redundancy or severance payment shall be made except as provided for in the Agreement' (see clause 20(5) of the Agreement).

12. The agreement between the parties as to what should happen in the situation in which the applicant's member finds himself is a powerful factor against the Arbitrator exercising discretion, in the event it finds it has such discretion, to intervene in the current matter in the way the applicant seeks.

13. For the sake of completeness the respondent notes that the applicant's member has fixed term contracts with the respondent to perform services at Fremantle Hospital (expiring 4 February 2019) and Princess Margaret Hospital (expiring 2 November 2016).

The respondent seeks that the matter be dismissed.

Background

6 It is the practice of the public health system to engage senior medical practitioners on fixed term contracts. This practice has been enshrined in industrial agreements entered into by the parties.

7 Dr Savundra is a very senior plastic surgeon whose professional skills are highly regarded by his peers. He commenced employment with the WA public health system in 1993 as an intern. For a substantial number of years he has been engaged as a sessional consultant on a series of fixed term contracts at Royal Perth Hospital. He has also been engaged on the same basis to work at Fremantle Hospital and Princess Margaret Hospital and at the time of the hearing of the matters referred, he continued to work at Fremantle Hospital and Princess Margaret Hospital as a sessional consultant.

8 When the matter was heard by the Arbitrator, on behalf of the AMA a bundle of documents were tendered into evidence and the following witnesses gave evidence by the tender of witness statements supplemented by oral evidence:

(a) Dr Savundra;

(b) Dr Brigid Corrigan (specialist plastic and reconstructive surgeon and consultant and co-head of the department of Royal Perth Hospital plastic surgery);

(c) Dr Anthony Williams (specialist plastic and reconstructive surgeon and consultant and co-head of the department of Royal Perth Hospital plastic surgery); and

(d) Dr Mark Duncan-Smith (specialist plastic and reconstructive surgeon and former consultant and head of the department of Royal Perth Hospital plastic surgery).

9 At the conclusion of the case for the AMA, an election was made on behalf of the employer not to adduce any evidence.

10 In 2013, Dr Savundra's employment was covered by the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* (the 2013 Agreement). Pursuant to cl 20(1)(a) of the 2013 Agreement, all appointments of practitioners are to be on five-year contracts unless there is written agreement to the contrary between the employer and practitioner. There is no automatic right of reappointment upon expiry of a contract (cl 20(4)). Clause 20(5) contemplates a payment which could be characterised as compensation where no new contract is entered into on expiry of the fixed term. Clause 20(5) provides that in circumstances of there being no new contract, a contract completion payment to be paid to the practitioner which is equal to 10% of the final base salary of the practitioner for each year of continuous service.

11 The final contract Dr Savundra entered into at Royal Perth Hospital was executed by him on 17 December 2009. The express terms of the contract provided that the date of commencement of the renewal was 1 November 2009 and was for a period of five years from the date of commencement (AB 400 - 402). The material express terms of the contract were as follows:

(a) The contract was described as a renewal of a five-year contract as consultant (sessional) in the department of plastic surgery.

(b) The renewal was offered in accordance with the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2007* (the 2007 Agreement). (Clause 21 of the 2007 Agreement is materially in the same terms as cl 20 of the 2013 Agreement.)

(c) The employer was not to be liable to employ Dr Savundra in any capacity beyond the specified term. In the event that the hospital did elect to make a subsequent offer of employment to Dr Savundra, it was to be in the form of a written offer subject to such terms and conditions as may be contained in that offer.

(d) The appointment could be terminated by three months' notice on either side.

(a) The incident at Royal Perth Hospital in February 2013

12 On 15 February 2013, an incident occurred which resulted in Dr Savundra being suspended on full pay from Royal Perth Hospital.

13 In February 2013, there were two plastic surgeons employed at Royal Perth Hospital as senior registrars/senior medical practitioners, Dr Barry O'Sullivan and Dr Jeremy Rawlins. Both were plastic surgeons who were qualified to be accredited or classified as specialist plastic surgeons in Australia. From mid-2012 they had been treated as if they had been employed as consultants at Royal Perth Hospital. Yet, they were not credentialed or engaged as consultants at the hospital.

14 Dr Savundra and other specialist consultants in the department of plastic surgery at the hospital had no difficulty with the clinical skills, experience and training of Dr O'Sullivan and Dr Rawlins, but they objected to them not being employed as consultants.

15 By letter dated 6 February 2013, five consultant surgeons employed in the hospital's plastic surgery department, Dr Savundra, Dr Williams, Dr Corrigan, Dr Paul Quinn and Dr Duncan-Smith (who was at that time the head of department) wrote to Dr Frank Daly, the executive director of Royal Perth Hospital, raising this issue (AB 275 - 277). In the letter they set out their concerns and stated that whilst the hospital recognises Dr O'Sullivan and Dr Rawlins as senior registrars/senior medical practitioners but not as credentialed consultants, they the undersigned would not be able to act as consultant plastic surgeons for the on-call roster at Royal Perth Hospital. The letter also stated that unless Dr O'Sullivan and Dr Rawlins were given appointments as consultants they would treat the two doctors as registrars and Dr O'Sullivan and Dr Rawlins would not be able to carry out on-call work as consultants unless they were being supervised by a consultant plastic surgeon.

16 By Friday, 15 February 2013, the issue was not resolved. Dr Savundra was going on leave that evening to go overseas to carry out voluntary surgery in a third world country for three weeks. Prior to going on leave, he intended to go to Royal Perth Hospital before his on-call rostered period ended at 6.00pm. Before going to the hospital he had a discussion with his colleagues to initiate action about this matter as he was the most senior plastic surgeon on the on-call trauma roster.

17 Dr Savundra spoke to Dr Patterson, the head of department of Royal Perth Hospital emergency department, and Dr Ruven Gurfinkel, who was to be the plastic surgeon on-call for the weekend at Sir Charles Gairdner Hospital. He told Dr Patterson that, having checked the on-call roster for specialist plastic surgeons for the weekend, he noted that Dr O'Sullivan was rostered. He advised Dr Patterson that, in the circumstances, there would be no consultant plastic surgeon on-call for the weekend at Royal Perth Hospital and as Dr O'Sullivan had been contracted by Royal Perth Hospital as a senior registrar/senior medical practitioner Dr O'Sullivan could not carry out certain duties without consultant oversight. When Dr Savundra spoke to Dr Gurfinkel he requested and Dr Gurfinkel agreed to organise extra operating theatre time for that weekend at Sir Charles Gairdner Hospital and advise the plastic surgery registrars at Sir Charles Gairdner Hospital of the situation.

18 After making these arrangements, at about 4.30pm Dr Savundra was driving to Royal Perth Hospital when he received a telephone call from Dr Daly. Dr Savundra asked Dr Daly whether there was a plastic surgeon consultant on-call for Royal Perth Hospital from 6.00pm that evening and Dr Daly did not answer. He told Dr Daly that he was on his way to Royal Perth Hospital and he was going to the emergency department and he had already spoken with Dr Patterson about the situation. During the conversation, Dr Daly directed Dr Savundra multiple times not to attend Royal Perth Hospital's emergency department. Dr Savundra told Dr Daly that he could not follow his directive and do his job properly. During the conversation, Dr Savundra told Dr Daly that Dr O'Sullivan was not contracted as a specialist plastic surgeon and therefore could not carry out certain duties without consultant oversight. Dr Savundra also told Dr Daly that he had to make sure all plastic surgery patients 'were safe' and that was why he was going to the emergency department. Dr Savundra also informed Dr Daly that if Dr O'Sullivan 'got accredited at 10 to 6 that would have been okay'. When giving evidence, Dr Savundra explained that he regarded a patient safety issue was raised as Dr O'Sullivan was not willing to take the responsibility of being a consultant when the hospital had not credentialed him as a consultant.

19 After he spoke to Dr Daly, Dr Savundra went to Royal Perth Hospital, made what he said were appropriate arrangements and ensured that there were no patients with serious injuries in the emergency department requiring plastic surgeon consultant attention. He told the plastic surgery doctors, who were rostered on, that the patients who had been already admitted to the plastic surgery department would have consultant oversight over the weekend, but they were the last of the patients that they could admit given the inadequate staffing levels. He also gave a direction that new patients who presented to the emergency department that weekend and required prompt plastic surgery care were to be given a piece of paper with Sir Charles Gairdner Hospital's address. Dr Savundra then went on three weeks' planned leave from the next day.

20 When Dr Savundra returned to Royal Perth Hospital after being away for three weeks he was asked to attend a meeting at which Dr Daly handed him a letter dated 12 March 2013 from Mr Marshall Warner, Director, Health Industrial Relations Service, in which it was stated that he was suspended from duty. In the letter Dr Savundra was also advised by Mr Warner that the Director General had directed him to undertake a preliminary inquiry into his conduct in connection with industrial action by medical staff of the plastic surgery department of Royal Perth Hospital. It was also stated that the purpose of the preliminary inquiry was to establish whether or not there were grounds to initiate a formal disciplinary investigation and the allegations made against Dr Savundra were set out as follows (AB 281):

> I am advised that contrary to an explicit direction from Dr Frank Daly, you attended the Hospital on Friday 15 February 2013 and gave instructions, to Emergency Department and other staff, to the effect:
>
> - no plastics on-call service would be provided from Friday 15 February 2013;
> - no plastics admissions would be accepted on the immediately following Saturday and Sunday; and
> - plastics referrals from other hospitals to be diverted to Sir Charles Gairdner Hospital.

21 On 27 March 2013, Dr Savundra went to Africa for some weeks, again to undertake voluntary surgery.

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

23 By letter dated 15 May 2013, Dr Savundra's lawyers raised other issues regarding the preliminary inquiry referred to in Mr Warner's letter. It appears there was a meeting on 16 May 2013. However, there was no evidence as to what occurred at that meeting.

24 On 30 May 2013, an application for a conference pursuant to s 44 of the IR Act was lodged by the AMA in C 204 of 2013 in the Commission's general jurisdiction.

25 By letter dated 6 June 2013, Professor Bryant Stokes, acting Director General, wrote to Dr Savundra in the following terms (AB 304 - 305):

> In March 2013, the then Director General (Mr Snowball) directed that a preliminary enquiry into your conduct in connection with Industrial action by medical staff of the Plastic Surgery Department of Royal Perth Hospital be undertaken.
>
> I have had the opportunity to review the matters at issue.
>
> It is plain that industrial action, in the form of withdrawal of labour, occurred and further action was threatened. This is entirely unacceptable and any repetition will necessitate retaliatory industrial action being taken by the Hospital.
>
> There are well established processes to deal with disputes about contractual and other entitlements including ultimately recourse to relevant industrial tribunals. Failure to follow these processes in future will result in sanctions being imposed.

> The industrial action having ceased, little purpose would be served by pursuing the matter further.
>
> It is plain that you failed to comply with a verbal direction given to you by the Executive Director Royal Perth Hospital Group, Dr Frank Daly, to the effect that you were not to attend the Hospital on Friday 15 February 2013. It is apparent that you did attend the Hospital and gave various directions in connection with the admission of patients in the furtherance of the industrial objectives then being pursued.
>
> If in future should you fail to comply with your contractual obligations or unreasonably involve yourself in matters pertaining to the organisation of the business of the Hospital then disciplinary action, which may call into question your continuing association with the Hospital, will be taken.
>
> Whether the Medical Board of Australia (Board) will take any action is a matter for the Board to consider. The Hospital has no further action to take in this regard.
>
> In the present circumstances, I am satisfied that there is nothing to prevent you from returning to your clinical duties at a date to be fixed by Dr Daly. Dr Daly's office will liaise with you directly in this regard.

26 The Commission convened conferences and the parties reached agreement on Dr Savundra returning to duty at Royal Perth Hospital on 10 June 2013.

27 The AMA filed an application for a conference pursuant to s 44 of the IR Act in the Arbitrator's jurisdiction in this matter on 25 June 2013. After a conference was convened by the Arbitrator on 4 July 2013, Mr Warner wrote to the executive director of the AMA by letter dated 12 July 2013, in the following terms (AB 309):

> I refer to the Conference proceedings before the Public Service Arbitrator (PSA) on Thursday 4 July 2013.
>
> It is apparent that the Applicant's claim that Mr Savundra was not afforded procedural fairness in connection with this matter cannot be contested.
>
> Acknowledging the procedural error, I advise that the finding of misconduct is abandoned, the formal warning is withdrawn and that the matter is discontinued.

28 However, proceedings in the Commission continued as a number of issues remained in dispute between the parties and as a result the Arbitrator convened conferences on 28 November 2013, 14 April 2014 and 24 October 2014: [2015] WAIRC 00333 [9] - [11].

(b) Dr Savundra's work at Fremantle Hospital

29 Dr Savundra also had a contract to work as a sessional consultant at Fremantle Hospital which was due to expire on 12 December 2013. Dr Savundra was at that time also head of department of plastic surgery at Fremantle Hospital. By letter dated 4 December 2013, Dr David Blythe, the executive director of Fremantle Hospital, wrote to Dr Savundra advising him that his appointment at Fremantle Hospital, which was due for renewal on 13 December 2013, could be extended to match the longer term of Dr Savundra's appointment at Royal Perth Hospital which was to expire 'on 31 October 2014'. Dr Savundra objected and sought a renewal of the Fremantle Hospital contract for five years. There was correspondence between Dr Savundra and Dr Blythe and telephone calls between the two of them about this issue over a period of weeks. In the interim, Dr Savundra's contract at Fremantle Hospital was extended for a short term. One of the issues raised by Dr Blythe was that he did not know what sort of plastic service he would need at Fremantle Hospital from about October 2014 when elective surgery started moving to Fiona Stanley Hospital. Dr Savundra did not accept this explanation. This is because only two months earlier another doctor at Fremantle Hospital had had his five-year contract renewed at Fremantle Hospital. This was known to Dr Savundra because he was the head of department.

30 By letter dated 23 December 2013, Dr Blythe wrote to Dr Savundra and advised him that Professor Stokes, the Director General, wished to speak to Dr Savundra about future employment within the South Metropolitan Health Service and requested that he make an appointment to see Professor Stokes.

31 In late December 2013, Dr Savundra met with Professor Stokes. At the end of the meeting, the Director General told Dr Savundra he would look into the question of Dr Savundra's five-year contract at Fremantle Hospital.

32 Following the meeting, Dr Savundra sent Professor Stokes an email setting out information requested by Professor Stokes relating to FTE for plastic surgery specialists at Royal Perth Hospital and Fremantle Hospital. Dr Savundra in the email also referred to his involvement in the plastic surgery review implementation committee and informed Professor Stokes that he would be happy with a further five-year contract across the South Metropolitan Health Service, allowing him to work at all three campuses, depending on where the work was. He also referred to issues associated with Dr Daly and tension and morale at Royal Perth Hospital.

33 On 20 February 2014, Dr Savundra was informed he would be offered a five-year contract at Fremantle Hospital which he accepted. It was for a fixed term of five years commencing on 4 February 2014 as a sessional plastic surgeon consultant.

(c) Expiry of Dr Savundra's contract at Royal Perth Hospital in 2014

34 Dr Savundra expected that when his Royal Perth Hospital 2009 contract was due to expire in 2014 it would be renewed. He, however, was not the only doctor who worked at the hospital not to be offered a further contract. At least six other doctors at the hospital were not offered a new contract when their contracts expired.

35 A number of emails covering the period of March 2013 to October 2013 were received into evidence. They indicate that consideration was being given to the renewal of contracts of employment of nine consultants at Royal Perth Hospital, one of whom was Dr Savundra. There was no evidence of how many were offered new contracts.

36 On 19 March 2014, Dr Aresh Anwar, Director of Clinical Services at Royal Perth Hospital, wrote to Dr Savundra advising that a decision would be made as to whether a further contract of employment would be offered to him on the cessation of his existing contract on 1 November 2014. The letter also noted that should he not be offered a further contract, he would be eligible for a contract completion payment in accordance with the 2013 Agreement.

37 By letter dated 28 July 2014, Mr Alex Smith, acting Executive Director, Royal Perth Group South Metropolitan Health Service, sent a letter to Dr Savundra informing him that a further contract of employment would not be offered, that his employment at Royal Perth Hospital would cease at close of business on Saturday, 1 November 2014 and he would receive a contract completion payment.

38 For some time Dr Savundra was not provided with any information as to why he was not offered a new contract.

39 Professor Stokes met with Dr Savundra on 3 October 2014. Before attending the meeting, Dr Savundra inspected his personnel file. There was little information on the file. However, there was a file note of a meeting Dr Savundra and his AMA representative had with Dr Mark Platell, director of clinical services at Royal Perth Hospital and Dr Daly in June 2012. This meeting arose because Dr Savundra had made an inappropriate note in a patient's medical notes. The notation that Dr Savundra had made was 'If anyone in Executive blocks my ability to transfer this patient for proper care I will be taking it further'. Dr Savundra testified that he made the note out of frustration with hospital administration about transferring a patient. Dr Savundra's evidence is that he disagreed with the content of the file note on his record. The file note identified discussion about two issues. The first was how staff working with and around him perceived his work and personality style. The second was the proper approach to notations on a patient's medical record. The file note stated that:

(a) both issues were vigorously discussed and debated;

(b) the outcomes of the meeting were positive; and

(c) Dr Savundra was aware of how he impacted upon other staff and agreed as to what were appropriate and inappropriate notations within a medical record.

40 Dr Savundra's evidence was that there was no vigorous discussion and debate at that meeting and the only issue dealt with was his note on the patient's record.

(d) Dr Savundra's colleagues' evidence

41 Dr Duncan-Smith, Dr Corrigan and Dr Williams all have a high regard for Dr Savundra's skill, expertise and dedication. Each expressed the opinion that Dr Savundra's skills are needed at Royal Perth Hospital as Dr Savundra has a level of skill and expertise in procedures that other plastic surgeons at Royal Perth Hospital do not have. Prior to, and subsequent to, the expiry of Dr Savundra's contract, all have recommended on a number of occasions that Dr Savundra be reappointed as a consultant at Royal Perth Hospital.

42 Tendered into evidence was a bundle of emails and letters of support from medical specialists and trainees in other areas for Dr Savundra's retention at Royal Perth Hospital (AB 359 - 371). Three of these letters were given to Professor Stokes in September 2014 (AB 518).

43 Dr Corrigan initially raised her concerns as to why there was an impediment to reappointing Dr Savundra to Royal Perth Hospital with Professor Grant Waterer and Dr Anwar in August 2014. Professor Waterer told her that the reappointment of Dr Savundra at Royal Perth Hospital is being 'blocked' further up the line than him. On another occasion Professor Waterer told her that Dr Savundra could not be reappointed because he was 'difficult'. He also told her that of all the consultants he is responsible for, he spent a lot of his time dealing with Dr Savundra. Towards the end of 2014, Dr Anwar or someone else in management at Royal Perth Hospital told Dr Corrigan that Dr Savundra would not be given a five-year contract at Royal Perth Hospital because he is 'difficult' and he has had 'allegations of bullying made against him'.

44 In about September 2014, Dr Williams and Dr Duncan-Smith met with Professor Stokes about Dr Savundra's contract not being renewed. It appears this meeting and a subsequent meeting took place prior to Dr Savundra meeting Professor Stokes in October 2014. At the meeting, Dr Williams gave Professor Stokes the three letters of recommendations about Dr Savundra which they obtained from the orthopaedic surgery department, the plastic surgery department and the plastic surgery trainees (AB 359 - 371). Professor Stokes said he would look at the matter and meet with them again. On 24 September 2014, Dr Daly sent an email to Professor Stokes in which it was stated that (AB 383):

> We will not enter into a new contract with Mr Savundra at RPH but instead offer him up to 5 sessions at FHHS for plastic surgery at that site within his contract there. His commitment to other SMHS sites will be reviewed in two years (November 2016) depending on performance.
>
> Secondly, I have asked Grant Waterer to provide a confidential file note outlining his conversations and concerns. He has alre[sic].

45 It appears that no confidential file note referred to in the email was discovered. On behalf of the employer it said that no such document could be found.

46 Dr Williams and Dr Duncan-Smith met with Professor Stokes again shortly after the first meeting. Dr Williams' evidence was that Professor Stokes at the second meeting told them that Dr Savundra's contract would not be renewed at Royal Perth Hospital because he 'had been a naughty boy'. Professor Stokes also indicated he would not go into any further detail about why he thought Dr Savundra had been a 'naughty boy' and said that Dr Savundra had a contract at Fremantle Hospital and he could do plastic surgery work from there. Professor Stokes also said that Dr Savundra could come to Royal Perth Hospital for teaching purposes and the decision might be able to be reviewed in a year's time.

47 When Dr Duncan-Smith gave evidence about the meetings that he and Dr Williams had with Professor Stokes he said that Professor Stokes said words to the effect that:

(a) he did not wish to intervene with the decision management of the health group;

(b) there had been issues with Dr Savundra over the industrial action; and

(c) he was aware of concerns about an incident involving an entry Dr Savundra had made in a patient's medical record at Shenton Park Hospital and some information raised by the plastic surgery review committee regarding Dr Savundra being a bully.

(e) Dr Savundra's meeting with Professor Stokes in October 2014

48 When Dr Savundra met with Professor Stokes on 3 October 2014, he made notes of the meeting. Professor Stokes told him that his contract at Royal Perth Hospital would not be renewed due to several issues regarding his behaviour at Royal Perth Hospital. Professor Stokes suggested that there was evidence of bullying and intimidation towards other staff members. Dr Savundra asked for details of the allegations. Professor Stokes told Dr Savundra that surgeons he had spoken to had stated Dr Savundra was a highly competent surgeon, but he had 'a polarising effect on the people' he works with and he 'needed to learn to work with management in a more cohesive way' (AB 357 - 358). Professor Stokes also told Dr Savundra that:

(a) a young plastic surgeon was asked whether they would work at Royal Perth Hospital and stated that they would not work there due to the intimidation of working with Dr Savundra; and

(b) the circumstances surrounding his suspension from Royal Perth Hospital was evidence that he had not behaved well.

49 Professor Stokes also told Dr Savundra at the meeting he could work an extra two sessions at Fremantle Hospital in lieu of his contract terminating at Royal Perth Hospital and he could attend Royal Perth Hospital to teach registrars and other doctors and give advice on difficult cases such as the management of complex pressure sores. Professor Stokes also told Dr Savundra that after 12 months of this service he would personally review the merits of him returning to work at Royal Perth Hospital.

Arbitrator's findings

(a) Was the employer obliged to provide procedural fairness to Dr Savundra when making the decision not to renew Dr Savundra's contract?

50 The Arbitrator concluded that in the particular circumstances of this matter the employer was not obliged to provide procedural fairness in making the decision not to renew Dr Savundra's contract for work at Royal Perth Hospital.

51 In reaching this decision, the Arbitrator found that the Arbitrator's role was not to undertake judicial review where it is concerned with the fairness of the procedure adopted as an end in itself. It is concerned with the equity and substantial merits of the case: ***Director General Department of Justice v Civil Service Association of Western Australia Inc*** [2005] WASCA 244; (2005) 86 WAIG 231 (***Jones***) [21] - [34] (Wheeler and Le Miere JJ). Applying this test, the Arbitrator found that the appropriate question may be, did the employer act unfairly in deciding to not renew Dr Savundra's contract at Royal Perth Hospital, or in not advising him of the issues it would consider and not giving him a hearing before deciding, that is, in denying him procedural fairness?

52 The Arbitrator then went on to consider the issues raised by the AMA in the schedule to the memorandum of matters referred for hearing and determination which include the suspension, the directions and the findings arising from the incident on 15 February 2013. The Arbitrator found these matters caused the AMA and Dr Savundra to be aggrieved for two reasons. The first was the circumstances of themselves and their direct consequences. The second was the effect the circumstances of the suspension appeared to have had on the employer's decision to not renew Dr Savundra's contract at Royal Perth Hospital. This included whether Dr Savundra was denied procedural fairness in the decision to suspend.

(b) The suspension, directions and findings arising from the incident on 15 February 2013

53 The Arbitrator found that the main concern to the AMA and to Dr Savundra is that it was acknowledged in Mr Warner's letter of 12 July 2013 that Dr Savundra was not afforded procedural fairness in connection with the suspension, that this could not be contested, the finding of misconduct was abandoned, the formal warning was withdrawn and the matter was discontinued. Yet, the employer is said to have continued to believe and act as if these findings remain valid.

(c) The non-renewal of the Royal Perth Hospital contract

54 The Arbitrator had regard to the principle that an employer who allows a fixed term contract to expire and does not offer a further contract it is not a dismissal: ***Gallotti v Argyle Diamond Mines Pty Ltd*** [2003] WASCA 166; (2003) 83 WAIG 3053 [4] - [7], and to the principle that where an employee accepts employment for a fixed term, the employee must be taken to have consented to the position that the contract comes to an end on a specified day: ***Ex parte Wurth; Re Tully*** (1954) 55 SR (NSW) 47, 59 - 60, 62 – 63.

55 She then had regard to the following:

(a) the 2013 Agreement makes five-year fixed term contracts for those in Dr Savundra's circumstances the norm (cl 20(1)(a)). It not only explicitly recognises that 'there shall be no automatic right to reappointment', but also provides compensation of 10% of final base salary for each year of continuous service;

(b) the contract signed by Dr Savundra provided that it would be for five years and there could be no expectation of employment beyond that point (AB 400 - 402);

(c) Dr Savundra signed the contract on 17 December 2009; and

(d) Dr Savundra knew some months before the expiry of his contract that the employer was considering whether to offer him a new contract.

56 The Arbitrator observed the 'deal' that both parties had made was to an agreement for a fixed term and compensation for the non-renewal of a contract. When all of these circumstances were considered, the Arbitrator found Dr Savundra could not have a genuine or objective expectation that he would be offered a new contract.

57 The Arbitrator found that the evidence demonstrated that the employer made a decision not to renew the contract; that it was a deliberate decision as it did not merely allow the contract to come to an end and do nothing about it. She also found that the facts established that there appeared to be particular reasons behind that decision and those reasons appeared on their face to include conclusions, findings and opinions associated with the incident on 15 February 2013, which the employer had advised the AMA were made without affording Dr Savundra procedural fairness and which were effectively withdrawn.

58 The Arbitrator then turned her mind to the question whether Dr Savundra was entitled to procedural fairness in the non-renewal decision. She firstly had regard to the principle in ***Jarratt v Commissioner of Police for New South Wales*** [2005] HCA 50; (2005) 224 CLR 44; (2005) 221 ALR 95 in which Gleeson CJ noted that in ***Annetts v McCann*** [1990] HCA 57; (1990) 170 CLR 596 it was said that it can now be taken as settled that the rules of natural justice regulate the exercise of a power to remove a person from public office unless they are excluded by plain words of necessary intendment. The Arbitrator observed that the case of ***Jarratt*** was a decision to remove an officer, not a decision to not renew a contract; that is to employ or re-employ.

59 The Arbitrator then found that:

(a) the fact that the 2013 Agreement and the contract expressly state that there is no obligation on the employer to offer a new contract on the expiration of the previous one and that there is no right to reappointment means there can be no right to, interest in or legitimate expectation of a new contract;

(b) a decision not to offer a new contract is not dissimilar to a decision to not employ at first instance. An employer is free to choose whom they wish to employ and on grounds they choose;

(c) neither the 2013 Agreement nor the contract places any obligation on the employer to afford procedural fairness in that decision;

(d) to now create a new requirement to afford procedural fairness in making a decision of this nature would have widespread effects on employment practices and could in the public sector open the 'floodgates';

(e) to require employers to justify decisions not to offer a further contract in the circumstances where the parties had agreed that there could be no expectation in the future is not reasonable, both in contractual terms and in public policy terms; and

(f) in this case, such a process (being an opportunity to be heard) would be unreasonable given the basis upon which the parties had entered into their agreement in the first place.

(d) Is industrial unfairness demonstrated in the records?

60 The Arbitrator found that it was most likely that the decision not to offer a new contract was made based on the personal knowledge and opinion of the participants in that decision, particularly Professor Stokes and Dr Daly, without necessarily relying on an incomplete personnel file.

61 She then found in the circumstances, the incomplete file neither added to nor subtracted from the fact that the employer made a decision based on views of people who had dealt with Dr Savundra. She also found that it was most likely that the fact that the formal adverse findings and the formal warning which were withdrawn did not mean that Dr Daly and Professor Stokes had changed their minds about Dr Savundra's conduct on 15 February 2013.

62 In relation to the T1 termination form, the Arbitrator found that the form provided no options to reflect the employment came to an end by the effluxion of time or the end of a contract and found that the boxes which were ticked under the heading 'Reasons for Termination' and the words written 'End of Contract' did not reflect that there was a 'termination of the employment relationship' as meaning a dismissal.

(e) Was unfairness to other doctors and to the interests of patients demonstrated?

63 In the schedule of the memorandum of matters referred for hearing and determination a claim is made that the decision not to offer a new contract at Royal Perth Hospital was made unfairly to Dr Savundra and numerous other doctors employed at that hospital. The Arbitrator found that there was no substantive evidence of unfairness to other doctors employed at Royal Perth Hospital by the decision not to renew Dr Savundra's contract. Further, she found there was no real evidence of unreasonable workloads or demands placed on any doctors as a consequence of Dr Savundra not having a contract at Royal Perth Hospital.

64 The Arbitrator then found that whilst she accepted that there may be a real view amongst doctors at Royal Perth Hospital about Dr Savundra's professional skills and a real demand for such skills, the matter referred for hearing and determination was never really about unfairness to other doctors at Royal Perth Hospital consequential upon the decision to not renew Dr Savundra's contract. Further, she found that, in the circumstances, whether the management of Royal Perth Hospital decided to take some action against an individual doctor for good reason or ill, its impact on the doctor's colleagues is not directly material, nor appropriate to be dealt with in her reasons for decision. She then found that it could just as reasonably be argued that, regardless of the reasons for a non-renewal of a contract or, in different circumstances, the dismissal of an employee, the fact that a particular individual's skills are, in the view of that individual's colleagues, necessary for the wellbeing of patients does not mean that the person ought to continue to be employed. Finally she found this issue is not relevant to whether that individual has or has not been treated fairly in all of the circumstances.

(f) The relevance of impact on patients of the contract decision

65 The Arbitrator found that the impact on patients, even if it is an industrial matter, which she did not determine, is a matter to be treated in the same way as unfairness to other doctors. She found that this issue whilst it could not be said to be a matter of no consequence, was not a relevant matter for her decision.

(g) Alternatively - If there is an obligation on the employer to provide procedural fairness in deciding whether to offer a new contract should the remedy sought by the AMA be granted?

66 The Arbitrator found it was clear that before the decision to not offer a new contract was made, as Dr Savundra was not informed of what matters would be taken into account and was not given an opportunity to be heard, he was denied procedural fairness.

67 She observed that the AMA does not pursue an opportunity for Dr Savundra to be offered more employment at Royal Perth Hospital, but seeks that:

(a) the decision not to offer a new contract and its circumstances be reviewed;

(b) the decision be nullified;

(c) an opportunity be given to Dr Savundra to understand and respond to any 'adverse allegations' the employer wishes to make against him; and

(d) a new decision be made by the employer 'lawfully, fairly and transparently'.

68 The Arbitrator then went on to review the decision to not offer a new contract. She observed that in putting its case and the process for the hearing, the AMA had elicited evidence of at least some of the reasons for the employer not offering Dr Savundra a new contract.

69 As to the issue of writing on patients' notes, she found that Dr Savundra appeared to accept, at the time, that he should have done things differently. She also found that the note he wrote was demonstrative of an attitude towards hospital administration which was reflected in his conduct and attitude in the incident of 15 February 2013.

70 The Arbitrator then went on to consider Dr Savundra's own evidence of the incident of 15 February 2013. She found that:

(a) the arrangements that he made with another hospital to receive patients, the directions that he gave and the action he took at Royal Perth Hospital were made in the circumstances where he appeared to have no managerial or organisation authority. In particular, he took matters into his own hands, beyond his authority;

(b) there was no real or genuine risk to patient safety on the weekend in question as Dr O'Sullivan was competent to deal with patients who presented and the issue was simply that he had not yet been credentialed; and

(c) Dr Savundra's own evidence made it clear that he was given a verbal direction by Dr Daly to not attend the emergency department at Royal Perth Hospital on 15 February 2013 but he refused to comply with that direction.

71 The Arbitrator did not make any determination as to whether Dr Savundra or the conduct of others in regard to that day constituted industrial action. She found it was not argued before her and it was unnecessary to make any findings in that respect.

72 The Arbitrator then went on to consider the inherent tension between the health service management and clinicians. She found that:

(a) the former are required to make decisions about the type of service and the allocation of resources, by taking a broad view of the best interests of the organisation, and, in this case, how that fits within the Western Australian health system;

(b) on the other hand, the clinician is focussed, quite properly, on the best interests of each patient and obtaining the best possible care for each of them;

(c) there is an immediate tension between the health services management and clinicians and this can lead to conflict;

(d) it is how the two, the management and the clinicians, work together and co-operate, each understanding the other's position and interests, which allows the whole system to work in the best interests, not merely of one patient or some patients, but the whole of the patients;

(e) working together involves compromises, as resources are limited; and

(f) where an arrangement is difficult, where compromise and co-operation are troublesome, management will be entitled to make necessary decisions, and employees are not entitled to take things into their own hands regardless of the strength of their beliefs about those decisions.

73 The Arbitrator then found she did not see it was necessary to nullify the decision because the decision was not to do something, that is, not to offer a new contract and that nullifying such a decision has no effect. She also observed that Dr Savundra and the AMA do not specifically seek that a new contract be offered, rather that Dr Savundra have an opportunity to know what is against him and respond to it, and that the employer consider that and make a decision. She then observed that if she found in Dr Savundra's favour, those other things might flow without the need for the original decision to be nullified.

74 She finally found that her reasons for decision had given Dr Savundra the remedy sought of an opportunity to understand and respond to adverse allegations, and in giving his evidence, he had responded to them. In particular, the hearing of the matter had otherwise enabled the AMA and Dr Savundra to know what was against him, if he did not already know.

Grounds of appeal

75 The grounds of appeal are as follows:

> The Acting Senior Commissioner erred in law in that she:
>
> 1. Failed to correctly identify, and apply, the correct principles concerning whether the Respondent was required to provide procedural fairness to the Appellant's member Dr Savundra in deciding whether to offer Dr Savundra a further contract to work at Royal Perth Hospital (RPH) in the course of, and as part of, his ongoing employment with the Respondent (the RPH Contract Decision), and specifically:
>
>   (a) Having observed that procedural fairness is generally applicable where a relevant right, interest or legitimate expectation may be defeated, destroyed or prejudiced, then failed to address, properly or at all, whether Dr Savundra had a material interest in being offered a further contract to work at RPH in the course of his ongoing employment with the Respondent;
>
>   (b) In circumstances where she found that Dr Savundra was not informed of what matters would be taken into account and be given an opportunity to be heard about those matters, further erred in law in failing to find that Dr Savundra did, materially have an interest in being offered a further contract to work at RPH, and therefore necessarily was denied procedural fairness by the Respondent when it made the RPH Contract Decision.
>
> 2. Failed to properly address, and make findings about, the totality of the Applicant's claim for relief that the RPH Contract decision be nullified with the effect that was expressly claimed at paragraph 9(b)(i)-(iii) of the initiating application, as amended by leave, and specifically:
>
>   (a) Addressed the issue of Dr Savundra being afforded an opportunity to understand and respond to any material adverse allegations made, or maintained by the Respondent in the context of the evidence as led in the hearing in this Commission, as opposed to within the context of his ongoing employment with the Respondent;
>
>   (b) Incorrectly failed to acknowledge and address Dr Savundra's wish to have the opportunity to be offered more employment with the Respondent at RPH; and
>
>   (c) Failed to make findings about whether the Respondent had acted lawfully, fairly and transparently in making the RPH Contract Decision, and thus whether that Decision should in fairness and good conscience be remade, so that those essential attributes would then be properly observed by the Respondent.

Conduct of the appeal - submissions

76 Prior to the hearing of the appeal on 23 May 2016, on 16 May 2016 a letter was sent to the parties' representatives by email on behalf of the Full Bench in which it was stated:

> The Full Bench notes that:
>
>   (a) ground 1 of the appeal directly raises the issue whether Dr Savundra was denied procedural fairness by the respondent when it made the Royal Perth Hospital contract decision; and
>
>   (b) ground 2 of the appeal appears also to raise issues going to procedural fairness.
>
> As the rules of procedural fairness are principles that apply to administrative decisions, at the hearing of the appeal, the members of the Full Bench wish to hear submissions from the parties in respect of the issue whether a right to procedural fairness can, or should, apply to a decision that arises pursuant to a contract between Dr Savundra and the respondent and as such is a private right.

77 Subsequent to the letter, both parties filed written submissions on Friday, 20 May 2016 in which the point raised by the Full Bench was addressed.

78 At the hearing of the appeal the Full Bench referred counsel to the following three decisions in which there was judicial consideration of the point raised by the Full Bench in its letter dated 16 May 2016:

(a) ***Australian National University v Burns*** (1982) 43 ALR 25;

(b) ***Australian National University v Lewins*** (1996) 138 ALR 1; (1996) 68 FCR 87; and

(c) ***Griffith University v Tang*** [2005] HCA 7; (2005) 221 CLR 99.

79 At the conclusion of oral submissions on 23 May 2016, both counsel for the parties sought to file supplementary written submissions about the point raised by the Full Bench and the issues arising from the authorities referred to by the Full Bench. Mr Hooker, counsel for the AMA, also sought to address in the supplementary submissions the final matters his client wished to raise in reply to the matters raised on behalf of the employer. At that point in time it was agreed that the AMA would file its submissions by 27 May 2016 and the employer by 3 June 2016.

80 On 25 May 2016, the parties were sent an email on behalf of the Full Bench in which it was stated:

> One of the issues to be addressed in the submissions to be filed by the parties is whether the Royal Perth Hospital contract decision involved an exercise of statutory power as contended on behalf of the appellant in its outline of submissions filed on 20 May 2016.

The Full Bench advises that in addressing this issue, the parties may wish to consider whether any of the recent observations made by Pritchard J in ***Byrne v The Owners of Ceresa River Apartments Strata Plan 55597*** [2016] WASC 153 [42] - [51], [57] - [71] (delivered 20 May 2016) are relevant.

81 On 1 June 2016, solicitors for the AMA advised that it had been agreed with counsel for the employer that the AMA file its written submissions by 2 June 2016 and the employer by 9 June 2016. Unfortunately, the supplementary submissions were not forthcoming.

82 On 22 June 2016, the Full Bench reconvened and made the following orders ([2016] WAIRC 00382):

1. The appellant is to file and serve its supplementary submissions by close of business 29 June 2016;
2. The respondent is to file and serve his supplementary submissions within seven (7) days of receipt of the appellant's supplementary submissions.

83 On 1 July 2016, the Full Bench extended the time for compliance for order 1 of the order ([2016] WAIRC 00382) until 6 July 2016.

84 By letter dated 6 July 2016, the AMA through its solicitors advised that it would not be providing any further written submissions and asked that the matter proceed on the basis of the submissions that had been put before the Full Bench on 23 May 2016.

85 The employer filed its supplementary submissions on 8 July 2016 in which the remaining points raised by the Full Bench were addressed.

86 One of the issues raised by the Full Bench is whether the 2007 and 2013 Agreements can be properly characterised as 'subsidiary legislation'. One of the matters relevant to the determination of this issue is the operative effect of the definition of subsidiary legislation in s 5 of the *Interpretation Act 1984* (WA) and whether industrial agreements can be said to be made under any written law and have legislative effect. As this is an issue which is likely to be of importance in other matters that come before the Commission in the absence of submissions on this point from both parties, no consideration of this issue has been addressed in these reasons. In any event, for the reasons that follow, resolution of this point in this appeal is not necessary.

AMA's submissions

87 The AMA contends there are two significant appealable errors committed by the Arbitrator as set out in the grounds of appeal.

88 In ground 1, the AMA argues that the Arbitrator erred in concluding that the principles of procedural fairness were inapplicable to the decision of the employer as to whether or not to offer Dr Savundra a further contract to work at Royal Perth Hospital in the course of, and as part of, his ongoing employment with the employer. I understand this ground of appeal to rely upon the application of the principles of administrative law that require procedural fairness to be applied when making an administrative decision in the exercise of a statutory power.

89 In ground 2, it is argued that the Arbitrator failed to properly address the totality of the industrial matter referred under s 80F of the IR Act. In particular, she failed to make factual findings, and arrive at ultimate conclusions about, significant issues of injustice that warranted a remedy. This appeal ground includes a claim of denial of procedural fairness but encompasses a wider claim of industrial unfairness and a claim of unreasonableness in making the decision not to offer Dr Savundra a further contract of employment to carry out work at Royal Perth Hospital.

(a) Ground 1 of the appeal

90 It is pointed out on behalf of the AMA that since the seminal decision in ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, the High Court has consistently held that the making of administrative decisions derived from statutory powers when exercised so as to destroy, defeat or prejudice not merely a person's rights, but also his or her interests, a strong presumption applies that the rules of procedural fairness regulate the exercise of that power unless excluded by plain words of necessary intendment.

91 The AMA contends it was accepted in the proceedings at first instance that there was an ultimate statutory power from which the various decisions made from time to time in the course of Dr Savundra's overall employment. This power it says is provided in s 19 (when read with s 7 and s 7A) of the *Hospital and Health Services Act 1927* (WA) (repealed). It is also argued in written submissions filed on behalf of the AMA on 20 May 2016 that the applicable power is also sourced in the industrial agreements that governed Dr Savundra's employment at all material times.

92 The other major component of the case for the AMA at first instance relied upon the existence of a material interest which it says was in peril of being prejudiced, or derogated from by the decision not to offer Dr Savundra a further fixed term contract of employment at Royal Perth Hospital.

93 It is argued that the Arbitrator failed to have any, or any proper regard to what was, an irresistible inference on the evidence and other material before her, that Dr Savundra had an 'interest' in the making of the decision not to offer him a new contract. Further, that such an interest comes within the observations of the 'almost' infinite variety of interests which are protected by the principles of natural justice and that 'any interest possessed by an individual' attracted the protection that compliance with the obligation provides: ***Kioa*** (617, 619) (Brennan J). The width of this test it is said was reinforced by a majority of the High Court in ***Plaintiff S10/2011 v Minister for Immigration and Citizenship*** [2012] HCA 31; (2012) 246 CLR 636 in which their Honours observed that the plurality judgment of Brennan J in ***Kioa*** emphasised that there are interests beyond legal rights that the legislature is presumed to intend to protect by the principles of natural justice: [66] (Gummow, Hayne, Crennan and Bell JJ).

94 The relevant right or interests that Dr Savundra had are said to be as follows:

(a) There was a pre-existing employment relationship, between the employer and Dr Savundra which had been ongoing for over a decade, pursuant to which Dr Savundra was and had been undertaking work at Royal Perth Hospital on more than one fixed term contract and he had been undertaking work on fixed terms at other public hospitals and continued to do so. Further, he was undertaking other work within the public health system which work was not necessarily easy to ascribe to any particular hospital.

(b) Dr Savundra retained relevant rights of private practice contemplated by the 2007 and 2013 industrial agreements which was orthodox and common for senior highly experienced and eminent doctors such as Dr Savundra.

(c) Whilst it is accepted that the expiry of specific fixed term contract work at Royal Perth Hospital did not generate any relevant right, Dr Savundra had an inherent interest in the importance of going to work and performing one's work in addition to the drawing of a particular salary: ***Quinn v Overland*** [2010] FCA 799; (2010) 199 IR 40 [101] - [103].

(d) The nature of Dr Savundra's work at Royal Perth Hospital pursuant to a series of fixed term contracts was important specialist work which was highly regarded not only by the patients but by other specialists at the hospital.

(e) Another part of Dr Savundra's interests is his eminence, his seniority and the undoubted sophisticated quality of the work value of the work performed by him.

95 When all of these circumstances are considered, it is argued that Dr Savundra had an interest that not only related to reputation as recognised by Brennan J in ***Kioa***, but also his interests were broader than that. Further, if one analyses his interest by an analogy to an issue of 'standing' at common law, he would meet the test of standing.

96 As this matter turns on its own facts, it is said that the Arbitrator erred in finding that to apply the rules of procedural fairness in this matter would have created 'new requirements' or of itself 'opened the floodgates'.

97 Alternatively, it is argued that to recognise the existence of an interest in this matter would not have a widespread effect on employment practices as the High Court has recognised unequivocally that where a person has an interest in the making of an administrative decision the rules of procedural fairness regulate the exercise of that power to make the decision.

98 Moreover, the AMA points out that it was not argued that Dr Savundra had an expectation of being offered a new contract for work at Royal Perth Hospital, be it a 'legitimate expectation' or otherwise, as the source of the presumption of the applicability of procedural fairness. Since ***Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*** [2003] HCA 6; (2003) 214 CLR 1, the concept of 'legitimate expectation' in this area of public law discourse has not been supported by the High Court, notwithstanding the form of words used in authorities such as ***Annetts***. In ***Plaintiff S10***, it was found that the phrase 'legitimate expectation' either adds nothing or poses more questions than it answers, and was therefore an 'unfortunate expression which should be disregarded': [65].

99 The AMA points out it cannot be disputed that the Arbitrator correctly found that Dr Savundra had been denied procedural fairness in making the decision not to renew his contract. The decision in question was deliberate. The employer did not merely allow the contract to come to an end and do nothing about it.

100 The AMA also contends that it is not the point to say that an employer is free to choose whom they wish to employ and do not state the grounds on which they chose. In isolation that may not be incorrect to say, but in the context of a situation where a senior employee, in the circumstances of Dr Savundra, plainly does have an interest, the freedom to make the decision in question in pursuing that freedom to contract is qualified by the obligations that procedural fairness imposes.

(b) Ground 2 of the appeal

101 Section 80E of the IR Act confers jurisdiction on the Arbitrator of substantial width to conduct a real review into the industrial fairness and lawfulness of occurrences, acts and omissions within the parameters of what has been referred: ***Jones***.

102 In the hearing at first instance, the AMA on behalf of Dr Savundra did seek an order for Dr Savundra to work at Royal Perth Hospital within his employment with the employer. However, it is said that this important component of the industrial matter before the Commission was overlooked by the Arbitrator. Whilst an assertion was never put that the employer should be ordered to award a new contract to Dr Savundra at Royal Perth Hospital, what was sought was that the decision not to offer a new contract be nullified and that the employer reconsiders the matter in a manner that is lawful, fair and transparent. In these circumstances, it is argued that Dr Savundra should be given an opportunity to be apprised of the particulars of all of the allegations made against him and have an opportunity of addressing those matters prior to a further decision being made.

103 It is pointed out that a failure by an administrative tribunal, such as the Commission, to properly and fully address the entirety of an applicant's claim, including making necessary factual findings, will amount to a jurisdictional error: ***Dranichnikov v Minister for Immigration and Multicultural Affairs*** [2003] HCA 26; (2003) 77 ALJR 1088.

104 The AMA contends that the factual findings made by the Arbitrator in her reasons for decision about the circumstances of the incident in February 2013, were made in an artificial context of a failure to acknowledge what it was, in reality the AMA was seeking by way of relief on Dr Savundra's behalf. Consequently, it is argued that the Commission's jurisdictional task remained, and still remains, unfulfilled: ***Minister for Immigration and Multicultural Affairs v Bhardwaj*** [2002] HCA 11; (2002) 209 CLR 597. Thus, it is argued that such an error in and of itself entitles the AMA to relief on appeal.

105 The AMA also contends that the decision not to offer Dr Savundra a new contract was industrially unfair as the decision lacked patent transparency, openness, procedural unfairness and was manifestly unreasonable with consequences for colleagues and patients.

106 The finding that the inquiry into the matter by the Arbitrator has given Dr Savundra the remedy sought of an opportunity to understand and respond to adverse allegations and in giving his evidence he has responded to them, is in error as Dr Savundra has been denied an opportunity of being provided with particulars of the adverse allegations and a hearing by the employer.

107 It is argued that if it is accepted that there was an obligation on the employer to provide procedural fairness in deciding whether or not to offer a new contract, the evidence established that before the decision was made, Dr Savundra was not informed what matters would be taken into account and was not given an opportunity to be heard. Further, that the hearing that took place before the Arbitrator did not provide Dr Savundra with a hearing that would satisfy the requirements of procedural fairness.

108 Whilst not raised in the grounds of appeal, it is not conceded that some of the factual findings made about the conduct of Dr Savundra in the incident that occurred in February 2013 fairly reflected the evidence. However, it is said that even if those assertions are correct, the hearing that was conducted before the Arbitrator could not be said to obviate the need to refer the matter back to the employer to provide procedural fairness to Dr Savundra.

109 In various conversations Dr Savundra had with Professor Stokes and the conversations Dr Williams and Dr Duncan-Smith had with Professor Stokes, it appears that the reasons Dr Savundra was not offered a further contract at Royal Perth Hospital was based on broad-based assertions of Dr Savundra being a bully, having a polarising effect on people and needing to learn to work with management in a more cohesive way. In light of the fact that the employer elected not to give evidence in the matter at first instance, the AMA and Dr Savundra have simply been left with these vague assertions which, if a fair hearing was to be accorded by the employer, would be required to be particularised. Further, any critical evidence and material that might support those particulars should be put to Dr Savundra with a fair opportunity to understand the material and respond.

110 In any event, the Arbitrator did not make any determination as to the circumstances of the incident of 15 February 2013 other than to find that there were two competing conflicting views about what should have occurred in relation to that incident and a finding that there were different interests of management to the view of Dr Savundra of what was important.

111 The AMA contends the decision of the employer was industrially unfair because of the following matters:

(a) The head of the AMA, Mr Paul Boyatzis, wrote to Professor Stokes on 19 August 2014 stating that the AMA was concerned about the manner in which Dr Savundra had been treated by Royal Perth Hospital (AB 345 - 346). A number of matters were put to Professor Stokes in that letter, including there had been no finding of any wrongdoing on Dr Savundra's part. No answer to that letter was received. However, it is conceded that a letter was received from Professor Daly to Mr Boyatzis dated 5 September 2014 (AB 347 - 348).

(b) Although Mr Warner had on behalf of the employer written to Dr Savundra on 12 July 2013 acknowledging that the finding of misconduct was abandoned, the formal warning was withdrawn and the matter raised in PSAC 20 of 2013 (the incident on 15 February 2013) was withdrawn, the adverse findings that were made continued to be given currency by the employer in 2014 when the decision was made not to offer Dr Savundra a further contract to work at Royal Perth Hospital.

(c) The decision was made with non-compliance with the rules of procedural fairness, took into account considerations based on assumptions or conclusions that seemingly came out of thin air. Put another way, the matters that were taken into account appear to be irrelevant and manifestly unreasonable.

(d) The decision was unfair to Dr Savundra and numerous other doctors employed at Royal Perth Hospital. In particular, Dr Corrigan and Dr Williams who became joint heads of department, gave evidence about some of the practical difficulties they have been encountering at Royal Perth Hospital since Dr Savundra no longer works there because they have been unable to use his particular expertise in some areas. In Dr Savundra's absence there are concerns about the quality of patient care at Royal Perth Hospital with particular conditions.

The employer's submissions

112 The employer points out that in order to be conditioned by the provision of procedural fairness the exercise of a power must be public as opposed to private in nature. The exercise of the power must be apt to reflect adversely what is a sufficient interest of a party: ***Plaintiff S10*** [66]. It is pointed out that the AMA contend that the Arbitrator was in error in that she only looked for a 'legitimate expectation' rather than an 'interest' to support Dr Savundra's claim that he is entitled to procedural fairness in the making of the contract renewal decision. However, the employer says that Dr Savundra had no greater interest in a further contract than any other person employed under a fixed term contract. His desire and reasonable hope of a further contract does not objectively amount to a sufficient interest to attract the principles of procedural fairness. Further, it is said that in any event the Arbitrator did not limit her examination to whether there was a legitimate expectation of a further contract. At [116] of her reasons for decision, she found that there was no obligation on the employer to offer a new contract on the expiration of the previous one and there was no right to reappointment meant there could be no right to, interest in or legitimate expectation of a new contract.

113 The employer argues that statutory source of the general power to employ under s 19 of the *Hospital and Health Services Act* constitutes a bare power to contract and is not the type of power that attracts judicial review. Further, it is said the industrial agreements that applied to Dr Savundra's employment cannot be considered to be in the nature of legislation, subsidiary or otherwise: ***Byrne v The Owners of Ceresa River Apartments Strata Plan 55597*** [2016] WASC 153. Thus, it argued that the rights that Dr Savundra had pursuant to his contract of employment were private rights and do not arise out of a statutory power.

114 It is also argued that the nature of the power exercised by the employer in this case was to allow the contract to which he and Dr Savundra were parties to expire according to its terms without a further contract being offered. The legal position is that it is a private right to decide whether or not to offer a further contract at the expiration of a fixed term. This private right is one arising from the bargain struck to allow the contract to expire with or without reason or hearing without offering a further contract. Such a decision is not public in character.

115 An application for judicial review does not extend to a pure employment situation. It is confined to reviewing activities of a public nature as opposed to those of a private or domestic character: ***R v British Broadcasting Corporation; Ex parte Lavelle*** [1983] 1 All ER 241; [1983] 1 WLR 23, 30 - 31 (Woolf J); cited in ***Whitehead v Griffith University*** [2002] QSC 153 [15] - [16]. The exercise of powers or assertion of rights under a contract of employment is not the exercise of a statutory power or public in nature: ***Whitehead*** [16] - [17].

116 A bare power of appointment under a statute constitutes the appointee an ordinary servant without a right to be heard prior to dismissal: ***Malloch v Aberdeen Corporation*** [1971] 2 All ER 1278, 1282 (Lord Reid).

117 In any event, the employer says there is no reviewable decision. The parties have let occur what they agreed to, that is, it was agreed that the contract for work at Royal Perth Hospital would expire on the date specified.

118 Where the parties to a contract have agreed, as they did here, that employment will be for a specified term there can be no obligation on the part of the employer to offer further employment. Nor is there any obligation to consider whether to offer further employment, provide reasons for not offering further work, have reasons for not doing so, or where there are reasons, to advise the employee of them and provide a hearing before finally deciding to allow the contract to expire. If the position were to be otherwise employment for a fixed term would not be that. It would become employment for so long as the employer had a fair basis to not offer a further term of employment upon the expiry of the fixed term contract. That is employment for an indefinite term in all but name.

119 The employer argues that whilst there may be reason as to why a further period of employment is not offered that is irrelevant where the contract is simply permitted to terminate on the date the parties have agreed to.

120 The employer contends that Dr Savundra was in an analogous but inferior position to an applicant for employment.

121 In ***Jones*** [117], Hasluck J referred to Dawson J's approval in ***Attorney-General for the State of New South Wales v Quin*** [1990] HCA 21; (1990) 170 CLR 1, 59 of the observations of Lord Denning MR in ***Breen v Amalgamated Engineering Union*** [1971] 2 QB 175, 191 where he said:

> If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given …

122 Thus, in ***Quin*** the majority of the High Court accepted that in ordinary circumstances the making of an appointment would not attract the rules of natural justice.

123 The employer, however, concedes that the rules of natural justice can be attracted where an employer makes a representation sufficient to displace the ordinary rule referred to in ***Quin*** or confer upon an applicant for employment an entitlement to procedural fairness based upon a legitimate expectation that he would be heard: ***Jones***. In support of this contention, the employer also referred to the factual circumstances in ***Cole v Cunningham*** (1983) 81 FLR 158. In that matter Cunningham had applied for reappointment to the Public Service which was refused on the ground of prior misconduct. The Full Court of the Federal Court held that there were special facts or circumstances giving rise to a legitimate or reasonable expectation by Cunningham that an application for reappointment would not be refused on the ground of prior misconduct unless he was given an opportunity to answer the allegations made against him. The special circumstances were that Cunningham had been induced to resign on the basis that he would leave his employment with a clear record and criminal proceedings would not be instituted in relation to the alleged misconduct. Some weeks after resigning Cunningham sought to revoke his resignation which would have allowed him a hearing in relation to the alleged misconduct which his resignation had denied him. In those circumstances, the Full Court found that these were special facts that Cunningham had a legitimate expectation that the question of his future employment in the Public Service would not be decided on the basis that his past record in the department was blemished. If contrary to that expectation, his past record was to be treated by the department as blemished, the law required that he be afforded a proper opportunity to be heard.

124 The employer contends that the only circumstances of any representation that could possibly be of relevance in this matter is contained in the letter that was sent to Dr Savundra on 12 July 2013 advising him that the finding of misconduct in respect of the incident of 12 March 2013 would be abandoned, the formal warning was withdrawn and the matter was discontinued. However, when all of the circumstances are examined, it is argued that the matters stated in that letter do not amount to, or cannot amount at law to a representation that would give rise to any special circumstances as it did in the facts of the decision in ***Cole v Cunningham***.

125 The employer says that if the reasoning in ***Cole v Cunningham*** is applied on the evidence adduced at first instance in this matter, Dr Savundra had no right of procedural fairness in relation to the contract decision or to a further contract in the sense that term has been used in the authorities. At most he had the hope of a further contract. Thus, the Arbitrator after considering the evidence correctly found that Dr Savundra could have no genuine or objective expectation he would be offered a new contract.

126 The employer argues that the Arbitrator correctly set out the facts of the events that occurred on 15 February 2013. He says:

(a) By letter dated 12 March 2013, Dr Savundra was suspended from duty pending the outcome of a preliminary inquiry in relation to his conduct concerning the status of Dr Rawlins and Dr O'Sullivan. The particulars of the action taken by Dr Savundra were set out in that letter.

(b) Professor Stokes by letter dated 6 June 2013 advised Dr Savundra that the preliminary investigation had been complete and that it was plain that industrial action, in the form of withdrawal of labour, occurred and further action was threatened. Further, he stated that this was entirely unacceptable and any repetition would necessitate retaliatory industrial action being taken by the hospital. Professor Stokes also stated that it was plain that Dr Savundra failed to comply with a verbal direction given to him by the executive director of Royal Perth Hospital, Dr Daly, to the effect that he was not to attend the hospital on Friday, 15 February 2013. It is apparent that Dr Savundra did attend the hospital and gave various directions in connection with the admission of patients in the furtherance of the industrial objectives then being pursued. Professor Stokes warned Dr Savundra that if in future he failed to comply with his contractual obligations or unreasonably involve himself in matters pertaining to the organisation of the business of the hospital then disciplinary action, which may call into question his continuing association with the hospital, would be taken.

(c) Prior to the expiry of Dr Savundra's contract he met with Professor Stokes. During the meeting Dr Savundra was advised by Professor Stokes that a further contract would not be offered to him by reason of unspecified evidence of bullying and intimidation by Dr Savundra towards other staff members. There is nothing arising from the evidence to oblige the employer to accord Dr Savundra procedural fairness in deciding whether to offer him a further contract. While it was not necessary to do this Dr Savundra was advised of the issues of concern by Professor Stokes and he had the opportunity to respond to them in the meeting that took place in October 2014.

(d) Even though the letter of 6 June 2013 which withdrew the earlier findings made by Professor Stokes it was legitimate for the employer to remain concerned regarding the actions of Dr Savundra on the evening of 15 February 2013.

127 Consequently, in light of these facts, as the Arbitrator found, Dr Savundra's conduct was that he:

(a) took matters into his own hands, beyond his authority;

(b) was given a verbal direction not to attend the emergency department and refused to comply with that direction; and

(c) acted without authority in providing instructions to staff at Royal Perth Hospital about what they would do and would not do in respect of receiving and treating patients, and went beyond that to make arrangements with another hospital, which resulted in that hospital making additional resources available.

128 The employer says there were more than sufficient circumstances to justify the remark made by Professor Stokes that the behaviour engaged in by Dr Savundra had not reflected well on him.

129 In any event, it is argued the letter that was provided to Dr Savundra in June 2013 did not cause or induce Dr Savundra to act to his detriment. He did not take any action that he might otherwise have taken. In any event, even though the findings were withdrawn, the employer's concern about the behaviour does not go simply because the findings were withdrawn.

130 The employer also contends that there can be no useful purpose in requiring it to revisit the decision not to renew Dr Savundra's contract after having heard Dr Savundra in relation to the matters that took place on 15 February 2013. It is said that on Dr Savundra's own evidence it is obvious that Professor Stokes could reasonably conclude Dr Savundra's involvement in the events of 15 February 2013 was evidence he had not behaved well.

131 It follows from the nature of a fixed term of employment that there is no decision to be reviewed if the employer simply allows the contract to expire. That is the nature of the employment, the bargain struck. The interest argument raised on behalf of Dr Savundra cannot be made out as there is no right to a hearing in a decision not to offer a further contract of employment after a fixed term contract has expired.

Consideration of grounds of appeal

(a) Ground 1 of the appeal - did the rules of procedural fairness apply by application of the principles of administrative law to the decision not to offer Dr Savundra a further contract?

132 It is a rule of common law that a power conferred by statute is to be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power: ***Quin*** (57) (Dawson J); ***Plaintiff S10*** [97] (Gummow, Hayne, Crennan and Bell JJ); ***Re Refugee Review Tribunal; Ex parte Aala*** [2000] HCA 57; (2000) 204 CLR 82 [39] - [41] (Gaudron and Gummow JJ).

133 The rule is concerned with an obligation to provide a fair procedure and defects in the procedure of exercising a statutory power. The concern of procedural fairness is to avoid practical injustice: ***Lam*** [37].

134 In ***Aala*** [59], Gaudron and Gummow JJ observed:

> [T]he conditioning of a statutory power so as to require the provision of procedural fairness has, as its basis, a rationale which differs from that which generally underpins the doctrine of excess of power or jurisdiction. The concern is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures.

135 The AMA on behalf of Dr Savundra argues that the decision not to offer a further contract involved an exercise of statutory power. In particular, the power to employ Dr Savundra was conferred upon the Minister for Health by s 19, read with s 7 and s 7A, of the *Hospital and Health Services Act*. It is also argued that the power to determine Dr Savundra's terms and conditions of employment was also sourced in a statutory power by operation of the 2013 Agreement.

136 Section 19(1) of the *Hospital and Health Services Act* provided at the time the decision was made:

> (1) A board may, for the purpose of the performance of its functions —
>
> (a) employ or engage employees and other persons; and
>
> (b) engage persons, whether or not natural persons, to perform functions on its behalf.

137 Pursuant to s 7 of the *Hospital and Health Services Act* the Minister was deemed to be the board of Royal Perth Hospital. Section 7A(2) provided for general powers of the Minister, including a power to enter into contracts, as follows:

> (2) For the purposes of the performance or exercise of the duties, powers or functions imposed or conferred on the Minister by or under this Act the Minister may —
>
> (a) enter into contracts and make arrangements on such terms and conditions, which may include the payment of charges, as the Minister thinks fit; or
>
> (b) make arrangements for the provision of services by an agency or agencies,
>
> or both.

138 It is clear from these provisions that by operation of s 19(1) the Minister was conferred with a power to employ or engage employees for the purpose of performance of the functions of the board of Royal Perth Hospital.

139 The first question to be determined is whether a bare power to employ is sufficient to attract the rules of procedural fairness by application of the rules that apply to administrative law.

140 Relevant decisions on this point have been made by regard to the question whether a particular decision sought to be impugned is a decision of an administrative character made under an enactment and thus excluded from review by administrative tribunals which have been created by legislative schemes to replace review of government decisions through common law prerogative writs.

141 In ***Burns***, the question was whether a decision by the council of the university to dismiss Professor Burns on grounds of permanent incapacity was a 'decision of an administrative character made … under an enactment' within the meaning of s 3 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act). Section 23 of the *Australian National University Act 1946* (Cth) (the University Act) empowered the council from time to time to appoint, among others, professors and have the entire management and control of the affairs and concerns of the university. Pursuant to s 27(1)(g) of the University Act, the council was able to make, alter or repeal statutes with respect to manner of appointment and dismissal of professors. However, at the time the matter was heard the council had not made any statutes in respect of the matters mentioned in s 27(1)(g). The Full Court of the Federal Court found that although s 23 of the University Act was the source of the council's power to enter into contracts of engagement with professors and other staff, the decision to dismiss on grounds of permanent incapacity was made pursuant to the terms of Professor Burns' contract and not from s 23 of the University Act. At (32) Bowen CJ and Lockhart J said:

> Although s 23 confers no power in express terms to remove or suspend professors and others, such power arises from the more general powers conferred by the section on the Council after the express reference to the powers of appointment. In our opinion the control and management of the affairs of the appellant must include the suspension or removal of its deans, professors and others.
>
> Notwithstanding that s 23 was the source of the Council's power to appoint and dismiss the respondent in 1966, it does not follow that the decision to dismiss him was made under the University Act. The answer to the question lies in the true characterization of the decision itself. It was not a decision to dismiss the respondent simpliciter. It was a decision to dismiss him on a particular ground namely, that he had become permanently incapacitated from performing the duties of his office. This was one of the grounds expressly provided for in condition 2(b)(ii) of the conditions of appointment which formed part of the respondent's contract of engagement. The University Act prescribes no essential procedural requirements to be observed before a professor is dismissed and lays down no incidents of a professor's employment.
>
> In our opinion the rights and duties of the parties to the contract of engagement were derived under the contract and not under the University Act. Section 23 empowered the Council to enter into the contract on behalf of the appellant. Even if the Council, in considering the position of the appellant under the contract, might be said to be acting under s 23, the effective decision for dismissal taken and notified to the respondent was directly under the contract.

142 A similar issue arose in ***Lewins***. In that matter, Mr Lewins unsuccessfully applied for promotion to a position of reader in accordance with a university policy set out in a promotions statement. He sought review of a refusal to provide him with a statement of reasons of the decision pursuant to s 13 of the ADJR Act. The Full Court of the Federal Court found that even though a promotions statement may have raised a legitimate expectation that the procedures set out in the promotions statement would have been followed, the ADJR Act did not apply as the decision was not made under an enactment.

143 The promotions statement in ***Lewins*** was not contractual in effect, but was imposed by a unilateral act of the university after presumably it was negotiated between the university and the relevant union. The promotions statement was found to have been promulgated simply under the wide powers of the council in relation to the control and management of the university and it was found that the promotions statement was not one to which the University Act gave the university capacity to affect legal rights and obligations unilaterally. Thus, it was found it was not made under an enactment and any capacity of the promotions statement to affect legal right may have been a matter of private law such as contract.

144 In the judgment of Lehane J in ***Lewins***, his Honour approached the question whether a decision to vary an employment contract owed its capacity to bind, from the enactment of the legislation, or from contract, or some other source by analysing the question in the following way (103):

> In this case, the relevant statutory power (in s 6(2)(k) of the ANU Act) is simply one 'to employ staff'. Obviously that, taken together with the general power to contract, empowers the University to enter into contracts of employment, to make consensual variations of employment contracts and to enter into new contracts with existing employees. But I cannot see how it is possible to construe a mere power to employ staff as enabling the University unilaterally to vary its contracts with its employees or to impose on them, without their consent, conditions which legally bind them — except, of course, to the extent that contracts of employment may themselves empower the University to make determinations which will be binding on the employees concerned (see, eg, *Thorby v Goldberg* (1964) 112 CLR 597).

145 This passage was approved by Gummow, Callinan and Heydon JJ in ***Tang***. In determining the meaning of the phrase 'a decision must be of an administrative character under an enactment', their Honours adopted the approach of Lehane J in ***Lewins***. In ***Tang***, they observed [79] - [81]:

> The decision so required or authorised must be 'of an administrative character'. This element of the definition casts some light on the force to be given by the phrase '*under* an enactment'. What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?
>
> The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement? (cf *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154) To adapt what was said by Lehane J in *Lewins* (1996) 68 FCR 87 at 103), does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute? (*General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164 at 169)
>
> If the decision derives its capacity to bind from contract or some other private law source, then the decision is not 'made under' the enactment in question. Thus, in *Lewins*, a decision not to promote to Reader a member of the staff of the Australian National University was not 'made under' the *Australian National University Act* 1991 (Cth) (the ANU Act).

146 Their Honours in ***Tang*** quoted the reasons given by Lehane J in ***Lewins*** at (103) which is set out in [144] of these reasons. They then went on to say [82]:

> For these reasons, a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment. A legislative grant of capacity to contract to a statutory body will not, without more, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect the other party's rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties. A decision to enter into a contract would have no legal effect without the consent of the other party; the agreement between the parties is the origin of the rights and liabilities as between the parties.

147 Whilst it could be said that the observations in ***Lewins*** and ***Tang*** only have application to a review of decisions by a body that has jurisdiction to review decisions of an administrative character under an enactment, the power to review such decision by a court exercising prerogative relief are substantially similar. This is simply because prerogative relief is confined to (pursuant to the rules of the court) the enforcement of public law remedies. This point is illustrated in ***Lavelle***.

148 In ***Lavelle***, legislation establishing the BBC as a corporation gave it power to appoint, remove employees and to determine conditions of employment. Ms Lavelle's contract of employment incorporated the BBC's regulations, which, in turn, incorporated a disciplinary procedure. At (248) Woolf J observed that prerogative remedies of mandamus, prohibition or certiorari:

> [W]ere not previously available to enforce private rights but were what could be described as public law remedies. They were not appropriate, and in my view remain inappropriate remedies, for enforcing breaches of ordinary obligations owed by a master to his servant. An application for judicial review has not and should not be extended to a pure employment situation. Nor does it, in my view, make any difference that what is sought to be attacked is a decision of a domestic tribunal such as the series of disciplinary tribunals provided for by the BBC.

(Applied by Chesterman J in ***Whitehead*** [15] - [16]).

149 Further, even if a duty arises under a statute, if it is a private right it is beyond the reach of prerogative relief: ***John Fairfax & Sons Ltd v Australian Telecommunications Commission*** [1977] 2 NSWLR 400, 406 (Moffitt P) (Reynolds JA agreeing).

150 In this matter, the rights and obligations arising from Dr Savundra's engagement as a sessional consultant cannot be said to be derived from s 19 of the *Hospital and Health Services Act*. The decision not to offer Dr Savundra a further fixed term contract for sessional work at Royal Perth Hospital was not made or acted upon under s 19. Section 19 simply provided a bare capacity or power to contract. The duration and rights arising under the contract were not conferred by s 19. The operative effect of s 19 in the circumstances of this matter was to authorise the making of the contract between Dr Savundra and the employer in 2009. The terms of the contract were set out in writing and had effect in the law of contract as private rights and obligations.

151 Leaving aside the issue whether an industrial agreement can be properly characterised as subsidiary legislation, it cannot be said that the decision not to offer Dr Savundra a further fixed term contract for work at Royal Perth Hospital was derived from the 2007 and 2013 Agreements. Clause 21(1), cl 21(4), cl 21(5) and cl 21(6) of the 2007 Agreement and cl 20(1), cl 20(4), cl 20(5) and cl 20(6) of the 2013 Agreement provide that:

(a) appointments of senior practitioners are to be on five-year contracts unless there is written agreement to the contrary between the employer and practitioner;

(b) there shall be no automatic right of reappointment upon expiry of a contract;

(c) a practitioner who is unsuccessful in seeking a new contract shall be paid a contract completion payment; and

(d) a practitioner with permanent tenure may elect to convert to a fixed term.

152 These provisions, when read with cl 24 of the 2007 Agreement and cl 23 of the 2013 Agreement, contemplate that a contract for a five-year term may be entered into between a sessional practitioner and the employer. However, these provisions also contemplate that a contract could be made for a shorter or longer term, or an indefinite duration. Thus, whilst these provisions, together with s 19(1) of the *Hospital and Health Services Act*, authorised the making of the contract between Dr Savundra and the employer in November 2009, it is the terms of the contract which determined not only the term of the agreement, but also the form of a subsequent offer of renewal if the employer elected to make such an offer. Thus, any 'right' or 'interest', if any, Dr Savundra may claim to have had in a decision whether or not to be offered a new contract was conferred by the terms of the 2009 contract. Consequently, any 'right' or 'interest' the AMA claims on behalf of Dr Savundra must by necessity arise out of a private right and cannot be characterised as a public right.

153 For these reasons, insofar as ground 1 of the appeal relies upon the application of the rules of procedural fairness by application of the principles that apply to administrative law (when making a decision pursuant to a statutory power), this ground of appeal must fail.

(b) Ground 1 and ground 2 - the claim of procedural fairness as part of a claim of industrial fairness

154 Except for matters set out in s 80E(6) of the IR Act, s 80E(1) confers exclusive jurisdiction on the Arbitrator to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally. Pursuant to s 80E(5), any act, matter or thing done by an employer in relation to an industrial matter is liable to be reviewed, nullified, modified or varied by an Arbitrator.

155 Plainly, the matter referred for hearing by the Arbitrator was an industrial matter. An 'industrial matter' is defined in s 7(1) of the IR Act in subsections (c) and (ca) of the definition of 'industrial matter' to mean any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees and includes, among other matters, the employment of any person or the refusal to employ any person and the relationship between employers and employees.

156 The Arbitrator is required pursuant to s 26(1)(a) of the IR Act in the exercise of his or her jurisdiction to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. However, as Ritter AP pointed out in ***Health Services Union of Western Australia (Union of Workers) v Director General of Health*** [2008] WAIRC 00215; (2008) 88 WAIG 543, s 26(1)(a) is not a source of jurisdiction. It applies only to the exercise of jurisdiction granted by legislation: [163]. His Honour also pointed out the Commission and the Arbitrator as a constituent authority of the Commission cannot ignore the substantive law in the exercise of its jurisdiction: [164]. At [165] he said:

> [I]n *Ballantyne v WorkCover Authority of New South Wales* [2007] NSWCA 239, Basten JA with whom Beazley JA agreed at [89], cited the joint reasons in *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26 (*Gubbins*) with approval and reiterated that although the relevant body was required to act '*according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms, it is clear that it must exercise its powers according to law: were it otherwise, the conferral of a right of appeal to this Court "in point of law" … would be significantly diminished, if not rendered otiose*'. The same point was made in my reasons quoted above in *LHMU*. It was also succinctly made in *Townsville City Council v Chief Executive, Department of Main Roads* [2006] Qd R 77 at [43] where Keane JA with whom McMurdo P and White J agreed said:
>
> > *'The authorities suggest that a statutory obligation to have regard to the "substantial merits of the case" means that the merits may not be able to trump a countervailing rule of law but that they are one factor that must be taken into account when exercising a discretion.'*

157 The scope of the Arbitrator's jurisdiction conferred by s 80E of the IR Act does not depend upon or is not defined by the law and the principles of judicial review of administrative action in the exercise of statutory power. As Wheeler and Le Miere JJ point out in ***Jones***, an Arbitrator is required to conduct an inquiry into a relevant matter on its merits. The Arbitrator has no power to engage in judicial review: ***Jones*** [19] - [22] (Wheeler and Le Miere JJ). In particular, the Arbitrator's jurisdiction is not confined to a review of matters that rely upon any notion of public rights, remedies or interests. In ***Jones***, Wheeler and Le Miere JJ explained [28] - [34]:

> Turning, then, to the question of the proper construction of s 80E(5), read with s 80E(1), in our view the controversy which has arisen relates to a false issue. As we have noted, there is no power conferred by the Act upon the Arbitrator to engage in anything in the nature of 'judicial review', or to make a bare declaration. That is jurisdiction of a kind quite different from the merits-based inquiry contemplated by s 80E. To the extent that the reasons of the Full Bench might be read as suggesting that there is such power, they are in error.
>
> However, the powers of the Arbitrator are very wide. They are to inquire into and deal with any industrial matter. To the extent necessary, the exercise by an employer in relation to a government officer of a power relating to that industrial matter may be reviewed, nullified, modified, or varied by the Arbitrator.
>
> An inquiry into an industrial matter will, where that industrial matter is affected by other legislation, or where the actions of persons involved in the industrial matter are, in some respect, governed by other legislation, involve an inquiry into what was done, in that legislative context. In order to determine how to 'deal with' an industrial matter, the Arbitrator must find relevant facts. If it is the case that a relevant factual finding suggests that a person has been guilty of unlawful or improper conduct, that is a finding which it is open to the Arbitrator to make, not as an end in itself, but as a step in determining how the industrial matter is to be dealt with.
>
> Where, as is presently the case, the way in which officers in the public service deal with each other is the subject of principles and requirements contained in legislation such as the PSM Act, it will often be desirable for the Arbitrator to consider whether the behaviour of individuals involved in the industrial matter has been in conformity with those

principles and requirements. Again, findings of that kind would not be made as an end in themselves, but would be made in order to determine how, in the broad statutory context, it would be appropriate to deal with the industrial matter.

It will on occasion, as part of that process, be necessary for the Arbitrator to undertake a consideration of the relevant statutes, so as to ascertain how they apply to the facts as found. That exercise is undertaken, not in order authoritatively to declare the meaning of the statutory provision, but again as a step in the process of ascertaining what is required, in the statutory context, to deal with the industrial matter.

Those conclusions may on occasion lead to the view that it is necessary in order to deal appropriately with the industrial matter, to nullify, modify, or vary an action or decision of an employer, pursuant to s 80E(5). That subsection does not confer any independent jurisdiction to quash those decisions, but only to do so to the extent necessary to ensure that the industrial matter is dealt with as contemplated by s 80E(1). Similarly, the word 'reviewed' in s 80E(5) is plainly not intended to confer some independent power to review any decision of an employer, but only a power to review (and, if necessary, to differ from) the decision where it is necessary to do so as part of the process of dealing with an industrial matter.

When s 80E(1) and (5) are understood in the way in which we have endeavoured to explain, the controversy about the Arbitrator's power of 'judicial review' simply disappears. There is plainly no such independent power. Equally plainly, however, some of the questions which would be determined by a Court undertaking judicial review of the actions of government officers may be questions which it is necessary for an Arbitrator to consider and determine in order to deal with an industrial matter relating to those government officers. Those questions are dealt with by the Arbitrator, however, not in order to make an authoritative and binding determination concerning them, but as steps in the process of determining how the industrial matter is to be dealt with.

158 The facts in ***Jones*** and observations of Hasluck J in respect of the legal rights, if any, to procedural fairness of an applicant seeking appointment to a position are relevant to this matter.

159 In ***Jones***, it was argued that the Full Bench erred in law in finding that the Arbitrator had jurisdiction to enquire by way of judicial review into the refusal of the Director General of the Department of Justice to appoint a government officer (Mr Jones) to a level 7 position following a selection process and to advise Mr Jones that he had been recommended for the position by a selection panel. The Director General subsequently reopened the selection process and obtained referee reports. At first instance, among other findings, the Arbitrator hearing the matter found Mr Jones was denied procedural fairness when he was not given the opportunity to review two adverse referee reports obtained by the Director General. When considering these matters, Hasluck J referred to the fact that the Standards in Human Resource Management (established pursuant to s 21 of the *Public Sector Management Act 1994* (WA)) and the *Public Sector Management Act* did not expressly require an applicant for appointment to be provided with referee reports or adverse material or be accorded a hearing before a decision is taken to make or refuse an appointment having regard to any such material. His Honour then found [116] - [117]:

If it were a requirement, it would be a disincentive for referees to be frank, especially where they are not supportive of the applicant, and this would interfere with the objective of the recruitment process which on a competitive basis is to employ the most suitable candidate.

All of this suggests that it has never been a requirement of procedural fairness that adverse reports be made available to an applicant for an employment position for comment. It calls into question findings based on an assumption that contentious reports ought to be provided to an applicant for an employment position. In ***Attorney-General for the State of New South Wales v Quin*** (1990) 170 CLR 1 the High Court accepted that in ordinary circumstances the making of an appointment would not attract the rules of natural justice. In the present case the appellant himself did not take any step or make any representation sufficient to displace the ordinary rule or confer upon Mr Jones an entitlement to procedural fairness based upon a legitimate expectation that he would be heard.

160 In ***Quin***, Dawson J explained [58] - [59]:

It is one thing to expect to continue in a position; it is another to expect to be appointed to it. That distinction was drawn in *F.A.I. Insurances Ltd. v. Winneke* ((1982) 151 C.L.R. 342, at p. 377), between the initial application for a licence and an application for its renewal. No doubt even with an application for appointment to a position there may be special circumstances which make it only fair to accord some sort of a hearing. *Cole v. Cunningham* ((1983) 81 F.L.R. 158; 49 A.L.R.123) is an example. There an applicant for re-appointment to the public service had resigned under threat of prosecution and had unsuccessfully attempted to withdraw his resignation. However, in the absence of special circumstances, the situation is as described by Lord Denning M.R. in *Breen v. Amalgamated Engineering Union* ([1971] 2 Q.B. 175, at p. 191):

> 'If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given ...'

See also *McInnes v. Onslow-Fane* ([1978] 1 W.L.R. 1520; [1978] 3 All E.R. 211).

161 Reflected in this passage is the fundamental concept of employment law that an applicant for a new appointment is not entitled to procedural fairness. In particular, an applicant for employment is not entitled to be provided with particulars of any adverse material or to be heard in respect of any such material (see also the discussion in ***Cole v Cunningham***, the facts of which are referred to at [123] of these reasons).

162 In this matter, whilst the 'interests' of Dr Savundra identified by the AMA can legitimately be said to be genuine matters going to Dr Savundra's eminence and reputation as a highly skilled senior specialist plastic surgeon and the fact that he continues to be employed by the employer in other public hospitals in Perth are immaterial. Such interests cannot be elevated to operate to override the express terms of the contract between Dr Savundra and the employer in November 2009 to apply the rules of procedural fairness. The contract expressly provided that the employer was not to be liable to employ Dr Savundra (at Royal

Perth Hospital) in any capacity beyond the specified term. Thus, there was agreement that the employer had a right, unfettered by the rules of procedural fairness, to determine whether to offer a further contract to Dr Savundra. It is inherent in the reasoning of the Arbitrator in this matter that she accepted the principle that parties should in the normal course be bound by the bargains that they make.

163 Thus, in this matter, when the relevant principles applying to employment contracts are applied, in the absence of special circumstances or representation sufficient to displace the ordinary rule applying to employment contracts, Dr Savundra was not entitled to be heard prior to a decision being made as to whether to offer him a new contract: ***Quin***; ***Cole v Cunningham*** and ***Jones***.

164 In my opinion, the ordinary position at law of a person who wishes to be offered a further contract at the expiration of a contract for a fixed term is not in a different position to that of an applicant who has not previously been employed by the employer. To displace this rule there must be special circumstances which relate to circumstances of a decision to offer a new contract.

165 The circumstances relied upon by the AMA to displace the ordinary rule are that:

(a) Dr Savundra was an ongoing employee of the employer;

(b) it was 'industrially unfair' for the employer to give currency to the adverse findings that had been made in relation to the incident that occurred on 15 February 2013 when the finding of misconduct and the formal warning was withdrawn; and

(c) the decision was unfair to Dr Savundra and other doctors employed at Royal Perth Hospital who are unable to access Dr Savundra's skills and expertise which has raised concerns about the quality of patient care Royal Perth Hospital is able to deliver to plastic surgery patients.

166 In all of the circumstances, the AMA says the decision not to offer Dr Savundra a further contract for work at Royal Perth Hospital was manifestly unreasonable.

167 As to the first matter, the evidence establishes that at the time the decision sought to be impugned was made Dr Savundra had ongoing employment with the employer at other hospitals. It appears Dr Savundra was engaged to work at Fremantle Hospital and at Princess Margaret Hospital on a sessional basis for fixed terms. The fact that he was engaged to work at other hospitals and had been engaged to work at Royal Perth Hospital on a series of fixed term contracts at the time the decision was made not to offer him a further contract for sessional work at Royal Perth Hospital does not in itself raise any special circumstances.

168 In respect of the second matter, it appears that Dr Savundra and the AMA did not rely upon the letter dated 12 July 2013 withdrawing the adverse findings of misconduct and the withdrawal of the formal warning in any material way that was adverse to his interests. To the contrary, it is clear from the matters for hearing and determination (set out in [5] of these reasons) and the conduct of the hearing at first instance that a review of and an assessment of the circumstances of the conduct of Dr Savundra on 15 February 2013 was pressed by the AMA. Consequently, other than the concessions made in the letter dated 12 July 2013, it cannot be said that the letter dated 12 July 2013 resulted in a settlement of the whole of the industrial matter before the Arbitrator in July 2013 or a significant part of it. Proceedings in PSACR 20 of 2013 commenced after the letter was provided to Dr Savundra as the parties remained in dispute about a number of matters relating to Dr Savundra. It is also notable that in the proceedings at first instance and on appeal no representations have been sought to be relied upon other than those contained in the letter itself. Thus, it seems that it cannot be said that Dr Savundra altered his position in any material way after receipt of the letter, so as to confer on him a right to procedural fairness.

169 The third matter relies upon opinions given by former colleagues of Dr Savundra who gave evidence in support of him that Royal Perth Hospital needs to be able to access the services of Dr Savundra for services to be provided to patients. These opinions were found by the Arbitrator not to:

(a) demonstrate 'substantial unfairness';

(b) demonstrate that Dr Savundra should continue to be employed; and

(c) be relevant to the question whether Dr Savundra had been treated fairly.

The Arbitrator also found that there was no real evidence of unreasonable workloads or demands placed on doctors at Royal Perth Hospital in the absence of Dr Savundra.

170 When the evidence given by Dr Savundra and his colleagues is reviewed, it is clear from the evidence that senior employees of Royal Perth Hospital made their opinions known to senior management of Royal Perth Hospital and Professor Stokes prior to Dr Savundra's 2009 contract coming to an end. Professor Stokes was also provided by Dr Williams in September 2014 with three letters of recommendation from the orthopaedic surgery department, the plastic surgery department and plastic surgery trainees. Whilst Dr Williams and Dr Duncan-Smith met with Professor Stokes after the decision was made not to offer Dr Savundra a new contract at Royal Perth Hospital, it appears from Professor Stokes' role in Dr Savundra's negotiations for a five-year contract at Fremantle Hospital in December 2013 and January 2014 that Professor Stokes had the capacity to review the decision made in July 2014 not to offer Dr Savundra a further contract at Royal Perth Hospital. In fact, when Dr Williams and Dr Duncan-Smith first met with Professor Stokes on the first of two occasions in September 2014, he told them that he would look into the matter.

171 In any event, the opinions of Dr Savundra's colleagues are, as the Arbitrator found (albeit in a slightly different context) irrelevant. The employer was, in all circumstances, entitled to ignore those opinions.

172 For these reasons, the circumstances raised by the AMA cannot constitute special circumstances which would displace the ordinary rule that a person is not entitled to be heard prior to a decision being made whether to offer a new contract of employment.

173 In this matter, no representation or other conduct has been identified which could give rise to a claim of industrial unfairness.

174 Consequently, in the absence of any right to procedural fairness in this matter, the delegates of the employer were entitled to have regard to any matter that they wished to consider in deciding whether to offer Dr Savundra a new contract.

175 Whilst it is not material to the disposition of this appeal, I do not agree with the observation made by the Arbitrator that her reasons for decision had given Dr Savundra the remedy he sought and in giving evidence he had an opportunity to respond to adverse allegations.

176 It is an accepted principle that a hearing of an industrial matter may cure a breach of procedural fairness if the person aggrieved by a decision is allowed to canvas the issues that he or she would have raised if the original process had been properly conducted: see the discussion by Forbes J R S in *Justice in Tribunals* (4th ed, 2014) [14.10]; citing ***Baker v University of Ballarat*** (2005) 225 ALR 218; [2005] FCAFC 210 [51] - [52].

177 In this matter, the employer elected not to go into evidence. One matter of importance is that it is clear Dr Savundra if provided with a hearing prior to the decision being made would have sought to clarify the allegation made by Professor Stokes that one of the reasons he was not offered a new contract at Royal Perth Hospital was because of 'evidence of bullying and intimidation towards other staff members'. In the absence of any particulars of this allegation, it could not be said that Dr Savundra had an opportunity to canvas or explore all adverse allegations made against him. Consequently, in light of the unchallenged finding that Dr Savundra was denied procedural fairness in the making of the decision not to offer him a further contract, in the absence of particularisation of all allegations that were taken into account by the delegates of the Minister making this decision or a consequent opportunity to address those allegations before the decision was made, it cannot be said the hearing before the Arbitrator cured the defects in procedural fairness.

178 However, Dr Savundra did not have a right to be provided with procedural fairness prior to the decision being made. Consequently, I am of the opinion that the grounds of appeal have not been made out and that an order should be made to dismiss the appeal.

KENNER ASC

179 I have had the benefit of reading the draft reasons for decision of Her Honour, the Acting President. I agree with those reasons and have nothing to add.

EMMANUEL C

180 I have had the benefit of reading the draft reasons for decision of Her Honour, the Acting President. I agree with those reasons and have nothing to add.

2016 WAIRC 00701

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPELLANT
	-and-
	THE MINISTER FOR HEALTH
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 11 AUGUST 2016
FILE NO.	FBA 1 OF 2016
CITATION NO.	2016 WAIRC 00701

Result	Appeal dismissed
Appearances	
Appellant	Mr R L Hooker (of counsel)
Respondent	Mr R J Andretich (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 23 May 2016 and 22 June 2016, and having heard Mr R L Hooker (of counsel) on behalf of the appellant and Mr R J Andretich (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 11 August 2016, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2016 WAIRC 00703

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 58 OF 2015 GIVEN ON 7 DECEMBER 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2016 WAIRC 00703
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER P E SCOTT
		COMMISSIONER D J MATTHEWS
HEARD	**:**	TUESDAY, 5 JULY 2016
DELIVERED	**:**	FRIDAY, 12 AUGUST 2016
FILE NO	**:**	FBA 17 OF 2015
BETWEEN	**:**	JASON ZHOU
		Appellant
		AND
		CURTIN UNIVERSITY
		Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner J L Harrison**
Citation	**:**	**[2015] WAIRC 01065; (2015) 95 WAIG 1876**
File No	**:**	**B 58 of 2015**

CatchWords	**:**	Industrial Law (WA) - Appeal against decision of Commission - Claim of contractual benefits - Appellant used interpreter at first instance - Claimed his evidence was mistranslated and respondent's evidence not translated to him - Principles relating to adequate translation of proceedings considered - Errors in translation found to be inconsequential - No error demonstrated in findings made that the Commission had no jurisdiction to hear and determine the appellant's claims on grounds appellant independent contractor and claims made out of time
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7(1), s 12(1), s 23, s 23(1), s 29(1)(b)(ii), s 49
		Education Services for Overseas Students Act 2000 (Cth)
		Limitation Act 2005 (WA) s 3(1)(a), s 13(1)
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	In person (by audio-link) and Mr C Gu (the interpreter)
Respondent	**:**	Ms S J Maddern (of counsel) and with her Ms C L Russo (of counsel)

Case(s) referred to in reasons:

Becirbasic v Building West Pty Ltd [2015] WAIRC 01118; (2015) 96 WAIG 22

Devries v Australian National Railways Commission [1993] HCA 78; (1993) 177 CLR 472

SZRMQ v Minister for Immigration and Border Protection [2013] FCAFC 142; (2013) 219 FCR 212

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd (1996) 77 WAIG 4

WALN v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1704

Case(s) also cited:

Fox v Percy [2003] HCA 22

Grierson v International Exporters Pty Ltd [2006] WAIRC 05465

May v Hedley [2004] WAIRC 10651

McCarthy v Sir Charles Gairdner Hospital [2004] WAIRC 11634

Perera v Minister of Immigration & Multicultural Affairs [1999] FCA 507

The Minister for Health v Drake-Brockman [2012] WAIRC 00150

Reasons for Decision

SMITH AP:

The appeal

1 This is an appeal instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the IR Act) against a decision made by the Commission on 7 December 2015 dismissing application B 58 of 2015. Application B 58 of 2015 was referred to the Commission by Jason Zhou under s 29(1)(b)(ii) of the IR Act. Mr Zhou claims that he was employed by Curtin University for approximately 10 years, but he was never paid any wages. In his application, he claims that he is owed the following benefits under a contract of employment:

(a) Wages - outstanding salary in the amount of $800,000 being a claim for an annual salary of $80,000 for 10 years.

(b) Annual leave - unpaid annual leave in the amount of $72,297.70. This is based on an entitlement of four weeks annual leave per year and includes annual leave loading of 17.5%.

(c) Superannuation - unpaid superannuation in the amount of $136,000. This is based on Curtin University's standard superannuation entitlement of 17% over 10 years of service.

(d) Sick leave - an entitlement to 40 weeks of sick leave based on four weeks sick leave per year. Mr Zhou claims he never took any sick leave and he is currently suffering stress due to being treated unfairly by Curtin University. Mr Zhou has not specified which days he had taken as sick leave.

(e) Medical expenses - an amount of approximately $10,000 covering the periods he was unwell in China and Australia.

2 Curtin University denies the claims made by Mr Zhou and puts forward two defences. It firstly argues that it has not at any time entered into a contract of employment with Mr Zhou, but it engaged Mr Zhou and an entity associated with him, Xin Nan Real Estate Development Co Ltd (Xin Nan), between 15 June 2006 and 30 November 2008 as a contractor. The second defence is that even if Mr Zhou was employed under a contract of employment, which is not conceded, he is unable to bring a claim of denied contractual benefits for the period for which he was employed, as the application was lodged on 15 April 2015 which is outside the six-year time limit for lodging a claim for contractual benefits.

3 After conferring with the parties, Harrison C heard and determined the issue whether Mr Zhou was an employee or an independent contractor as a preliminary issue. In reasons for decision delivered on 7 December 2015, Harrison C upheld Curtin University's objections and found that the Commission lacked jurisdiction to determine Mr Zhou's claims.

The evidence

(a) Mr Zhou's evidence

4 When Mr Zhou presented his case and gave evidence he was assisted by a translator who spoke Mandarin. In Mr Zhou's application he has stated his name as Jason Zhou. However, he said when giving evidence that his Chinese name is spelt Zou but it is pronounced Zhou. He also said that his Chinese name is Sen Jie Zou.

5 Mr Zhou claimed that he was employed as Curtin University's regional manager of international recruitment from January 2005. He said he was supposed to be given a contract for that job, but he never received one. He also claimed that he continued to be employed in that role until February 2015.

6 When asked how he came to be employed by Curtin University, he said he had an interview with Mr Walter Ong, the Dean of International Admissions, and he also had discussions about the position with Vice-Chancellor International Professor Kevin McKenna and Professor Celia Cornwell and that those discussions were held in Perth. He said his role was to support all of Curtin University's agents and deal with the Chinese government universities for offshore programs. The arrangements

would be that students would study for two years at a Chinese university and then another two years at Curtin University for a bachelor degree or first year in China and three years at Curtin University for a bachelor degree.

7 Mr Zhou gave evidence that he reported to Mr Ong and to Professor McKenna and he worked almost seven days a week for Curtin University because all the exhibition events happened on weekends. He said he also worked with the Western Australia Trade Office developing in the Perth Education City visits to Chinese schools and colleges. When asked when was the last time he met someone from Curtin University in Shanghai or elsewhere in China, he said in 2009. He also said that Mr Ong left in 2010, but in 2011 he kept working with him. From 2011 to 2015 he said he wrote to the former vice-chancellor about his claim, Professor Jeanette Hacket, but he received no reply about his claim.

8 In support of his evidence, Mr Zhou tendered into evidence a number of documents which he claims confirms that he was an employee of Curtin University. These documents were as follows:

(a) A memorandum from the College of Economics, Qingdao University, China (undated) (exhibit A1).

(b) A letter dated 2 May 2007 from Tom Hands, Manager, International Relations, The Sydney Campus of Curtin University of Technology (exhibit A2). In this letter Mr Hands states that:

(i) he has known Mr Jason Zou for a period of approximately one year in both work and personal capacities;

(ii) Jason has been the Shanghai representative for Curtin University of Technology for some time; and

(iii) Jason has contributed greatly to our efforts to export Curtin University of Technology Sydney Campus programs to students in China.

(c) Six letters from organisations in support of Mr Zhou's application for Australian citizenship: (1) letter dated 24 April 2007 from Peter Ironmonger; (2) letter dated 27 April 2007 from B J Zhuang; (3) letter dated 25 April 2007 from Shirley Pan; (4) letter dated 24 April 2007 from James Xu; (5) letter (undated) from Yu Zhang; and (6) letter dated 18 April 2007 from Li Min (exhibit A3).

(d) An email Mr Zhou sent to Irina Lobeta-Ortega in 2008 which he claims confirms that Curtin University allocated him an email address (exhibit A4).

(e) A letter dated 5 May 2007 addressed 'To Whom It May Concern' from Walter Ong, Dean, International Student Admissions, re Mr Senjie Zou, supporting his application for Australian citizenship (exhibit A5). In this letter, Mr Ong states:

> Mr Senjie Zou is currently employed on a full time basis as our Regional Manager by Curtin University of Technology. In this capacity he is responsible for strategic planning, branding development, promoting the university and its courses to potential students and parents, servicing and training of our agents, identifying new agents, attending educational events such as the Perth education city road show and sourcing colleges that will prepare their students to transfer to studies in our university.

(f) A document containing extracts from emails which are undated and incomplete between Mr Zhou and Mr Ong and Professor Cornwell regarding a 2005 visit by Professor McKenna to Shanghai and a document written in Mandarin dated 27 July 2007 (exhibit A6). In one of these undated emails Mr Ong states:

> Curtin will pay your salary one month in advance. You can also do it for the Office rent of RMB3,000. Can you send the invoice for 2 month's rent then.

(g) A badge with the name 'Jason Zou Curtin University of Technology' which Mr Zhou says was provided to him in 2005 by Mr Ong who interviewed him for his position with Curtin University (exhibit A7).

9 Commissioner Harrison asked Mr Zhou whether he had any documents confirming that he continued to be employed by Curtin University until February 2015 and that he was to be paid $80,000 per year to undertake that role and the duties that he undertook in those years. Mr Zhou simply said in response that he continued to seek to have discussions with Curtin University about his case, but he did not receive any response. By that evidence, I understand him to say that between 2008 and February 2015 he made representations to Curtin University about his claims. He also stated that he was never paid at all but he continued to work for Curtin University as he thought it was just a matter of time that he would be paid. When asked what duties he undertook between 2005 and 2015, he said he attended exhibitions on weekends and he also visited agents and training agents on a full-time basis.

10 When Mr Zhou was cross-examined he was asked again whether he had any evidence to show that he had worked for Curtin University between 2008 and 2015 and he said firstly that there was an incident in 2008 regarding two students that were agreed to be sent from China to Australia to go to Curtin University, but they were sent to a private school. He said after that event he had trouble getting in contact with Curtin University because the leadership of Curtin University kept changing. When asked again since 2008 who had told him to work for Curtin University he said that there was no specific instruction to stop work and that the managers and leadership of Curtin University kept changing but the arrangements for China were still ongoing.

11 In cross-examination, two letters titled 'Exchange of Letters' and two unsigned documents titled 'Representative Agreement' were put to Mr Zhou as documents which Curtin University says record the terms and conditions of the contracting arrangements he had with Curtin University through his company. These documents were tendered into evidence as exhibits R1 to R4. The representative agreements were each headed 'Representative Agreement between Curtin University of

Technology and Mr Jason Zou Trading as Xin Nan Real Estate Development Co. Ltd'. The first exchange of letters document stated (exhibit R1):

> Mr Jason Zou Sen Jie
>
> Shanghai Xin Nan Real Estate Development Co.Ltd.,
>
> Level Building No.1, Zhao Jia Bang Rd.
>
> Shanghai 200032, P.R. China
>
> Dear Jason
>
> **Exchange of Letters**
>
> Further to discussions with Walter Ong, Dean, International Student Admissions Curtin has agreed to pay an annual fee of AUD $24,000 to you to represent Curtin in People's Republic of China from 15 June 2006 to 14 June 2007. This fee will be paid to your bank account monthly. Please let us have the nominated bank account so we can arrange for the monthly transfers. We will do the transfer at the beginning of each month.
>
> Whilst the formal Agreement is being prepared and prior to signing by Curtin and yourself of a formal Agreement, this Exchange of Letters will cover the interim period from 19 May 2006 until the formal Agreement is signed.
>
> Could you please sign both copies of the this Exchange of Letters and return one duly signed copy as soon as possible and retain one copy for your records.

12 This letter was signed by Professor McKenna as Curtin University of Technology Authorised Representative on 19 May 2006 and by a Jason Zou as Appointee on 19 May 2006.

13 The second exchange of letters document contained similar terms. It stated (exhibit R3):

> Mr Jason Zou
>
> Shanghai Xin Nan Real Estate Development Co. Ltd
>
> No 393 Level 1, Building 1
>
> Zhao Jie Bang Road
>
> Shanghai 200032, PR China
>
> Dear Jason,
>
> **Exchange of Letters**
>
> Further to discussions with Mr Walter Ong, Dean, International Student Admissions, Curtin has agreed to renew the Representative Agreement for the period from 1 January 2008 to 31 March 2008. The terms of the renewed Representative Agreement will provide for an annual fee of AUD $24,000 which will be paid to your bank account monthly upon receiving an invoice.
>
> Whilst the Representative Agreement is being prepared and prior to signature by Curtin and yourself, this Exchange of Letters will cover the interim period from 1 January 2008 until the Representative Agreement is signed by both parties.
>
> This Exchange of Letters will be subject to the terms of the current Representative Agreement between Curtin and yourself and compliance with the Education Services for Overseas Services (ESOS) statutory requirements when representing Curtin in the People's Republic of China. Enclosed is a copy of the '*National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students*'. Please read this document carefully as it outlines compliance requirements. You should refer specifically to Standard 1, 2, 4, 5, 7 of the National Code. The ESOS Act is available on the web and the address is http://www.dest.gov.au/esos/.
>
> Could you please sign both copies of the Exchange of Letters and return one duly signed copy by the 31 December 2007 and retain one copy for your records.
>
> Two copies of the Representative Agreement for the renewed term from 1 January 2008 to 31 March 2008 will be posted to you shortly for execution.

14 This letter was signed by Professor McKenna as Curtin University of Technology Authorised Representative on 24 April 2008 and by a Mr Jason Zou as Appointee whose signature is undated.

15 Each of the representative agreements set out a comprehensive statement of responsibilities and obligations to be undertaken by the representative to provide services of finding suitable prospective students in regions of China for enrolment and study in Australia. The documents also set out in some detail how a payment of $24,000 annual service fee was to be made and invoices for payment of costs of 'the international office' which were accommodation, meals, incidentals, transport, telephone charges, internet, entertainment, postage, a laptop, printer, photocopier and fax machine. Payment of all of these items was to be made on actual bills incurred and receipts for reimbursement. The documents also dealt with clauses for the process of termination and notices to be given. It is common ground that the representative agreements were not signed by Mr Zhou.

16 When asked about exhibits R1 to R4 (the exchange of letters and the representative agreements), Mr Zhou stated that he was not the owner or operator of Xin Nan and had never heard of this company. He also said he had not seen any of the documents before and that the signature on each of the exchange of letters documents was not his.

17 Creditor payment forms titled 'Allonge Foreign Payments' with the creditor name Yong Ming Zhou (Jason Zhou) (which Curtin University relied upon as confirmation of payments it made to Mr Zhou in January 2009) were also put to Mr Zhou in cross-examination. In response, he stated that this was not his name and he does not know who this person is despite a reference to Jason Zhou or Zou (after the name of Yong Ming Zou) on the forms (exhibit R6). When asked about these documents by Harrison C, Mr Zhou claimed that the payments made were not received by him as the payments were made in Chinese currency (RMB) which is a currency that cannot be transferred to China from overseas.

18 Mr Zhou claimed in his evidence Chinese currency RMB (which is not an international currency) could not be paid overseas from China and that as the transfers by Curtin University were in RMB (Chinese local currency) this confirms that he was not paid. When asked to explain whether RMB is different to Chinese yuan, Mr Zhou said that they are one and the same, that CNY, which is Chinese yuan, is a western name for the Chinese local currency of RMB.

19 Mr Zhou claimed that no monies were ever paid to him by Curtin University, including no expenses. He also said that Yong Ming Zou was not him and he knew nothing about an account name of Yong Ming Zou at the Industrial and Commercial Bank of China, Shanghai Municipal Branch, to which the expenses were paid by Curtin University in January 2007 (exhibit R6).

20 Also put to Mr Zhou in cross-examination was a letter dated 1 September 2008, which Curtin University says had the effect of terminating the contractual relationship between it and Mr Zhou, signed on behalf of Professor McKenna, Deputy Vice-Chancellor, International. This letter was sent to Mr Jason Zou. The terms of this letter stated as follows (exhibit R5):

> The University hereby provides you with formal written notice of its intention to discontinue the services that are being provided by Shanghai Xin Nan Real Estate Development Co. Ltd under the terms of the Representative Agreement. As per clause 12 of the Representative Agreement, the termination of the Representative Agreement will be effective 90 days from the date of this written notice.
>
> The main factors taken into consideration for this decision to terminate are highlighted below:
>
> - Failure to submit budgeting reports;
> - Failure to reconcile travel expenses upon return of marketing trips;
> - Failure to seek approval prior to attending marketing events;
> - Failure to submit weekly reports; and
> - Failure to sign and return the Representative Agreements.
>
> The International Office agrees to pay your service fees and expenses as stated in Schedules 1 and 3 of the Representative Agreement until 31 November 2008.
>
> Walter Ong, Dean International Student Admissions, will visit you sometime in late October 2008 to do the handover of equipment and documentation that belongs to Curtin.
>
> I do thank you for your support and services for the duration of your appointment and wish you every success in future business endeavours.

21 When a copy of exhibit R5 is examined, it can be seen that the letter was not signed by Professor McKenna, but it was signed for him with the notation 'pp'. When cross-examined, Mr Zhou said he had not seen that document before. However, prior to the hearing he had filed a submission in writing referring to this document (submission filed by email on 5 November 2015). When asked to explain why he says the document is not authentic, he said that the signature of Professor McKenna was not like he had seen before and this was extremely different from Professor McKenna's usual signature.

(b) Curtin University's evidence

22 Ms Bronwyn Jean Bartsch has been employed as the acting director of Curtin International since 2012. As part of this role she gives final approval within Curtin International for the appointment of overseas representatives and other suppliers of services to Curtin International.

23 Ms Bartsch investigated Mr Zhou's claims for payment. Ms Bartsch ascertained that a number of payments were made to Jason Zhou for office expenses incurred from June 2008 until November 2008 (exhibit R6). These payments were made in January 2009. She also found that there had been an email exchange from April 2008 notifying that Yong Ming Zhou had opened a second bank account to which the payments were made in January 2009. She said there were difficulties making the payments. A number of times they attempted to pay in RMB, but the bank in China automatically converted the payments to US dollars. An email trail recorded Curtin University staff attempts to resolve the issue with the clearing house (exhibit R8). Finally the monies were paid and they received confirmation through the clearing house system that payments were made in RMB. Ms Bartsch also produced a reconciliation document, which is a summary of claims and cash advances of payments made to Jason Zou for claims between December 2007 and June 2008 (exhibit R7). Ms Bartsch explained that the representative agreements allowed for reimbursement of certain expenses, including office, rent or transport expenses payable upon presentation of receipts and that exhibit R7 confirmed what was paid and the fact that receipts for payment were provided.

24 Ms Bartsch stated that documents held by Curtin University show that Mr Zhou was a contractor to Curtin University between June 2006 and December 2008. She also said that the two representative agreements between Mr Zhou, Xin Nan and Curtin University were not signed by Mr Zhou despite repeated requests for him to do so and that this was one of the reasons why Curtin University terminated its arrangement with Mr Zhou.

25 Ms Bartsch also gave evidence that Professor McKenna retired in about October 2008 and Mr Ong retired in April 2013.

26 When asked about the email address that Mr Zhou claimed he had, which was J.Zhou@Curtin.edu.au, Ms Bartsch said that she had not been able to find that email address. She said this was not, however, material because non-Curtin employees may have a Curtin email address even if they are a university associate. However, this is usually under the terms of a specific agreement. She also said she could not locate a staff ID number that Mr Zhou claimed he had.

27 Ms Bartsch also said that she could find no evidence of Mr Zhou being an employee of Curtin University as of February 2015.

28 When Ms Bartsch was cross-examined, she was asked why Professor McKenna did not sign the letter terminating the agreement (exhibit R5). Ms Bartsch said the letter had been signed 'pp' by his official authorised delegate on his behalf. She explained that at Curtin University a standard authorisation of delegation procedure is if someone is out of the office there is an authorised representative who has the authority to sign correspondence on behalf of that person.

29 Ms Bartsch was also cross-examined as to whether Curtin University had an office in China to which she said that they did not, that Curtin University has never had an office in China.

30 Mr Zhou also put to Ms Bartsch that the representative agreements say that there are to be monthly office expenses including rental, electricity and stationery of RMB of $3,000 a month, but if Curtin University has no overseas office does this not show that in fact Curtin University did have an office in China at that time. Ms Bartsch said that the premises were not leased in Curtin University's name or on behalf of Curtin University.

The Commissioner's reasons for decision at first instance

31 In the reasons for decision, Harrison C records that Mr Zhou's claim that he was employed by Curtin University relies upon a submission that because he had a Curtin University name badge, he was allocated a Curtin University email address and letters were written by officers of Curtin University in support of his application for Australian citizenship, this recognised his work with Curtin University.

32 Commissioner Harrison rejected Mr Zhou's contention that he was employed as an employee by Curtin University over a period of 10 years, that he worked almost every day and did so without payment of wages or reimbursement of costs incurred by him during this period. She found this to be implausible and the claims bordered on being fanciful. She said that she had closely observed Mr Zhou whilst he gave evidence. In her view, Mr Zhou was evasive at times when giving his evidence and she found that the evidence he gave lacked credibility and substance. She also observed and found that his claim that he worked for Curtin University over this lengthy period was not supported by any documentation tendered by him.

33 In contrast, Harrison C found the evidence given by Ms Bartsch to be clear, direct and forthright. Commissioner Harrison also found that Ms Bartsch's evidence was supported by documentation which directly contradicted and was at odds with the evidence given by Mr Zhou. In these circumstances, she found she had no confidence in the veracity of the evidence given by Mr Zhou and she accepted the evidence of Ms Bartsch and the documentation relied on by Curtin University where there was any conflict.

34 Commissioner Harrison then went on to find that Mr Zhou was not employed as an employee of Curtin University between January 2005 and February 2015. She pointed out that in a claim made by a person under a contract of service where it is in dispute that an applicant was an employee the applicant must demonstrate, on the balance of probabilities, that he was an employee: ***The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd*** (1996) 77 WAIG 4, 8 (Fielding SC).

35 Commissioner Harrison then made the following findings of fact:

(a) there was no credible evidence before the Commission or any documentation in support of Mr Zhou's claim that he was an employee of Curtin University for approximately 10 years;

(b) even though Mr Zhou has a name badge issued by Curtin University this does not confirm that he was an employee of Curtin University, nor does the existence of an email account in his name related to Curtin University demonstrate an employee/employer relationship, if such an email address was allocated to Mr Zhou by Curtin University;

(c) accepting Curtin University's evidence and related documentation, Mr Zhou worked with Curtin University under a contract for service between 15 June 2006 and December 2008 under the terms contained in the two signed exchange of letters and the two unsigned representative agreements (exhibits R1 to R4);

(d) the arrangement between 15 June 2006 and December 2008 was a contract for services between the parties and that is not a contract of employment; and

(e) Curtin University paid Mr Zhou a monthly fee in accordance with the terms of the representative agreements as well as expenses due to him to his nominated bank account after he forwarded invoices for costs he incurred whilst working as a contractor to Curtin University (exhibits R6 and R7).

36 Alternatively, Harrison C found that even if Mr Zhou was an employee of Curtin University under a contract of service between June 2006 and December 2008 (which she did not find), Mr Zhou is unable to bring a claim of denied contractual

benefits for this period as his application was lodged in the Commission on 15 April 2015 which is outside of the six year time limit for lodging a claim of this nature.

Grounds of appeal and 'particulars' provided by Mr Zhou

37 Mr Zhou's grounds of appeal, as set out in his notice of appeal, are difficult to understand and are not properly particularised. However, his grounds can be summarised as follows:

(a) He was a full-time staff member of Curtin University and not a contractor.

(b) RMB is not an international currency. Curtin University documents state it will reimburse expenses in local currency - RMB. However, the documents from FX centre (email) stated no RMB can be transferred (exhibit R8).

(c) No expenses were paid as submitted in the expense sheet by Curtin University (exhibit R7).

(d) The translator did not translate the full part of the hearing.

38 In the notice of appeal, Mr Zhou states that he has no relationship with Xin Nan and should be treated without race, religion and nationality. He seeks orders that another Commissioner hear the matter and ask Curtin University to pay full expenses, wages and superannuation which he says is owed to him.

39 Following lodgement of the notice of appeal and the filing and service of an appeal book, solicitors for Curtin University filed an application seeking orders that the Full Bench dismiss the appeal as incompetent on the following grounds:

(a) the grounds of appeal are insufficient. In particular, the notice of appeal does not include any particulars demonstrating why the decision of Harrison C is against the evidence or wrong in law;

(b) the grounds of appeal appear to be little more than an attempt to have the matter reheard by a different Commissioner in the hope that a different result may be obtained;

(c) it is unclear how a reference in the notice of appeal to 'race, religion or nationality' is relevant, if at all; and

(d) the grounds of appeal include allegations against the translator who was used in the matter at first instance.

40 The Full Bench convened a directions hearing on 4 March 2016 and made the following orders by consent ([2016] WAIRC 00127; (2016) 96 WAIG 309):

1. By 18 March 2016, Jason Zhou file and serve submissions addressing:

   (a) the particulars he relies upon to demonstrate that the decision of Commissioner J L Harrison (citation 2005 WAIRC 01065) is against the evidence and the weight of the evidence; and

   (b) the specific reasons why he alleges the decision to be wrong in law.

2. By 1 April 2016, Curtin University file and serve any submissions in response.

3. If the Commission determines the appeal should proceed, the matter be listed for hearing not before 4 April 2016.

41 Mr Zhou sought an extension of time to comply with the orders made by the Full Bench. On 16 March 2016, the Full Bench extended the time for compliance with order 1 to Friday, 1 April 2016, for compliance with order 2 to Friday, 15 April 2016 and amending the time in order 3 to Monday, 18 April 2016 ([2016] WAIRC 00151; (2016) 96 WAIG 310).

42 On 4 April 2016, Mr Zhou filed the following 'particulars':

1. Translator cannot provide professional translation. Not translator all parts for me

2. Curtin against Labour Act in both China and Australia instruct me to work 7 days

3. Illegal to pay staff in China with Australia Dollar and cannot employ staffs in China as Australia Biz entity

4. Some senior staff use curtin office fund for their own usage such as airline tickets, digital camera, cash, as they use that fund, so do not allow me back to campus

5. Curtin against ESOS Act, corruption in Chinese University to get 200 students which did not assess by commissioner.

6. treat different because I am Chinese and work 7 days when I called sick just through away. It is not like a world classic University.

7. contract not sign by me, do not pay tax and super in Both China and Australia. No relationship with Xin Nan or other third party. Contract is not signed by me.

8. expense travel cost, training cost, wages and car rental by Alvin Cheong not paid. RMB is not International currency. No RMB can be transferred from Australia especially Curtin do not use four big Banks in Australia for transfer

9. Curtin agreed to pay all the expenses including office expenses. But no expenses be paid based on the expense sheet submit by Curtin.

Curtin University's submissions in response to Mr Zhou's particulars

43 On 15 April 2016, Curtin University filed submissions (as required by the order made by the Full Bench) in which the following submissions were made:

(a) Mr Zhou's submission (particulars) do not disclose any basis whatsoever for the Full Bench to find that the decision is wrong in law or against the evidence or the weight of the evidence. Nor does it address any of the concerns which Curtin University identified with the notice of appeal.

(b) The decision is not wrong in law. Commissioner Harrison at first instance found that Mr Zhou was never an employee of Curtin University and on that basis dismissed Mr Zhou's claim. Under s 29(1)(b)(ii) of the IR Act any claim for a denial of contractual benefits under a contract of employment must be brought within six years from the date on which the entitlement arose. The Commission found that the last day on which Mr Zhou was engaged by Curtin University was 1 December 2008, meaning that, even if Mr Zhou was an employee of Curtin University, the claim is out of time.

(c) The decision is entirely consistent with the evidence. None of the material provided by Mr Zhou in his notice of appeal or further 'particulars' provides any basis for the Full Bench to find that the decision was against the evidence or against the weight of the evidence. The onus for establishing that the decision was against the evidence or against the weight of the evidence lies on Mr Zhou and he has utterly failed to discharge this onus and has not addressed either his lack of credible evidence or the strength of the evidence given on behalf of Curtin University.

(d) None of Mr Zhou's 'reasons' for his appeal are capable of providing a basis for the decision to be overturned or set aside. Mr Zhou appears to be alleging that:

(i) the translator used in the hearing at first instance is to blame for not properly translating some of the exchanges between Curtin University's representative and/or witness and the Commissioner. Mr Zhou did not raise this concern at the hearing before Harrison C. Nor has he provided any particulars of which parts of which discussions were not translated or how this impacted upon the key findings made by Harrison C. Further, Mr Zhou was often able to respond directly to Harrison C without waiting for a translation;

(ii) Curtin University has breached unknown labour laws in China and Australia. Even if such an allegation is true, this does not and cannot have any bearing on the key findings;

(iii) there were problems with the currency (it was illegal for Curtin University to pay Mr Zhou in Australian dollars but, at the same time, RMB cannot be transferred from Australia to China). Even if this is true, the evidence before the Commission is that monies were paid by Curtin University into the account nominated by Mr Zhou;

(iv) Curtin University engaged in corrupt practices in China. Even if this allegation is true, this does not and cannot have any bearing on the key findings;

(v) he was discriminated against because he is Chinese. There is no basis whatsoever for this allegation and, even if true, this does not and cannot have any bearing on the key findings; and

(vi) he is not 'Xin Nan' the person to whom Curtin University paid the funds in accordance with Mr Zhou's directions. The evidence before the Commission was quite to the contrary.

44 Curtin University says that when regard was had to all of these matters, the Full Bench should dismiss the appeal taking into account:

(a) the Appellant has filed a notice of appeal, addressed the Full Bench at a directions hearing and filed a further submission - despite having 3 separate opportunities to persuade the Full Bench that he has even an arguable case, he has failed to do so;

(b) the prospects of success of an appeal are virtually zero;

(c) the filing of this appeal is vexatious, frivolous and unreasonable and ought not to be further encouraged by permitting the Appellant to provide further oral submissions in circumstances where the Appellant clearly has nothing more to offer other than baseless and, frankly, quite offensive, allegations against the Respondent;

(d) the Appellant, by his own admission (Point 3 of page 2 of the Appellant's Notice of Appeal: 'I want to put a new application. Another commissioner can hear and ask Curtin to pay full expense and wages, super which Curtin owed to me.'), is seeking a rehearing of his claim by a differently constituted Commission in the hope that he will receive a more favourable outcome - that is not a proper basis for an appeal under s.49 of the Act and should not be permitted by the Full Bench.

Particulars of grounds of appeal provided by Mr Zhou

45 Following the filing of the particulars provided by Mr Zhou and Curtin University's submissions, a letter was sent to Mr Zhou by the Commission on 2 May 2016 which stated as follows:

The members of the Full Bench have read the document filed by you on 31 March 2016 and the respondent's submissions. It is of the opinion that prior to considering whether it should make an order to dismiss your appeal or to list your appeal for hearing, they require you to file written submissions addressing each of the points raised in the respondent's submissions. Your written submissions should also set out in full the point you raise about the translator. In particular:

(a) do you say any part of the translation of what you said was incorrect;

(b) whether you say that there were parts of the evidence that you did not understand as it was not translated to you; and

(c) if you did not understand part of the evidence, what part did you not understand?

If you require any part of the submissions filed on behalf of Curtin University to be translated into Mandarin, please advise these chambers which paragraphs of the document you require to be translated and that will be arranged. You are required to file your submissions in English. However, if there are any parts of your submission that you are of the opinion you can better express in Mandarin, you may also file a short explanation in Mandarin and the Commission will arrange for that part of the document to be translated.

You are required to file your submissions by email by Monday, 23 May 2016.

Following receipt of your submissions, the Full Bench will determine whether your appeal will be listed for hearing or dismissed without further hearing.

46 Mr Zhou advised that he required the submissions filed on behalf of Curtin University on 15 April 2016 to be translated. Those arrangements were made and Mr Zhou was provided with a copy of a translation by an accredited translator. Mr Zhou then provided a response to those submissions both in English and in Mandarin. The response filed in Mandarin was translated in English by an accredited translator.

47 Despite being afforded the opportunity of translating Curtin University's submissions into Mandarin, which is Mr Zhou's first language, the subsequent submissions filed by Mr Zhou both in English and in Mandarin do not shed further light on Mr Zhou's grounds of appeal. Nor do these submissions provide any articulated argument of any clarity which properly address the merits of the appeal. The only additional submission that Mr Zhou put in his subsequent submissions which added to the 'particulars' is a submission that he filed in English in an email sent to the Commission on 12 May 2016 which relates to the point he raises about the translator. He stated in English that:

(a) the hearing at first instance had not been fully translated to him and that if that had been done he could have responded to the Commission in his own language and informed the Commission of what happened;

(b) the translator that was used at first instance is western and Mandarin is his second language;

(c) the translator does not understand 'the dialect' so he would put his own thoughts and opinions into the translation;

(d) when Ms van den Herik asked him questions, those questions were not translated to him with questions and answers;

(e) some parts of the questions asked of him by Harrison C were not translated to him; and

(f) the evidence given on behalf of Curtin University was not translated to him.

Conduct of the appeal

48 After receiving the submissions in writing by each of the parties, the Full Bench listed the appeal for hearing on 5 July 2016. At the hearing an accredited translator was made available to Mr Zhou to assist him in presenting his submissions and to translate the oral submissions made on behalf of Curtin University.

Conclusion

(a) Legal principles - employee/independent contractor

49 The Commission may only determine a claim for a contractual benefit where it arises as an industrial matter and is a claim made by an employee: s 7(1) (definition of industrial matter), s 23 and s 29(1)(b)(ii) of the IR Act.

50 Commissioner Harrison correctly applied the law in respect of the onus of proof. As stated by her, it is not for an employer to show that an applicant is an employee, it is for the applicant to show on balance of probabilities that he was an employee: ***R B Exclusive Pools Pty Ltd*** (8) (Fielding SC). Consequently, in this matter an onus lies upon Mr Zhou to prove that he was an employee of Curtin University.

51 It is always necessary for the Commission when determining a claim for contractual benefits to ascertain what the terms of the contract are. In this matter, the only material terms of the contract that were in issue in the determination of the preliminary issue were:

(a) whether Mr Zhou was engaged by Curtin University as an employee or an independent contractor; and

(b) the duration of the arrangement.

52 Curtin University concedes it entered into a contract to engage Mr Zhou to provide services, but says the terms of the contract engaged Mr Zhou as an independent contractor from 15 June 2006 until 30 November 2008.

(b) Was Mr Zhou denied procedural fairness by the procedure adopted for the translation of his evidence and was the translation service provided adequate?

53 In ***Becirbasic v Building West Pty Ltd*** [2015] WAIRC 01118; (2015) 96 WAIG 22 [112], I pointed out that at common law there is no general right to an interpreter.

54 If a party whose proficiency in English is insufficient to understand proceedings, to properly understand questions being asked, or evidence given by a witness, or is unable to properly articulate answers to questions, then a hearing without allowing that party an adequate use of an interpreter may constitute a breach of the rules of procedural fairness. This is because a hearing cannot be said to be fair unless a person is able to understand the proceedings and be able to not only adequately put their case forward for consideration by the court or tribunal hearing the matter, but to also adequately understand the case that is put against them.

55 In this matter, Mr Zhou effectively argues there was a failure to provide him with an adequate hearing, as there was non-translation of part of the proceedings before Harrison C and there was a mistranslation of some of his evidence.

56 In ***SZRMQ v Minister for Immigration and Border Protection*** [2013] FCAFC 142; (2013) 219 FCR 212, mistranslation and non-translation was the central issue in determining whether a hearing conducted by an independent merits review was fair. In that matter, Allsop CJ observed ([9] - [11]):

> The question whether standards of interpretation have affected a hearing as an opportunity to be heard is a question of evaluation as to whether the hearing was fair. That in turn involves the recognition of the purpose of the hearing: to give the person concerned or affected by the exercise of power a real opportunity to place before the repository of the power such information as is relevant. This will require a substantially effective mechanism of communicating oral and written information, both from, and to, the person. To the extent that interpretation or translation is necessary, it must be adequate to convey the substance of what is said, to a degree that the hearing can be described both as real and fair. It will be a matter of evaluation in all the circumstances, by reference to the issues, the nature of the evidence, the character and frequency of any proven errors in interpretation, and any other factor apparently relevant to the quality of the communication, as to whether the hearing was fair. Relevant to the task will be how the decision-maker approached the resolution of the task before her or him.
>
> How the decision-maker approached the matter *may* be critical. If an error of interpretation or translation can be seen to lead to a material and adverse finding relevant to a decision against the person, the unfairness of the hearing is self-evident. It may not be possible, however, to show how one or more inaccuracies affected the decision, since it will often be impossible to show what the decision-maker would have done with different information. This is especially so if the decision is based in part, or in whole, on credit. It is at this point that the focus upon the process becomes important. The enquiry is not to investigate, and the applicant's burden is not to establish, a precise causal link between any irregularity and an adverse result, but to assess whether the decision-making process (including the hearing and the making of the decision) was fair. Even if one cannot show an operative causal influence of any irregularity upon the decision, it may still be that the irregularity *might* reasonably have had such an effect through its materiality or repetition or context. Any such conclusion may affect the legitimacy of the process in that it may not be able to be concluded that it was fair. Such may be expressed as requiring the appearance of a fair hearing: cf *Assistant Commissioner Condon v Pompano* 295 ALR at 693 [209]; *NIB Health* [2002] FCA 40; 115 FCR 561 at 583 [84]; *R v Tran* [1994] 2 SCR 951 at 988, Lamer CJ, writing for the Canadian Supreme Court otherwise comprised of La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ, in a passage cited by Kenny J in her Honour's influential decision in *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507; 92 FCR 6 at 19-20 [30]. It can, in this context of adequacy of communication through interpretation, be perhaps better expressed as requiring that the hearing be fair. How, it might be asked rhetorically, can a hearing be described as fair, when it can be shown that real and potentially material errors of substance occurred in interpreting or translating a person's version of events to a decision-maker, being errors that may well have affected the decision in a real way, though such causal effect cannot be demonstrated one way or another?
>
> That rhetorical question should not be taken as intended to encapsulate any complete evaluative principle. Fairness of the process will fall to be judged by reference to the particular circumstances. In some circumstances, the interpretation may be so inadequate as to deny the fact of any hearing. In such circumstances, it may not even be necessary to show that the errors may well have affected the decision in a real way, because there has been no hearing, to which the person was entitled.

57 Chief Justice Allsop then went on to say that subject to his observations, he agreed with the approach of Robertson J at [65] - [75] of his reasons. Justice Robertson at [65] - [73] made the following observations which set out an approach which is squarely on point in this matter:

> The issue in the present appeal being procedural fairness under the general law, the analysis must be focused on the particular circumstances of the case: whether or not there has been a denial of procedural fairness is fact-sensitive.
>
> The question is whether the mistranslation or non-translation, singular or plural as the case may be, individually or in the aggregate, led to a material unfairness, that is, relating to a matter of significance or potential significance for the applicant's case and what the applicant was putting about the claim or for the decision-maker's decision.
>
> Attention must be given to the course the hearing took as well as to the ultimate reasoning of the decision-maker. A causative impact on the decision-maker's ultimate conclusion would usually be sufficient to establish a lack of procedural fairness, but may not be necessary. Even where a causative impact is being examined, the court on judicial review should consider whether the mistranslation or non-translation had or could have had significance if the applicant's words had not been mistranslated or, in the case of a non-translation, had been translated.

> The significance of the error or errors is not to be assessed by reference only to the reasoning in fact used by the decision-maker because the decision-maker was, by definition, unaware of the mistranslation or non-translation, singular or plural and because the process is central.
>
> If a mistranslation or non-translation could have affected the outcome then, depending on the circumstances, that may be sufficient to establish denial of procedural fairness.
>
> It will often be important to distinguish between a case where the mistranslation or non-translation is frequent or continuous, on the one hand, and a case, such as the present, where the errors are intermittent.
>
> In the former case it will be easier to conclude that there has been a denial of procedural fairness because, considered overall, the process has miscarried. The cause may be incompetence of the translator in English or in the particular non-English language but the cause is of very little relevance in my opinion.
>
> In the latter case, where the errors are intermittent, care must be taken to evaluate the overall fairness of the hearing as well as the individual instances in order to assess the quality of the process and whether it amounts to the applicant having had a reasonable opportunity to be heard and to present his or her claim.
>
> It is also important, in my view, to keep separate questions of mistranslation and non-translation, on the one hand, and mere errors of fact on the other hand. Similarly, it may be that a translation is confused and confusing because what an applicant has said is confused and confusing.

58 The first matter to determine is whether errors were made in the interpretation of Mr Zhou's evidence at first instance.

59 At the hearing of the appeal on 5 July 2016, Mr Zhou made a submission that the interpreter could not interpret a lot of what he meant and in particular the interpreter failed to interpret the following statements which were made by him in Mandarin:

(a) That Curtin University violated (by that I understand to mean it breached) the 'Industrial Relations Act', but he should have said that:

(i) Curtin University did not pay superannuation in Australia or China.

(ii) If Curtin International is to employ staff in China they should use a foreign services company or employ via its own branch in China. (When making a submission about another ground of appeal, Mr Zhou contended that Curtin University does not have the right to engage a contractor in China, except through a foreign services company or set up a representative office.)

(b) The interpreter did not state that the funds Curtin University allocated for an office in China were used wrongly by Curtin staff which resulted in 'my right, benefit being violated'. Mr Zhou explained because Curtin International does not have a branch in China but they had allotted some funds for a commercial property lease, but the funds were misused by a manager and that is why he (Mr Zhou) could not work in the office. Consequently, his work was delayed.

60 Mr Zhou also made a submission that the interpreter 'inserted' a lot of his own opinions and did not interpret the evidence given by Ms Bartsch and questions put by Harrison C of that witness.

61 It is difficult to ascertain whether Mr Zhou's contention that these matters were in fact misinterpreted is correct as the transcript at first instance does not readily reveal whether such errors were made. However, as counsel for Curtin University points out, even if it is the case that these matters were either wrongly stated or were not stated, these errors, if made out, cannot be said to be material, as evidence of these matters was irrelevant to the issue before Harrison C and that is, whether Mr Zhou was employed by Curtin University or engaged as a contractor.

62 Any omission to state that Mr Zhou was not paid superannuation was not material to determination of the preliminary issue whether Mr Zhou was engaged as an employee. Any obligation to pay superannuation is a matter the Commission would determine in a later hearing if a finding was made that Mr Zhou was an employee and that his claim for superannuation was made within the time limit for bringing such a claim. No such finding was made. However, Mr Zhou's claim for superannuation as a contractual benefit calculated at 17% over 10 years of service was squarely before the Commission. It was set out in his application and the fact that he maintained this claim was confirmed in the following exchange between Harrison C, Mr Zhou and the interpreter prior to Mr Zhou giving evidence. At page 15 of the transcript, Harrison C, when asking Mr Zhou about the components of his claim, said:

> Superannuation, 17 per cent of your salary. Why do you say you’re entitled to that?
>
> **ZHOU, MR:** (Through interpreter) Because university super is 17 per cent. Every one of my old - all of my colleagues are on that rate of 17 per cent.

63 The second matter Mr Zhou says was not stated does not assist his case. Firstly, a statement that Curtin International is unable to directly employ persons or directly engage an independent contractor in China is a statement that cannot be tested as it is not supported by any statement of legal principle or statutory source. Secondly, and perhaps of more importance is that as counsel for Curtin University pointed out such a statement does not assist Mr Zhou's case, it supports Curtin University's contention that Mr Zhou was engaged as a contractor by Curtin University as it engaged Mr Zhou through a company, Xin Nan.

64 The third matter Mr Zhou raises goes to whether funds provided by Curtin University to establish an office in China were misappropriated. Even if this issue had been raised in evidence in the proceedings before Harrison C by Mr Zhou, it would have been immaterial to the determination of the question whether Mr Zhou was at any time engaged as an employee by Curtin University.

65 Thus, the errors in interpretation identified by Mr Zhou were inconsequential. Minor or inconsequential errors in interpretation are not sufficient to establish a denial of procedural fairness: ***WALN v Minister for Immigration and Multicultural and Indigenous Affairs*** [2005] FCA 1704 [41] (Nicholson J).

66 Nor do I accept that the fact that Ms Bartsch's evidence in chief was not translated to Mr Zhou was unfair.

67 It became clear to me during the hearing of the appeal that Mr Zhou has more competency with the English language than he might otherwise suggest that he has. This became apparent when he made his submissions through a Mandarin interpreter. At the commencement of the hearing of the appeal Mr Zhou was asked in English whether he required the whole of the proceedings to be translated. Mr Zhou stated that the hearing of the appeal could commence in English and that he would seek assistance from the translator if it was necessary. The matter then proceeded by him answering questions put by the Bench in English by giving answers in Mandarin and these answers were interpreted to English by the translator. Yet, Mr Zhou did not require the interpreter to interpret the majority of questions put to him by the Full Bench in English. Also, on several occasions when the translator was stating Mr Zhou's answers in English, Mr Zhou interrupted the translator to correct the translation in English that was being given.

68 Prior to the hearing to determine whether Mr Zhou was an employee within the meaning of the IR Act, arrangements were made for Mr Zhou to appear on 16 October 2015 before Harrison C in person via telephone in a hearing for Mr Zhou to show cause. At that hearing, a Mandarin interpreter, Mr Jacobs, arranged by the Commission, was present to assist Mr Zhou. At that hearing, Harrison C ascertained that Mr Zhou had a degree of understanding and fluency in English, and that he was 'happy' to be asked questions in English, but required some assistance to understand some matters. At the hearing, the following interchange took place (ts 2):

> **HARRISON C:** I understand Mr Zhou does speak some English. Is it necessary that everything I say you have to translate for him?
>
> **THE INTERPRETER:** I can ask him?
>
> **HARRISON C:** Yes - - -
>
> **THE INTERPRETER:** Ah - - -
>
> **HARRISON C:** - - - that would be helpful because we will be here for a very long time even if I say 'yes' to some things. I understand he has a certain level of literacy as it relates to English.
>
> **THE INTERPRETER:** Ah, happy to listen to it in English, if I don't understand then I can ask the interpreter.
>
> **HARRISON C:** Thank you very much for that clarification. And, Mr Jacobs, I note you're assisting Mr Zhou today with interpreting.

69 At the conclusion of the show cause hearing, Harrison C determined that she would set down the preliminary issue for hearing in November 2015.

70 At the hearing on 16 November 2015, Mr Zhou attended the hearing in person in the hearing room in Perth and Mr Jacobs, the interpreter, also attended the hearing to assist Mr Zhou.

71 The transcript records where Mr Zhou gave his evidence by answering questions given to him in English directly in English and where the questions were answered by the translator after translating the questions.

72 In the course of considering this appeal, I have not only read the transcript of the proceedings on 16 November 2015, but I have listened to the audio to ascertain whether the transcript accurately records when Mr Zhou had matters stated in English transcribed to him in Mandarin. Having done so, except for one matter, I am satisfied that the transcript is an accurate record. The only part of the proceedings that was translated to Mr Zhou that is not reflected in the transcript is that when Ms van den Herik, who was acting for Curtin University at first instance, made a short closing submission, it is clear from the audio that what was said by Ms van den Herik was transcribed to Mr Zhou as Ms van den Herik was speaking.

73 The transcript of the proceedings records that when the hearing commenced on 16 November 2015, Harrison C asked Mr Zhou a number of questions in English and Mr Zhou responded. These were questions such as whether he represented himself and particulars about his specific claims. Mr Zhou answered these questions in English. It is apparent from the answers that he gave that he understood the questions that he was asked. The Commissioner then asked him questions about some documents he wished to tender into evidence in support of his claim. At that point in time Mr Zhou called upon the assistance of the interpreter to interpret the questions asked by Harrison C and gave some of his answers through the interpreter but many of the questions were put to him in English and he answered in English.

74 When Mr Zhou went into the witness box to give evidence under oath, Harrison C informed Mr Zhou that Mr Jacobs would assist him if he needed any assistance with translating. It is clear from the transcript that Mr Zhou was asked many questions which were not translated and he responded in English. The same procedure occurred during cross-examination of Mr Zhou. Some questions were interpreted to him by the interpreter and the answer was then given by the interpreter after Mr Zhou answered the interpreter in Mandarin. However, throughout the cross-examination many questions were put to Mr Zhou in English and he answered in English.

75 It is also clear from the transcript that Mr Zhou has the ability to read documents written in English. He was asked a number of questions in cross-examination about some documents and he was able to answer questions about the contents of those documents. Mr Zhou also tendered into evidence in support of his case a number of documents which were written in English.

76 After Mr Zhou gave his evidence, Ms J van den Herik called one witness to give evidence. The witness was Ms Bartsch. Ms Bartsch gave her evidence in English. None of her evidence was interpreted to Mr Zhou.

77 During Ms Bartsch's evidence Ms van den Herik sought to tender into evidence a number of documents which had not been previously discovered to Mr Zhou. Mr Zhou was asked by Harrison C whether he had any objection to these documents (which were emails generated in 2008 and 2009) going into evidence. After a brief discussion with the interpreter, Mr Zhou informed the Commission through the interpreter he had no objection to the tender of those documents into evidence (ts 56). Mr Zhou then cross-examined Ms Bartsch in English. He did, however, ask some questions with the assistance of the interpreter. However, the majority of the questions asked by Mr Zhou of Ms Bartsch were in English. In particular, he cross-examined the witness about a number of documents, including some of the content of the emails which were written in English and were documents that had not been discovered to him prior to the hearing (ts 64).

78 On one occasion, at the commencement of the cross-examination of Ms Bartsch, Mr Zhou sought to clarify an answer by Ms Bartsch by stating that he knew the situation and asked to speak Mandarin through the interpreter. Commissioner Harrison said 'no'. Commissioner Harrison then went to ask a different question. When one examines that exchange, it is clear that Harrison C was not refusing Mr Zhou the assistance of an interpreter, but was not allowing him to qualify the witness's evidence when he was cross-examining her.

79 At the conclusion of the evidence given by Ms Bartsch, Ms van den Herik made a short summary of Curtin University's case.

80 Mr Zhou then put his submission through the interpreter which was very short. Finally, Mr Zhou was asked a number of questions by Harrison C in English and he responded to most of those questions in English, but some answers were given through the assistance of the interpreter.

81 Consequently, when the transcript and audio of the proceedings at first instance are examined, it is clear that Mr Zhou appeared to have no difficulty reading documents written in English. When he gave his evidence, he was also asked and answered many questions in English. In addition, although none of the evidence of Ms Bartsch was translated to him, he appeared to have no difficulty cross-examining her about the content of documents that he regarded as material.

82 For these reasons, I am of the opinion that when the extent of the use of the interpreter by Mr Zhou at the hearing at first instance is examined, I am not satisfied that Mr Zhou was denied a fair hearing.

(c) Mr Zhou's other grounds of appeal

83 Mr Zhou says there was evidence before the Commission at first instance that proved that he was an employee of Curtin University for 10 years.

84 Yet, Mr Zhou's arguments largely rely upon matters that are irrelevant to the nature of the employment relationship between the parties. In addition, even if the evidence adduced on behalf of Curtin University is ignored, it cannot be said that he has put forward any credible or reliable evidence in support of his claim.

85 Commissioner Harrison did not accept Mr Zhou's evidence that he was an employee. She found him to not only lack credibility, but found his claim that he worked for almost 10 years for Curtin University without payment of wages or reimbursement of costs to be implausible and bordering on being fanciful.

86 As Brennan, Gaudron and McHugh JJ observed in ***Devries v Australian National Railways Commission*** [1993] HCA 78; (1993) 177 CLR 472, 479:

> More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact (See *Brunskill* (1985), 59 A.L.J.R. 842; 62 A.L.R. 53; *Jones v. Hyde* (1989), 63 A.L.J.R. 349; 85 A.L.R. 23; *Abalos v. Australian Postal Commission* (1990), 171 C.L.R. 167). If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' (*S.S. Hontestroom v. S.S. Sagaporack*, [1927] A.C. 37, at p. 47) or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable' (*Brunskill* (1985), 59 A.L.J.R., at p. 844; 62 A.L.R., at p. 57).

87 When regard is had to this well established principle, it is clear that there is no basis to set aside the findings made by Harrison C rejecting Mr Zhou's evidence.

88 It is clear from the reasons of Harrison C that she rejected Mr Zhou's evidence that he had not signed the exchange of letters documents (exhibits R1 and R3) as she found that those documents, together with the terms of the unsigned representative agreements (exhibits R2 and R4) contained the terms of agreement between Mr Zhou and Curtin University. Further, she found that the terms of those documents created a relationship of contractor and not employer and employee.

89 The following matters raised by Mr Zhou in this appeal are irrelevant to the issue that was before Harrison C in the preliminary hearing. These irrelevant matters are:

(a) whether or not Mr Zhou was directed to work seven days a week;

(b) whether payments cannot be made in Australian dollars in China or RMB from Australia;

(c) whether or not some unnamed senior staff of Curtin University misused office funds;

(d) whether or not Curtin University breached the *Education Services for Overseas Students Act 2000* (Cth) which requires providers of education and training courses to overseas students to be registered and sets out the requirements that Curtin University must comply with; and

(e) whether or not Mr Zhou was paid office expenses by Curtin University. In any event, evidence was adduced on behalf of Curtin University, which was accepted by Harrison C, that Mr Zhou was paid an annual fee (by payment of monthly fees) and costs in accordance with the terms of the representative agreements.

90 Alternatively, even if Mr Zhou's contention that he was an employee of Curtin University was made out, he has not been able to point to any error in the finding made by Harrison C that his claims for contractual benefits are out of time.

91 Pursuant to s 12(1) of the IR Act, an application referred by an employee pursuant to s 23(1) and s 29(1)(b)(ii) of the IR Act (being a claim for benefits said to be owing pursuant to a contract of employment) is an action instituted in a court as defined in s 3(1)(a) of the *Limitation Act 2005* (WA). Pursuant to s 13(1) of the *Limitation Act*, an application sought to be referred under s 29(1)(b)(ii) of the IR Act by an employee cannot be commenced if six years have elapsed since the cause of action accrued. Consequently, if an employee seeks to claim a contractual benefit, the claim must relate to a period of time that is less than six years.

92 In this matter, Mr Zhou claims he continued to work for Curtin University until 2015. His evidence on this point was rejected by Harrison C as implausible and fanciful.

93 At the hearing of the appeal Mr Zhou was asked whether there was any evidence put before Harrison C which supports his contention that he continued to be employed by Curtin University beyond the end of 2008. In response, he, in effect, said that as the letter dated 1 September 2008 (which Curtin University says was a notice terminating the representative arrangement) was not signed by Professor McKenna, notice to terminate the arrangement was not effective. Consequently, he argues that the arrangement continued. He also said that:

(a) the evidence of work beyond 2008 was that he contacted and continued to make representations to the principal (the vice-chancellor) of Curtin University about use of the funds and activities in foreign countries but he received no reply; and

(b) all the senior managers at Curtin University once they 'come across this issue' resigned.

94 When Mr Zhou gave evidence at first instance he said the last time he met with anyone from Curtin University in China was in 2009 (ts 46). He also explained that in 2008, 200 students had been promised by Curtin University that they would be placed to study with Curtin University but they were placed at a private college. This, he says, damaged his reputation and that after this occurred he made many representations to resolve this issue up until 2015 (ts 46 - 47).

95 These contentions are, however, insufficient to establish that the arrangement between Mr Zhou and Curtin University continued past 30 November 2008 as there was no cogent or reliable evidence before Harrison C that would support an inference that Mr Zhou continued to carry out work for Curtin University after that date. In these circumstances, even if Mr Zhou was an employee of Curtin University, his claims are out of time and Harrison C did not err in finding that the Commission had no jurisdiction to hear and determine Mr Zhou's claims of denied contractual benefits.

96 For these reasons, I am of the opinion that an order should be made to dismiss the appeal.

SCOTT CC:

97 I agree and have nothing to add.

MATTHEWS C:

98 I have read a draft of the reasons for decision of the Acting President. I agree with those reasons and agree that an order should be made to dismiss the appeal.

2016 WAIRC 00702

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JASON ZHOU
	APPELLANT
	-and-
	CURTIN UNIVERSITY
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 12 AUGUST 2016
FILE NO.	FBA 17 OF 2015
CITATION NO.	2016 WAIRC 00702

Result	Appeal dismissed
Appearances	
Appellant	In person by audio-link
Respondent	Ms S J Maddern (of counsel) and with her Ms C L Russo (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 5 July 2016, and having heard the appellant in person by audio-link and Ms S J Maddern (of counsel) and with her Ms C L Russo (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 12 August 2016, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2016 WAIRC 00677

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2016 WAIRC 00677
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 6 JULY 2016, THURSDAY, 7 JULY 2016
DELIVERED	**:**	THURSDAY, 28 JULY 2016
FILE NO.	**:**	M 32 OF 2015
BETWEEN	**:**	JING TAO SUN

CLAIMANT

AND

SUCCESS MOTORS SERVICE PTY LTD

RESPONDENT

Catchwords	**:**	Claim for unpaid wages – Whether the claimant and respondent entered into a contract of employment – Whether there was a breach of the Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089] – Small claims procedure.
Legislation	**:**	*Fair Work Act 2009*
Instruments	**:**	Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089]
Result	**:**	Claim proven
Representation:		
Claimant	**:**	In person
Respondent	**:**	Mr Yunbo Ji, director of the respondent

REASONS FOR DECISION

1 Mr Jing Tao Sun (the claimant) alleges:

a. that Success Motors Service Pty Ltd (the respondent) employed him as a welder in its panel beating business between 2 April 2013 and 14 August 2013; and

b. that it did not pay him at all during that period.

2 The respondent denies that it employed the claimant.

3 The claimant asserts that the terms and conditions of his employment were regulated by the Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089] (the Award).

Issues

4 The issues to be determined in these proceedings are:

1. Whether the parties entered into a contract of employment; and
2. If so, whether the Award applied to that employment; and
3. If the Award did apply, whether the claimant was paid in accordance with the Award.

The Claimant's Case

5 The claimant gave evidence and called three witnesses.

The Claimant's Evidence

6 The claimant testified that he is a qualified riveter, welder and assembler.

7 In about late March of 2013 he took a vehicle to the respondent's business for repair having been introduced to that business by a friend. At that time he met the respondent's managing director, Mr Yunbo Ji (Mr Ji), whom he discovered came from the same province in China.

8 In discussions, Mr Ji asked him what work he was doing. The claimant responded by saying that he was not working because he had recently been retrenched. Mr Ji asked him if he had ever worked in a panel beating shop. The claimant replied that he had done so in China but not in Australia.

9 The claimant alleges that Mr Ji told him that he had purchased several vehicles at auction, but had not had the time to fix them up and that if the claimant had no work he could work for him fixing up those vehicles. It was agreed that the claimant would start working for the respondent on a trial basis to see if he had the necessary skill required. If at the end of the trial period Mr Ji was happy with his work, then the claimant would be permitted to continue working for the respondent. If Mr Ji was not happy, then the claimant would not be employed.

10 The claimant asserts that he successfully completed his trial. There is an internal inconsistency in his evidence about the length of his trial. In evidence, he said that his trial was for two days whereas is his statement produced to the court (exhibit 2), he said that the period of his trial was for five days.

11 In any event, the claimant says that he successfully completed his trial and that Mr Ji agreed to employ him as a panel beater and welder involved in the repair of accident damaged vehicles. Mr Ji gave him two sets of uniforms to wear whilst working at the workshop. He has produced one set (exhibit 4). Thereafter he repaired accident damaged vehicles and carried out other miscellaneous tasks as instructed by Mr Ji.

12 The claimant contends that Mr Ji agreed to pay him 10% of the value of each car that he repaired. Such payment was to be made after the vehicle was sold. He asserts that he worked on about 27 or 28 vehicles each valued in excess of $15,000 and expected to be paid at least $1,000 for each vehicle on which he worked.

13 After having worked for two months without pay he approached Mr Ji for payment. At that time Mr Ji told him that the cars the claimant had repaired had not been sold. He told the claimant that he would be paid as soon as the cars were sold.

14 On 15 August 2013, the claimant again asked Mr Ji for payment. Mr Ji told him that he had no money because the repaired vehicles had not been sold. The claimant was unsatisfied with that and resigned with immediate effect.

15 The chronology of events subsequent to the claimant's resignation is not entirely clear, however what is clear is that the claimant attended the respondent's premises on at least two occasions seeking payment. It seems that on the last occasion the claimant and Mr Ji argued and the police were called. The claimant was warned by the police to stay away from the respondent's premises.

16 On one of the occasions that the claimant attended the respondent's premises, he took photographs of some of the vehicles that he had worked on. Those photographs are before the court (exhibit 3). Mr Ji takes exception to the claimant's actions in that regard. He says that the photographs the claimant took, which included photographs of compliance plates, was improper and breached the respondent's privacy.

17 The claimant asserts that on 23 August 2013 he visited the respondent's premises and spoke to Mr Ji about payment. At that time Mr Ji refused to pay him saying that the respondent had not made any money but later in the same conversation, asserted that the claimant had never been 'hired' and therefore was not owed anything.

18 On 1 September 2013 the claimant, as had been prearranged prior to his resignation, travelled to China and returned to Perth on 16 March 2014. Immediately upon his return he made a complaint to the Fair Work Ombudsman (FWO) who investigated the matter.

19 The claimant asserts that Mr Ji denied knowledge of him to the FWO investigator.

20 The claimant asserts that between 2 April 2013 and 14 August 2013 (19 weeks and four days) he worked 1,121 hours for the respondent. He says that he generally worked between 8:30 am and 6:30 pm Mondays to Saturdays but concedes that on occasions he started work later or finished earlier. Sometimes he finished as late as 9:00 pm and on odd occasions he worked on Sundays. He kept a contemporaneous record of the hours worked. He has produced that record (exhibit 1).

21 The claimant says that he is owed $25,827.84 in unpaid wages. He has calculated his claim using an hourly rate $23.04 which he says was payable to him at the time.

Other Evidence Called by the Claimant

22 The claimant called a number of witnesses. One of the witnesses called, Mr Yonglee Zoe (Mr Zoe) was called for the purpose of giving hearsay evidence. When that became apparent, Mr Zoe was not permitted to give such evidence and was excused.

The other witnesses called namely Mr Juang Hai Chen (Mr Chen), Mr Fei Wang (Mr Wang) and Mr Zhen Luo (Mr Luo) were each able to give direct evidence about the matter.

23 Mr Wang was the claimant's house mate at the material time. He testified that he observed the claimant returning home from work at about 7.00 pm on most evenings.

24 Mr Chen is a former work colleague of the claimant. He testified that he attended the respondent's premises for the purpose of purchasing a vehicle. He said that he visited the respondent's premises several times for that purpose and that on each occasion he saw the claimant working in the workshop.

25 The final witness called by the claimant was Mr Luo. Mr Luo is a driving instructor. He testified that he first met the claimant when he taught him how to drive. At the time he was also a customer and friend of Mr Ji. He said that between April 2013 and August 2013 he attended the respondent's workshop on a regular basis sometimes up to three to four times a week. He saw the claimant working there on each occasion. Sometimes during such visits he spoke to the claimant who informed him about the terms of his remuneration. He thought the arrangement to be 'interesting'.

26 At the end of August 2013, Mr Luo happened to be at the respondent's workshop and saw the claimant arrive and heard him ask Mr Ji for his pay. He heard Mr Ji's response which was initially that he did not have the money to pay him, which later changed to denying that the claimant had worked for the respondent as an employee. He observed the claimant and Mr Ji to argue loudly and the police attend.

Respondent's Case

27 The respondent relies on the evidence of its director Mr Ji, his daughter and a friend.

Mr Ji's Evidence

28 Mr Ji denies ever having employed the claimant. He says that at the time he first met the claimant, the claimant had told him that he had lost his job. Mr Ji advised the claimant that as the respondent was moving premises that the claimant could do some odd jobs for him in that move. Mr Ji said that the claimant agreed to that. In return the claimant was given his lunch on days worked plus was paid $300 to $500 in cash per week dependant on what was done.

29 He denies that the claimant worked for the respondent on a full-time basis between 8.30 am and 6.30 pm, Monday to Saturday. He said that the workshop did not even open until 9.00 am, which was the time that he arrived at the premises after having dropped his daughter off at school.

30 He testified that the claimant did not remain at the respondent's premises as alleged. He said that the claimant used to come and go as he pleased because at the time he was actively seeking employment as a welder and left the respondent's premises to seek out employment. In that regard Mr Ji's, daughter assisted the claimant in completing various job applications.

31 Mr Ji denies promising to pay the claimant 10% of the value of each vehicle repaired. He points out that the claimant is not a qualified panel beater and was not capable of repairing cars. Whilst in the workshop the claimant did, on the odd occasion in an attempt to help, do some work on cars but that work was generally valueless because rather than repair vehicles he further damaged them.

32 Mr Ji asserts that his relationship with the claimant soured after the pair disagreed about a matter concerning the repair of the claimant's own vehicle. Mr Ji asserts that the claimant used the respondent's account to purchase parts for his own vehicle. Consequently, he refused to pay him his weekly amount of $500. That led to vindictive retribution by the claimant.

Other Evidence Called by the Respondent

33 The respondent called two witnesses being Ms Nan Ji (Ms Ji) and his friend and former work colleague Mr Hong Wei (Mr Wei).

34 Ms Ji testified that she assisted the claimant in his attempt to find employment as a welder. She assisted him in completing his résumé. She said that on occasions the claimant attended her home and was invited to stay for dinner. She testified that she 'thinks' she saw her father (Mr Ji) give the claimant money on one occasion but could not elaborate further in that regard.

35 Mr Wei testified that on occasions he attended the respondent's workshop and at those times, saw the claimant doing odd jobs unconnected to panel beating. He said that he used to assist Mr Ji at the respondent's workshop some nights and on weekends and that the claimant was never there at those times. He told the court he remembered Mr Ji telling him in the hearing of the claimant that he was paying the claimant $300 to $500 per week to do odd jobs.

Assessment of the Evidence

36 The claimant impressed me as a truthful witness. He was unmoved when cross-examined and much of his evidence was corroborated by the witnesses he called. One of those witnesses, Mr Luo, was particularly impressive in his manner of delivery. He too stood firm under cross-examination. I found Mr Luo to be a truthful witness. His evidence corroborated the claimant's assertions that he worked as a panel beater on cars in the respondent's workshop. His evidence of the dispute that occurred in late August 2013 is also crucial because it confirms the claimant's contention that Mr Ji initially refuted the claim for payment on the grounds that he did not have the money to pay him.

37 By contrast, Mr Ji's evidence is unacceptable. His credit is found wanting. On the one hand he asserts that the claimant did only odd jobs and was rarely at the workshop, yet at the same time asserts that he paid him cash amounts of between $300 and $500 per week. He said that he, in part, paid him those amounts out of sympathy for his situation. The alleged payments were made altruistically to help the claimant as a friend. I note, however, that Mr Ji had only recently met the claimant. They were hardly friends. Further it is highly improbable that Mr Ji would pay the claimant $300 to $500 per week for doing very little.

38 The claimant rejects the contention that he had received cash payments and I believe him in that regard. I suspect that the suggestion that the claimant was paid is an invention aimed at defeating the claim. There is no credible corroborative evidence

of such payments. Ms Ji's evidence in that regard was vague and confused. I reject her evidence. Her evidence, particularly under cross-examination, was found wanting. She was vague as to the specific place, time and circumstance of such payments. Her evidence appeared to be given in a biased fashion aimed at supporting her father. The evidence she gave about assisting the claimant in seeking alternate employment is of no particular consequence and does not derogate from the fact that the claimant worked in the respondent's workshop repairing vehicles.

39 Mr Wei's evidence was similarly unacceptable. He was, when cross-examined, found to be particularly vague as to place, time and circumstance concerning the claimant work at the workshop. His evidence about never having met the claimant was unconvincing when challenged under cross-examination.

Findings

Did the Parties Enter into a Contract of Employment?

40 I find that the claimant was employed by Mr Ji on behalf of the respondent as alleged by the claimant. The fact that he was employed is supported by the fact that the claimant worked for the respondent on a full-time basis on Mondays to Saturdays, generally between 8.30 am and 6.30 pm as was recorded by the claimant. I accept that the claimant's record (exhibit 1) is genuine, contemporaneous and accurate. The fact that the claimant worked for the respondent on a regular full-time basis is also supported by the evidence of Mr Luo, who saw him regularly doing automotive work.

41 The fact that the claimant was employed is corroborated by the provision to him of a uniform. That contraindicates any notion of an informal arrangement. The fact that the claimant had in his possession the uniform supports his contention that it was given to him by Mr Ji to wear at the workplace.

42 It is clear to me that Mr Ji, on behalf of the respondent, employed the claimant to repair motor vehicles and to do other odd jobs that was required by the respondent. I accept that the parties agreed that the claimant's remuneration was to be on the basis that he would be paid 10% of the sale price of each vehicle repaired by the claimant. I am satisfied that the claimant was not paid in accordance with that agreement, or at all.

43 I am satisfied that the claimant did not work for the respondent under the arrangement suggested by Mr Ji.

44 I find that the claimant worked at the respondent's workshop using, with one exception, the tools and equipment provided by the respondent and at all times was under the control and direction of Mr Ji. The claimant provided nothing more than his labour in repairing vehicles. I am also satisfied that the respondent paid for all the parts used by the claimant in the repair of motor vehicles. The claimant never had any proprietary interest in the vehicles repaired and there was never any partnership intended or created.

45 I accept the claimant's evidence that the parties entered into an oral contract of employment in which it was agreed that the claimant would work for the respondent on the basis that he would be remunerated and that he would receive 10% of the sale value of each vehicle he repaired. It is clear that such term sought to oust the provisions of the Award and, to that extent, is void.

Did the Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089] Apply?

46 The answer to the question posed above is yes. Clause 4.1 of the Award covers all employees throughout Australia engaged in vehicle repair. The respondent's business was that of vehicle repair providing panel beating and painting services.

47 Further, the Award had application to the parties because the respondent was a national systems employer within the meaning of s 14(1)(a) of the *Fair Work Act 2009* (FW Act).

Was the Claimant Paid in Accordance with the Award?

48 The respondent did not pay the claimant in accordance with the Award or in any other way.

49 The claimant asserts that he is owed $25,827.84. He calculates that amount on the basis that he worked 1,121 hours and that he should have been paid at the rate of $23.04 per hour for each of those hours. The hourly rate of $23.04 claimed is not derived from the Award, but rather is the hourly rate that the claimant's former employer used to pay him whilst he was employed as a welder.

50 The claimant's claim is based on a flat hourly rate excluding overtime penalties and allowances however it is apparent from his evidence and other evidentiary material produced, such as exhibit 1, that he is entitled to overtime penalties and allowances.

51 Before deciding the quantum of his entitlement I must, for the purpose of determining the hourly rate payable to the claimant, establish what his proper classification was under the Award. In that regard, I am satisfied that the claimant fell within the classification of 'Vehicle industry RS&R – tradesperson or equivalent Level 1 R6' as set out in cl B.6 of Schedule B of the Award. The classification of 'welder' which applied to the claimant is found within it.

52 It follows that the Award hourly rate payable to the claimant with respect to his employment with the respondent was $18.58 until 30 June 2013 and then increased to $19.07 on 1 July 2013. The hourly rate used by the claimant cannot be used because it is not the relevant rate provided by the Award.

53 I accept that the claimant worked the 1,121 hours that he claims to have worked. Exhibit 1 supports his contention in that regard.

54 During the course of these proceedings I informed the claimant that his election to use the small claims procedure as provided by s 548 of the FW Act meant that the court could not make an order for payment in excess of $20,000. He was informed that should he want to recover in excess of $20,000, he needed to discontinue this small claim proceeding and instead commence a general procedure proceeding. He did not do that and has indicated he wishes to continue with his claim utilising the small claims procedure. He informed the court that he abandons any claim in excess of $20,000. Had the claimant not done so and

proceeded otherwise, he would have recovered in excess of that which this court is empowered to order pursuant to s 548(2)(a) of the FW Act.

55 The claimant seeks payment for the 1,121 hours worked at a flat hourly rate. An hourly rate of $18.58 was payable to the claimant up to 30 June 2013. If one uses that hourly rate alone without regard to the increase on 1 July 2013 and any other entitlements for overtime penalties and allowances the amount payable is $20,828.18. Given that amount exceeds the amount which this court can order it will be unnecessary to calculate the claimant's precise entitlement.

Conclusion

56 The claim is proven.

57 I order that the respondent pay to the claimant $20,000 less tax payable to the Australian Taxation Office.

58 Given that the claimant has not sought the imposition of a civil penalty, no further order is made.

G. CICCHINI

INDUSTRIAL MAGISTRATE

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2016 WAIRC 00676

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADIB ABDENNABI
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	WA POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 28 JULY 2016
FILE NO/S	APPL 42 OF 2016
CITATION NO.	2016 WAIRC 00676

Result	Appeal adjourned
Representation	(by written correspondence)
Appellant	Mr R Yates of counsel
Respondent	Mr J Winton of counsel

Order

WHEREAS on Wednesday, 13 July 2016, Adib Abdennabi instituted an appeal pursuant to s 33P of the *Police Act 1892* (the Police Act) against the decision of the Commissioner of Police to take removal action on 22 June 2016; and

WHEREAS on Wednesday, 13 July 2016, the appellant lodged an application for orders

a. for an adjournment of the hearing of the appeal pursuant to s 33T of the Police Act for 12 months until after criminal charges against the appellant are finally determined by a court or otherwise disposed of;

b. that the Commissioner of Police need not comply with reg 91 of the *Industrial Relations Commission Regulations 2005* until further order of the Commission, and

c. that either party may apply to vary the terms of the order; and

WHEREAS on Friday, 22 July 2016, the Commission received correspondence from the respondent stating that he has no objection to the appellant's application for orders, nor the application being dealt with on the papers; and

WHEREAS having considered the provisions of s 33T(3) of the Police Act the Commission considers that it is in the interests of justice to grant an adjournment of the hearing of the appeal.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s 33T of the Police Act, hereby orders –

1. THAT the hearing of the appeal be adjourned until Thursday, 27 July 2017.
2. THAT the appeal be listed for mention on Thursday, 27 July 2017.
3. THAT compliance with reg 91 of the *Industrial Relations Commission Regulations 2005* by the Commissioner of Police need not occur until further order.
4. THAT either party may apply to vary the terms of this order.

(Sgd.) P E SCOTT,
Chief Commissioner,
[L.S.] On behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2016 WAIRC 00674

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KATHERINE NICOLE BARKER

APPLICANT

-v-

HNZ AUSTRALIA PTY LTD (ABN 26 008 932 189)

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT
DATE WEDNESDAY, 27 JULY 2016
FILE NO/S B 98 OF 2016
CITATION NO. 2016 WAIRC 00674

Result Application discontinued

Order

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

WHEREAS on Monday, 18 July 2016, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*;

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

THAT this application be, and is hereby discontinued.

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

2016 WAIRC 00678

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2016 WAIRC 00678
CORAM : CHIEF COMMISSIONER P E SCOTT
HEARD : TUESDAY, 3 MAY 2016, FRIDAY, 6 MAY 2016
DELIVERED : THURSDAY, 28 JULY 2016
FILE NO. : B 189 OF 2015
BETWEEN : MARTIN GEOFFREY GRASETT

Applicant

AND

SCANIA AUSTRALIA PTY LTD

Respondent

CatchWords	:	Denied contractual entitlement - Alleged unpaid commission - Claim for commission as a contractual entitlement or a matter of merit - Contract of employment - Whether policy incorporated into contract of employment - Discretion for employer to unilaterally amend policy - Implied term
Legislation	:	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	:	Application dismissed
Representation:		
Applicant	:	Mr G Hoppe as agent
Respondent	:	Mr A Mossop of counsel

Reasons for Decision

1 Mr Michael Grasett, as an Account Manager for Scania Australia Pty Ltd, sold 33 trucks to Sadleirs. He says that the repair and maintenance contracts (R&M contracts) sold to Sadleirs in respect of those trucks were part of the one deal associated with the sale of the trucks and that he caused the sale of the R&M contracts. He seeks payment of commissions for the sale of those R&M contracts of $34,650.

2 According to the submissions made by Mr Grasett's representative, Mr Grasett's claim is based on two premises:

1. That he has a contractual entitlement to commissions for the sales of R&M contracts; and
2. Even if there was no contractual entitlement, as a matter of equity, Mr Grasett ought to be paid more for his contribution to those sales.

3 Mr Grasett says he should receive 75% of the commission rate in accordance with Part D of the Contracted Services Commission Structure, and that 25% is a fair and equitable apportionment for the Service Sales Executive, Mr Ennis, for the work he put in.

4 Scania Australia Pty Ltd (Scania) says it has paid Mr Grasett according to his contract. It says the commissions for the sale of R&M contracts were payable to Mr Ennis who performed the necessary work.

5 For the following reasons, I find that Mr Grasett is not entitled to the R&M contracts commissions he claims.

BACKGROUND

6 The following background is largely uncontentious.

Corporate Structure

7 Scania's business involves the sale of new trucks, busses and engines manufactured by Scania, and the provision of after sales service involving repairs and maintenance and general servicing of the vehicles, the sale of parts, driver training and coaching.

8 The company's headquarters in Australia is in Victoria.

9 In Western Australia, there is a Regional Executive Manager (previously the State Manager). There are also two functional heads. The first is the Regional Sales Manager, responsible for new vehicle sales. This position is held by Mr Robert Taylor. Under his direction were four Account Managers, including Mr Grasett.

10 The other functional head is the Commercial Services Manager, primarily concerned with after sales service, including repairs and maintenance. A number of positions report to this manager, including the Service Sales Executive, Mr Ennis.

11 Mr Michael Berti occupies both the Regional Executive Manager and the Commercial Services Manager positions. Therefore, Mr Berti's roles are responsible for after sales service, the position being the equivalent to that of Mr Taylor, and the overarching responsibility as Regional Executive Manager to cover the entire operation of the State.

12 Mr Berti commenced with Scania in February 2015 in both of these roles.

13 Mr Berti reports to the Managing Director of the company and to the Executive, which is made up of the Managing Director, the Chief Financial Officer, the National Aftersales Manager (Mr Sean Corby), the National New Truck Sales Manager (Mr Dean Dal Santo), and the National Human Resources Manager.

14 Therefore, two essential reporting relationships in this case are Mr Grasett reporting to Mr Taylor, and Mr Ennis reporting to Mr Berti, with Mr Berti having overall responsibility for the WA operation.

Role of Account Manager

15 The role of the Account Manager is to make sales of new trucks to existing or new customers.

Role of the Service Sales Executive

16 The role of the Service Sales Executive is concerned with the sales and provision of after sales service to customers, including parts and service sales. Scania seeks to enter into service agreements, with fixed price repairs and maintenance arrangements, with its customers, as well as providing ad hoc maintenance and repairs.

The New Truck Sales Process

17 When a new or existing customer is interested in purchasing a new truck, the Account Manager works with the customer to identify the general and technical specifications of the truck required to fill the customer's needs. In doing so, the Account

Manager works with Scania's Pre-Sales Technical Department. A proposal is then put to the customer. Should the customer wish to proceed, the customer signs an offer to purchase. The Account Manager then builds what is called a 'deal pack' of all of the paperwork.

18 Once the deal pack is finalised by the Account Manager, it is signed off by the Regional Sales Manager.

19 The deal pack is then submitted to the Pre-Sales Logistics Department, which takes over and coordinates the building of the vehicle or the sourcing of a truck from within stock, in conjunction with the New Vehicle Preparation Department. The Account Manager liaises with the customer about the progress of the vehicle.

20 After the truck is paid for and handed over to the customer, the deal is then 'washed out'. This involves a calculation of the deductions to be made from the sale price of the costs incurred by Scania. This determines the margin to be allocated to the branch. The margin is the basis upon which the Account Manager's commission is calculated. Typically, this is paid in the month following delivery of the vehicle to the customer.

21 The manager responsible for approving commission payable to an Account Manager is the Regional Sales Manager.

22 Mr Grasett says the process for claiming commissions on new truck sales was that he would send the paperwork to Mr Taylor, the Sales Manager, or, under the previous structure, prior to Mr Berti's appointment, it went through Mr Craig Brinkworth, the State Manager. Mr Taylor would approve the claim. It would then go to Mr Dal Santo, the National Sales Manager. The amount to be paid as commission would then be determined according to the policy, and subject to the calculation of the margin to be received by Scania, under the 'wash out' process.

The Aftersales Contracting Process

23 The Service Sales Executive is responsible for negotiations and administration of R&M contracts.

24 When the Account Manager is engaged with the client for the sale of a new truck, the Account Manager passes the client's contact details to the Service Sales Executive, and good communication between the two of them is necessary. The Service Sales Executive obtains a significant amount of information from the client to understand how the vehicle is to be used, the loads likely to be carried, the kilometres likely to be travelled and other details. This information affects the servicing schedule for the vehicle and enables the calculation of the costs to Scania for the purpose of calculating the cents per kilometre costs it will apply to the contract. The Service Sales Executive then discusses the terms of the contract with the client and deals with any barriers to agreement.

25 Typically, the Service Sales Executive takes the lead, however, the Account Manager is able to do so. It is typically the Service Sales Executive, the Account Manager, the Commercial Sales Manager or the National Aftersales Manager, who signs the contract.

26 Commission is paid to the person who sold the contract, and that person completes the form claiming the commission payment on the sale.

27 Under the business's previous structure, the State Manager determined who would receive the commission for any R&M contracts. However, with the change in structure, it is the Regional Executive Manager, being Mr Berti. It is then submitted to the Contract Supervisor in head office for approval. Payment is typically made in the month following the contract becoming active.

The Sadleirs Sales

28 There are two aspects to the dealings between Scania and Sadleirs. One is the sale of the trucks. The other is the sale of the R&M contracts for those trucks. The latter is the subject of Mr Grasett's claim but is linked to the sale of the trucks.

The Truck Sales

29 In 2014, Scania became aware that Sadleirs intended to bid for transport services in the north west of the state from Chevron.

30 At this point, Sadleirs had its own workshops and did its own servicing and maintenance.

31 Sadleirs fell within Mr Grasett's allocated territory.

32 Scania does not dispute that Mr Grasett played a significant role in winning the sale of 33 new trucks. Each of the 33 trucks was the subject of detailed planning to take account of the particular work it would do, in the manner I have discussed above. Mr Grasett worked with both Sadleirs and others within Scania to determine those requirements and how to source the trucks, whether they needed to be built or whether there were existing trucks which could be modified to meet the particular requirements.

33 Mr Grasett's involvement went from building the relationship with Sadleirs' decision-makers, working closely on the specification for each truck; sourcing the trucks; dealing with Scania regarding the development of the price and negotiating that price with Sadleirs; documentation for orders; preparation of the contracts; getting the contracts signed; and the delivery of trucks as they became available.

34 Mr Grasett was involved in very detailed matters associated with the development of the trucks, including designing the livery for the fleet, and in some cases, driving the new trucks to their delivery point and providing some driver training.

35 This was one of the largest, if not the largest, sale of trucks to a client of Scania. Mr Grasett says that, in effect, it was one deal even though almost all of the trucks were the subject of separate contracts containing different specifications and prices and signed on different dates.

36 Competition for the Sadleirs new truck sales was very high. The profit margin for Scania was very low because of the competitive environment. Also, as the trucks started to roll in from overseas, the Australian Dollar declined in value quite

significantly. Mr Taylor told Mr Grasett that Scania put another $5,000 into each vehicle and reduced their price to get the deal.

37 Mr Grasett's evidence was that for the first few trucks, he was paid commissions in full, but after that a decision was made that reduced his commissions to almost nothing. He said that seeing his commissions form with an amount of $10.40 and another with $16.00 commission was a slap in the face considering the work he had put into obtaining such a significant contract.

38 In the meantime, Scania had commenced negotiations with Sadleirs for R&M contracts for the vehicles being purchased.

The Sadleirs' R&M Contracts

Mr Grasett's Evidence

39 Mr Grasett says that he is entitled to the commissions arising from the R&M contracts for a number of reasons. He says that he was the 'rainmaker' and coordinator for the whole of the Sadleirs deal, and that Mr Ennis was merely supporting him.

40 Mr Grasett says there was an agreement in principle for those R&M contracts but the details of the cents per kilometre were being resolved by Mr Ennis – that Mr Ennis's role was 'about drawing up the documents, all the administration' (ts 76). 'The essential part of, um, selling the trucks and of adopting an R&M Policy to go with them in a package deal was done by myself' (ts 76). He says that by May/June 2015, when Mr Ennis was sending emails to Sadleirs and within Scania regarding the R&M contracts that he, Mr Grasett, had already brokered that deal and Mr Ennis's work was a matter of detail.

41 Mr Grasett acknowledged that Mr Ennis engaged in some but not a lot of the negotiations with Sadleirs representatives. Mr Ennis dealt with Mr Berti in the latter's Commercial Services Manager role and he was Mr Ennis's direct superior.

42 Mr Grasett says Mr Hale Preston-Samson and Mr Gary Pyne of Sadleirs always contacted him first and he referred them to Mr Ennis and Mr Berti. He also says that Mr Ennis would come to his office in the morning and they would talk through a range of issues.

43 Mr Grasett says that no-one from Sadleirs disputed that there would be R&M contracts with each truck sold – there was an agreement in principle he says, but 'we suddenly shot up in price' (ts 77).

44 In August 2015, a problem arose in that the factory subsidy towards the R&M contracts that had been available on the first batch of contracts was no longer available, meaning the price per month to Sadleirs for each truck increased.

45 It had become apparent that subsidies had been separately applied to both the new truck sale contracts and to the service contracts. After the first 19 contracts, head office became aware of this and decided that it could not afford to provide the subsidy for both. Sadleirs was sufficiently concerned that it was contemplating not proceeding with the purchase of the Euro 6 trucks. On 25 August 2015, Mr Dal Santo, the National Sales Manager, advised of a solution to save the sales. He said that both his sales section and the national head of servicing would each contribute amounts from their respective budgets, and Mr Berti would contribute to the R&M subsidy to place Sadleirs in the same position as they had been previously. At the same time, he said that '[n]o commission will be paid on the R&M [contracts] for this batch' (exhibit R1, tab 19, page 47).

46 Mr Grasett agrees that as National Sales Manager, Mr Dal Santo, being the person who issued the commissions policy, had authority to amend the policy and was entitled to make the decision that no commissions would be paid, but he also says that Mr Dal Santo was required to have his, Mr Grasett's, agreement to change that policy once it was in place.

47 Mr Ennis claimed and was paid the commissions for the sales of R&M contracts up to 25 August 2015, the date that Mr Dal Santo advised that no further commissions would be paid.

48 Mr Ennis left Scania on 25 September 2015 and Mr Berti then took over the work on the R&M contracts.

49 On 1 October 2015, Mr Grasett sought the contract numbers and dates for all of the Sadleirs' R&M contracts and that day submitted a claim for commissions on those sales, including those for which Mr Ennis had already been paid (exhibit R1, tab 23, page 55). He says that he had no idea that at that time Mr Ennis had already been paid those commissions.

50 Mr Grasett also says that he was told in a meeting on 30 October 2015 by either Mr Taylor or Mr Berti that he would be paid the commissions, they would be postponed to 2016, at which time Scania would evaluate the wash out as to what funds they could allocate to him as commissions, but that he might not get the full amount. Mr Grasett filed this application on 6 November 2015.

Mr Berti's Evidence

51 Mr Berti's evidence was that from his observations, Mr Ennis was primarily responsible for the negotiation of the R&M contracts for Sadleirs' vehicles. Mr Ennis was responsible for identifying from Sadleirs the essential parameters for determining the price of the contract. Mr Ennis negotiated agreements to proceed and dealt with any concerns Sadleirs had. He involved others including Mr Berti when required. He says that he spoke with Mr Ennis on a daily basis. Mr Berti says Mr Grasett had very few conversations with him about the R&M contracts.

52 He says Sadleirs raised some significant issues which Mr Ennis had to deal with, including explaining to Sadleirs the reasons for some variations in costs and securing subsidies or support from Scania to obtain the contracts. Mr Ennis negotiated directly with Mr Preston-Samson and Mr Pyne from Sadleirs to overcome their various objections and to push Sadleirs to sign the contracts.

53 On 27 May 2015, when Mr Preston-Samson advised Mr Ennis that Sadleirs was satisfied with the R&M proposal and asked for the bundle of contracts to be drawn up for signature, both Mr Berti and Mr Grasett sent Mr Ennis emails congratulating Mr Ennis on a job well done.

54 Mr Berti also gave evidence of a number of issues raised by Sadleirs regarding a bundle of R&M contracts. This resulted in Sadleirs forming the view that they would be better off not entering into R&M contracts but to pay as they went. Mr Pyne sent an email to Mr Preston-Samson and Mr Read on 12 June 2015 expressing this. Mr Preston-Samson forwarded it to Mr Ennis,

copied to a number of people, but not to Mr Grasett. Mr Ennis prepared a draft response for Mr Berti's approval, and suggested a meeting with Sadleirs.

55 There was a meeting at Sadleirs' office the following Monday, 15 June 2015, involving Mr Pyne, Mr Preston-Samson and Mr Read of Sadleirs, and Mr Berti, Mr Ennis and Mr Grasett. The meeting lasted between three quarters of an hour to an hour. Mr Grasett and Mr Preston-Samson left part the way through the meeting to discuss some new truck issues.

56 Following the meeting, Mr Ennis and Mr Berti discussed the R&M contracts and the other issues further, and believed Mr Pyne would be happy to progress.

57 On Friday, 19 June 2015, Mr Grasett informed Mr Ennis and Mr Berti by email that he had just spoken to Mr Pyne at Sadleirs, who had said that Mr Grasett could collect all the signed R&M contracts at 3.30 pm that day when he 'was due to catch up with them'. In the email, Mr Grasett again praised Mr Ennis for his 'hard work and dedication' (exhibit R1, tab 24).

58 Mr Ennis signed the R&M contracts with Sadleirs, except for those which were returned to Scania while he was on leave. Mr Berti signed those contracts.

59 Mr Ennis claimed commissions for those contracts, the first batch being signed by him on the date of execution of the contracts, on 22 May 2015, and another batch on 4 August 2015 for contracts executed between 3 June and 18 July 2015 (exhibit R1, tab 25). Those claims were approved and paid. When Mr Ennis claimed commissions for the R&M contracts, he selected that box indicating that Sadleirs was not a 'conquest' customer. It was Mr Berti who authorised Mr Ennis's commission claims, and said that Mr Ennis was entitled to commissions for the contracts prior to 25 August 2015.

60 Mr Ennis continued to work with Sadleirs to finalise further R&M contracts.

61 On 21 August 2015, Mr Ennis had to inform Sadleirs that the subsidy previously available was no longer available in Australia, so the monthly price for the R&M contracts for the new Euro 6 vehicle would increase (exhibit R1, tab 16). Mr Berti says that it was Mr Ennis who had to inform Sadleirs because he 'was the lead in the negotiations for the R&M contracts'. This increase in cost involved a significant risk to Scania, and Sadleirs suggested they might put their order on hold for that particular vehicle. Mr Ennis then emailed, saying to leave it with him and he would see what he could do. There seemed to be an impasse, and as a result, Mr Berti says that it was beyond Mr Ennis's authority to make any other arrangements as this needed to be resolved through Scania's Executive group. It was resolved by Mr Dal Santo's email of 25 August 2015, and the remainder of the contracts were sold.

62 The Managing Director then advised that because of the double-dipping of the subsidy and the subsequent financial difficulties for Scania, there would be no further commissions paid on the deal until the business fully understood the financial implications.

63 On 1 October 2015, Mr Grasett lodged commission claims forms for 23 R&M contracts (Exhibit A1, tab 9).

64 Mr Taylor, as Regional Sales Manager, signed Mr Grasett's commissions claims forms. Mr Berti told Mr Taylor he did not believe Mr Grasett sold the R&M contracts and that Part D of the Commission Policy did not apply. The commission claims were rejected.

65 Under cross-examination, Mr Berti says that it is his understanding from discussions with the National New Trucks Manager and the Managing Director that there was no profit for Scania from the sale of the trucks to Sadleirs. The financial implications of the whole deal with Sadleirs were not known when Mr Dal Santo sent an email advising that commissions would not be paid on the R&M contracts, that Mr Dal Santo was looking for a way to 'minimise the financial impact … based on the nature of the deal' (ts 167).

ISSUES AND CONCLUSIONS

Is the Commission Policy incorporated in the contract of employment such as to enable Mr Grasett to enforce it as a denied contractual benefit?

66 The first issue in dispute is about whether Mr Grasett's contract of employment entitled him to commissions on R&M contracts, whether he earned those commissions and whether they should be split.

The Contract of Employment

67 By letter dated 11 October 2012, Mr Grasett was offered employment by Scania. The first paragraph of the letter sets out his remuneration package of base salary, superannuation and motor vehicle allowance.

68 It also set out that:

> On accepting this offer, and the above conditions being satisfied by your commencement date, this letter and the attached contract will set out the terms and conditions of your employment with the Company.
>
> Exhibit A1, tab 1, page 1

69 Attached to the letter was a document headed 'Contract of Employment Scania Australia Pty Ltd'. This contained a number of conditions which relate to remuneration and to the terms of the contract.

70 Clause 6 – Employee Duties provides amongst other things:

> **6. Employee Duties:**
>
> You must:
>
> …
>
> - Adhere at all times to Company occupational health and safety, discrimination, bullying and harassment, and other policies and procedures, and comply with any relevant legislation;

…

71 Clause 7 – Remuneration provides:

> **7. Remuneration**
>
> Your Total Remuneration Package is as set out shown at Item 7 of Schedule A. It comprises base salary, any non-monetary benefits specified, and the superannuation guarantee contribution (SGC) the Company makes on your behalf at the minimum level provided for under the *Superannuation Guarantee (Administration) Act 1992* (Cth).
>
> …
>
> Exhibit A1, tab 1, page 3

The remainder of this paragraph is not contentious.

72 Other clauses make reference to the requirements for Mr Grasett to comply with Scania's policies, including 'all relevant Australian legislation, including regulations and codes of practice. You must abide by the Company's Occupational Health and Safety policies and procedures at all times. You have a duty of care to work in a safe and lawful manner'.

73 He was also to comply with 'policies that prohibit all forms of discrimination and workplace harassment while on Company premises or while representing the Company' (Exhibit A1, appendix 1, page 6).

74 Clause 22 – Entire Agreement provides that:

> **22. Entire Agreement**
>
> This agreement constitutes the entire agreement between you and the Company and supersedes any prior agreements, representations, warranties, covenants and guarantees or understanding between you and the Company, whether verbal or in writing.
>
> This agreement may only be varied in writing by the Company and you. Any variation to the agreement that is not in writing shall be of no force and effect.
>
> Exhibit A1, tab 1, page 7

75 Attached to the contract is Schedule A, which sets out clause 7 – Remuneration in the same terms as the letter. Under the heading of 8 – Guaranteed Commission, it provides:

8. Guaranteed Commission	In the first 12 months of your employment you will be paid a guaranteed commission of **$12,000**. Your guarantee[sic] commission will be paid to you in twelve equal instalments on top of your monthly salary. At the conclusion of the twelve month period you will revert to the standard commission structure.

Exhibit A1, tab 1, appendix 1, page 9

76 Mr Grasett signed the Contract and Schedule A on 26 October 2012.

77 Therefore, I note a number of things about the contract of employment as it stood when Mr Grasett commenced employment. Firstly, the contract was made up of the terms contained in the letter of offer, which set out a total remuneration package, but did not make reference to commissions.

78 Secondly, it included the terms of the 'Contract of Employment Scania Australia Pty Ltd' document. These documents required Mr Grasett to adhere to the Company's occupational health and safety, discrimination, bullying and harassment, and other policies and procedures.

79 Thirdly, the agreement constituted the entire agreement, and could only be varied in writing by Scania and Mr Grasett. Any variation not in writing was of no force or effect.

80 Fourthly, it incorporated Schedule A which provided for guaranteed commissions, including in the first 12 months, and set out that after 12 months, the 'standard commission structure' would apply.

Contract Varied

81 Mr Grasett's contract was varied, effective 1 July 2014, when instead of being provided with a motor vehicle allowance as set out in the letter of offer and Schedule A, he was provided with a fully maintained company vehicle in accordance with the company's vehicle policy released on 1 January 2014 (exhibit R1, pages 12 – 13). The variation also removed clause 8 – Guaranteed Commission of Schedule A.

82 These changes were recorded in a letter to Mr Grasett dated 28 April 2014, which said that it 'serve[d] as confirmation' that he was eligible for a fully maintained company vehicle. It also noted that:

> Your revised remuneration and vehicle details are outlined in "**Schedule A**" attached. All existing terms and conditions of employment remain the same.
>
> If you have any questions regarding this correspondence please contact me directly on (03) 9217 3371, otherwise please sign a duplicate of this letter and return a copy to myself in an envelope marked private and confidential.
>
> We would like to take this opportunity to thank you for your patience and working together with the business to make the required changes in an efficient manner.

83 Mr Grasett signed the revised Schedule A.

84 Therefore, Mr Grasett's contract of employment no longer made express reference to guaranteed commission or to the standard commission structure.

The Commissions Policy

85 Scania's policy dealing with commissions is in three parts. The first is the Scania Australia New Truck Sales Operational Policy dated 26 January 2010. It sets out a range of matters particularly relevant to this claim. They are:

1. 'The Commission policy is reviewed on a regular basis and the Company may amend or vary the Policy at any time as it considers necessary in line with business needs.'
2. It contained a section which put to the Account Manager that he 'acknowledge and agree that:
   - A) the commission amounts payable are determined in accordance with the Companies[sic] New Truck Sales Commission policy, as varied from time to time
   - B) the Company may at its discretion, amend the commission policy; and
   - C) Any change to the calculation of commission entitlement will take effect from the commencement date stated in the amended New Truck Sales Commission Policy.'

Exhibit R1, tab 1

86 Mr Grasett also signed this on 26 October 2012.

87 The second part is the Account Manager (New Truck) Sales Commission 2012. It was replaced by the 2015 version, effective 1 January 2015. Both versions provide that the contracts commissions under the Contracted Services Commission Structure, which was 'designed to reward staff for their success in growing the After Sales Business', would apply to Account Managers. It did not set out all of the details but provided that:

> *Note:* *Full Details of the R&M scheme for* [2012 or] *2015 are indicated in the attachment appendix 2 included with this commission policy.*

88 The third part was therefore the Contracted Services Commission Structure. This set out the circumstances under which contracts commission was payable including new vehicle contract sales, for Scania vehicles including trucks. The Base Commission was set out under four parts, A – D.

89 Part D is that part which Mr Grasett says entitles him to contracts commission for the Sadleirs R&M contracts. It provides:

> In order to achieve the 2015 target of 35% penetration of R&M's sold against new vehicles delivered;[sic] New Vehicle and Service Sales Executives will need to more closely co-ordinate their activities. Service Sales Exec's[sic] will also need to more actively support the creation of contract quotations and documents to their respective New Vehicle Sales teams.
>
> In order to support these activities, commissions payable on R&M's sold by the New Vehicle Sales Executive to vehicles within 30 days of their delivery date will be split; 75% of the amount payable will be paid to the New Vehicle Sales Executive and 25% to the Service Sales Executive.
>
> However, should the New Vehicle and Service Sales Executives reach an alternative, mutually agreeable split of the commission then this will apply.
>
> **Note:**
>
> - The contract commission will only be paid once per contract or contract re-sign and the commission receiver will be determined by the State Manager and approved by the Contracts Supervisor.
> - The contract commission will only be paid once the contract has been activated in RAMAS and all relevant paper work has been returned to the National Contracts Department. Paper work includes but is not limited to the contract quote, the original signed contract or contract re-sign/variation and contracts commission form (Appendix A).
> - From time to time the company may introduce special promotions at its discretion, which may or may not form part of the above commission.

Exhibit A1, Appendix 4, pages 1-3

90 Attached to this, as part of Appendix A, is a document headed 'Contracts Commission Payment Application Form' by which the staff member applies for payment of commissions.

91 Having read the three documents and heard the evidence, it is clear that:

1. The New Trucks Sales Operational Policy is to be read with the Account Manager (New Trucks) Sales Commissions 2015 document, which is Appendix 1, and the Contracted Services Commission Policy, which is Appendix 2.
2. The company may amend the commission policy at its discretion.
3. On R&M contracts, Part D provided an incentive for Account Managers (New Trucks) and Service Sales Executives to closely coordinate their activities. The incentive was particularly aimed at two things:
   - (a) encouraging close liaison between new truck sales personnel and the Service Sales Executive, to achieve the target of 35% of new vehicles being sold with R&M contracts; and
   - (b) the Commission would be split 75% to the New Vehicle Sales Executive and 25% to the Service Sales Executive, where the sale was made by the New Vehicle Sales Executive.

4. The commission would be paid once.

5. The recipient would be determined by the State Manager and approved by the Contracts Supervisor.

Was the Commission Policy Incorporated in the Contract?

92 Whether or not a policy will be incorporated into a contract of employment is a matter of interpretation of the contract and will depend upon the parties' intentions as objectively ascertained (*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40] – [41]).

93 In *McCormick v Riverwood International Australia Pty Ltd* [1999] FCA 1640; (1999) 167 ALR 689, Weinberg J at [74] – [77] set out a number of principles about interpretation of contracts, saying:

> 74 In ascertaining the meaning of an expression contained in a contract such as the requirement that the applicant "abide" by all "Company Policies and Practices currently in place, any alterations made to them, and any new ones introduced", the approach to be adopted differs from that taken in statutory interpretation. It must rest on the premise that the contract was made in good faith with the object of at least potential mutual benefit by due performance.
>
> 75 The Court approaches the task of ascertaining the meaning of the parties' expressions from an objective point of view. In the case of a disputed clause in a commercial agreement "the essential question is what would reasonable business people in the position of the parties have taken the clause to mean" - *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VicRp 74; [1990] VR 834 at 840 per McGarvie J. In *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201 Lord Diplock said:
>
> > *"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."*
>
> 76 The parties may be bound by the meaning reasonably to be inferred in the circumstances, even if it does not conform to the interpretation advanced by either. It is not necessary that a statement should be subjectively intended to be a term of a contract in order to be one; it is enough if it can reasonably be so understood.
>
> 77 In *Cheshire & Fifoot's Law of Contract* 7th Aust ed. 1997 it is stated that:
>
> > *"In interpreting the expressions of the parties, the court will consider them in their context. Except to the extent to which evidence is inadmissible, the court will as a matter of course take into account the objective background of the transaction, that is, its factual matrix, genesis and aim, and the common assumptions of the parties."* (see p 345)

(Weinberg J's approach was approved on appeal ([2000] FCA 889; (2000) 177 ALR 193). Also, North J, on appeal, noted the importance of the parties' intention to offer and accept mutual obligations (see [107]).)

94 A contractual provision will be illusory or unenforceable if it is phrased as a discretion which is exercisable entirely by one party to the contract (*Placer Development Ltd v Commonwealth* [1969] HCA 29; (1969) 121 CLR 353; *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130).

95 The contract of employment, in Item 7 of Schedule A, originally provided for total remuneration of base salary, superannuation and motor vehicle allowance. Part 8 of the Schedule provided for guaranteed commission, and there was an arrangement in the first 12 months for a guaranteed commission of $12,000, but after that, the commission would revert to the 'standard commission structure'.

96 Reference to commission being payable under the 'standard commission structure' can only refer to that set out in the Scania Australia New Truck Sales Operational Policy and its subsidiary documents, Appendices 1 and 2, which set out commission policies for new truck sales and for contracted services sales.

97 However, the policy reserved to the employer discretion on amending the policy and determining who will receive the commission. Changes to calculations would take effect from the commencement date stated in the amended policy.

98 When Schedule A was varied, the motor vehicle allowance was deleted from the remuneration section of Schedule A, but also the entire paragraph under point 8, headed Guaranteed Commission, was deleted. This meant the contract no longer contained specific reference to guaranteed commission, to the 'standard commission structure' or the commissions at all, although the policies still existed.

99 The commission policy is expressed in discretionary terms and gives management the ability to unilaterally change the policy, without consultation or agreement.

100 In this case, I conclude that the commission policy was incorporated in the contractual terms when the parties first entered into the contract. It was expressly referred to. However, it was specifically removed when the contract was amended. Mr Grasett does not suggest there was anything untoward in that.

101 Therefore, the contractual nature of the policy was removed.

Should it be an Implied Term?

102 To imply a term, a number of tests must be met. In accordance with the decision in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282 – 283, for a term to be implied, all of the following conditions must be satisfied:

(1) It must be reasonable and equitable;

(2) It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;

(3) It must be so obvious 'that it goes without saying';

(4) It must be capable of clear expression;

(5) It must not contradict any express terms of the contract.

103 In this case, it is arguable that it is reasonable and equitable that the policy be implied into the contract on the basis that commissions are important in areas of sales, and they were part of the normal remuneration and incentives arrangements for sales occupations in this industry. However, the policy contemplates circumstances where no commission might be payable or the policy varied.

104 It cannot be said, after the contract was varied to remove reference to 'guaranteed commission', that Scania would have said that 'of course' or 'it goes without saying' that the policy was part of the contract. If not, why was the contract varied to specifically remove it?

105 The contract could operate reasonably and effectively without the policy being part of the contract. It could operate with a policy regarding the payment of commissions being subject to managerial discretion, provided there was fair reward in all of the circumstances. However, a court must not find a term to be implied in order to make the contract 'reasonable or fair or prudent' (*Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337; (1982) 41 ALR 367 at 401 per Brennan J).

106 The circumstances here were that the contracts were not ultimately sold at a profit to Scania. The policy allowed for amendment. I find that it was not amended, rather Scania decided not to pay commissions at all after a given date because, as I understood Mr Berti's evidence, there was concern that with the subsidies and contributions being provided to sustain the deal, there would be no profit in it for Scania. As with the wash out for new trucks sales, the calculation of commissions relies on the amount remaining after the deduction of costs from the income from the sale. In this case, there was no profit remaining after those deductions. Even if the policy was not varied, the wash out process and the practicalities of the need for the sales to return a profit from which commissions are payable, means that the policy could still apply but little or no commissions be paid.

107 Further, the contract noted that it was the entire agreement. Therefore, to imply terms beyond those contained in the contract would be inconsistent with that express terms.

108 Therefore, I conclude that the application of the commissions policy was neither an express nor an implied term of the contract of employment. That being the case, it cannot be the subject of a claim under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (*Hotcopper Australia Ltd v Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704 (FB)).

Alternatively, did Mr Grasett Sell the R&M Contracts?

109 If I am wrong in that there was no express or implied contractual term entitling Mr Grasett to commission, then it is necessary to look at a number of issues. The first is whether Mr Grasett earned the commission. That required him to do the work to make the sale. That is a question of fact.

Credibility

110 Having observed Mr Grasett as he gave his evidence, but more importantly having considered that evidence, Mr Berti's evidence and the documents, I find Mr Grasett's evidence unconvincing.

111 There were a number of aspects about the way he gave his evidence that concerned me. Mr Grasett read from notes as he gave his evidence, and continued to do so despite being directed to give his evidence from his memory.

112 Mr Grasett was also argumentative and in spite of concessions made in cross-examination, he reverted to his argument that the sale of the 33 trucks together with the R&M service contracts was part of one deal.

113 One of the other aspects of Mr Grasett's evidence that makes it less than credible is regarding whether Sadleirs was a conquest client. When he was asked about whether Sadleirs had previously had R&M service contracts with Scania, he said 'No'. Yet, one such previous contract was produced to him, a contract from 2011. At this point, he attempted to distinguish it on the basis that Plantagenet Wines was the division of Sadleirs' business which purchased the trucks, and yet earlier he had not attempted to make that distinction. Until it suited him to argue that Plantagenet Wines was a conquest customer, he referred exclusively to Sadleirs.

114 Another issue which also undermines Mr Grasett's credibility is that he submitted all of his claims for the R&M contract commissions on 1 October 2015, some months after many of the contracts were signed and Mr Ennis had already been paid the commission. I find that he did so not because he had a belief that he was entitled to those commissions, but because he became disgruntled at the fact that the commissions for the sale of the trucks were significantly lower than he had anticipated. They were lower because there were deductions due to a range of issues having arisen, including a reduction in the Australian Dollar, which increased the cost of the vehicles to Scania and reduced the value of the contracts to Scania.

115 I think that at this point, having become disgruntled, Mr Grasett decided that he would claim the commissions on the R&M contracts, – not merely 75% of those commissions, under Part D of the Policy, which he asserted was the correct proportion, but 100%.

116 My conclusion is confirmed by Mr Grasett's email of 27 October 2015, in which he said:

> I write about my commissions and the delated payment. For all the hard work that I have put into my position securing orders, and the achievement of capturing the Sadleirs account, I have earned the sum of $44K so far this year. Refer to the attached. With 2 months to go to complete the year, in my opinion and of others this is not a fair income for my [ef]forts. It is certainly not an income which can support a family of 4 in Perth considering some health issues in our family.

> Fortunately according to the commission scheme that was sent to me, I consider that I am able to look to the R&M Commissions due to me, to pay the bills that I have incurred. I have submitted my commissions claim and completed forms in good faith some 4 weeks ago, and not received a reply as yet.
>
> I am most appreciative of my position and grateful of Scania Australia.
>
> I hope that Scania Australia would consider my application favourably. Failing which, if I have not heard on this issue by next week I will start to take up this issue further.
>
> I hope to hear from you soon please on this subject.
>
> Exhibit R1, supplementary documents
>
> Email from Mr M Grasett, 27 October 2015, 8.56 am

117 This confirms my view that Mr Grasett's claim for the R&M commissions comes from his disenchantment at not receiving commissions he thought due to him for new vehicle sales. I can understand his disappointment in those circumstances. However, that does not justify a claim for commission on the R&M contracts if he did not earn them.

118 As to the substance of Mr Grasett's evidence, that the truck sales and R&M contracts sale was one deal, this is quite clearly not the case. This is because, although there might have been a desire on Scania's part, there was no evidence of any overall contract or memorandum of understanding or agreement. The sales contracts, apart from some limited bundling, were separate contracts, were signed at different times, with different delivery dates and under different arrangements. The R&M service contracts were also separately negotiated and again signed over a period of time. When problems of pricing arose, Sadleirs raised the prospect of having ad hoc servicing and later putting the purchase of the Euro 6 trucks on hold.

119 Mr Berti's evidence is to be preferred. There were no apparent inconsistencies in his evidence and he had nothing to gain from colouring his evidence. Where Mr Berti's and Mr Grasett's evidence conflicts, I accept the former.

Who Made the R&M Contract Sales

120 While I accept that the sales of 33 trucks and R&M contracts for those trucks constituted very significant business for Sadleirs, and for Mr Grasett personally, it was not, as he says, largely due to him that the whole package was agreed. He diminished the contribution made by others, particularly Mr Ennis, when the evidence demonstrates that Mr Ennis put in a significant amount of work to achieve the R&M contracts. Mr Ennis did not merely undertake some administration and print out contracts. He was involved in detailed and sensitive negotiations with the client, independently of Mr Grasett, followed up with internal personnel and did the necessary work to bring the contracts to fruition.

121 Mr Grasett may have developed the relationship with Sadleirs for the purpose of the sale of the trucks, however, he was not the only one involved in that relationship. Others were required to complete their components of the work, and in the case of the R&M contracts, it was Mr Ennis who played the significant part.

122 I have referred earlier to the emails of 27 May 2015 from Mr Grasett and Mr Berti, congratulating Mr Ennis for his work in relation to the first bundle of contracts. Mr Grasett's email said 'All I say it is a pleasure working with you. You are a star, mate! Hear, hear from me. Great job.' (Exhibit R1, tab 8, page 8).

123 Some of the emails from and to Mr Ennis were not addressed to Mr Grasett but were addressed to others both internally and to Sadleirs. In some emails, he provided a copy to Mr Grasett, but not always.

124 For example, on 12 June 2015, Mr Pyne, Group Chief Financial Officer for Sadleirs, sent an email to Mr Preston-Samson and another person from Sadleirs, Mr Davis Read, in which he raised a number of concerns about the first bundle of R&M contracts from Scania. The final sentence reads 'therefore we would be better to just pay as we go, as there is no value in this option of agreement' (exhibit R1, tab 10, page 32). This meant that there would not be R&M contracts, rather there would be ad hoc service and repairs.

125 Mr Preston-Samson forwarded this to Mr Ennis and cc'd others, not including Mr Grasett. Mr Preston-Samson made comment and asked him, Mr Ennis, to 'please pass this onto your Melbourne offices so we can clarify all points' (page 32).

126 Mr Ennis drafted a reply in detail and addressed it to Mr Berti. As a consequence, a meeting was held on 15 June 2015 at Sadleirs' office. Present were Mr Pyne, Mr Preston-Samson, Mr Davis Read of Sadleirs and Mr Ennis, Mr Berti and Mr Grasett. Mr Grasett agrees that Mr Ennis and Mr Berti primarily addressed the concerns raised by Sadleirs because they were within their area of expertise (ts 80). About half way through the meeting, Mr Grasett and Mr Preston-Samson left to deal with issues relating to the delivery of the new trucks (ts 80).

127 As noted earlier, Mr Ennis and Mr Berti continued to work on the R&M contracts following the meeting.

128 As a result of the meeting, on 19 June 2015, the first bundle of R&M contracts was received from Mr Pyne from Sadleirs. Mr Grasett went over to Sadleirs and collected the contracts that afternoon. His email to Mr Ennis and Mr Berti said:

> I thought I would make your weekend. Well done to Kieran on his hard work and dedication mate. Mate, you are a star!!! You have worked so hard on this. Thank you so much for the team and your important role.
>
> Just spoke to Gary. Sadleirs have said that I should collect all the signed R&M Contracts at 3:30 pm this arvo, when I was due to catch up with them.
>
> Good news Guys. Signed, dusted and sealed.
>
> Exhibit R1, tab 24, page 57

129 I note this email records two things:

1. Mr Grasett recognises Mr Ennis' hard work and dedication;

2. Mr Grasett was going to collect the signed contracts from Sadleirs because he was due to 'catch-up' with Sadleirs at 3.30 that afternoon in any event. There is no suggestion that this was part of his responsibility, rather he was acting a delivery person.

130 The evidence demonstrates that Mr Ennis then proceeded to deal with the next batch of R&M contracts, through emails with Sadleirs' personnel, copied to Mr Grasett and Mr Berti.

131 In August 2015, there were further problems when Mr Ennis had to advise Sadleirs that the factory subsidy was not available for the next lot of R&M contracts. As a result, Sadleirs indicated they might place an order for the Euro 6 trucks on hold. It was Mr Ennis's job to communicate with them.

132 He did so, explaining the difficulties, saying he would see if there were any other ways Scania could enhance the deal.

133 As a result, there were further changes within Scania's pricing and subsidies, and ultimately the contracts were signed.

134 It is quite clear then that Mr Ennis was negotiating directly with Sadleirs and doing so without input from Mr Grasett. Mr Grasett was not the gatekeeper for Mr Ennis's dealings with Sadleirs.

The Performance Appraisal

135 Comments made by Mr Taylor in Mr Grasett's performance appraisal give Mr Grasett credit for the sale. This performance appraisal was made by Mr Taylor in his capacity as Sales Manager and Mr Grasett's line manager. Mr Taylor signed off on the R&M contracts sales commission forms presented to him by Mr Grasett. However, according to the policy and the other evidence, approval for R&M commissions is to be given by the State Manager. Following the restructure, this was the Regional Executive Manager, who was Mr Berti.

136 Therefore, the fact of Mr Taylor having given Mr Grasett credit for the sales of the R&M contracts does not mean he is entitled to the commissions. It required Mr Berti and the Contracts Supervisor to approve it.

Conquest Sale

137 If Mr Grasett is entitled to commission, in spite of my findings, then he seeks the additional $300 per chassis for the R&M contracts on the basis that he says Sadleirs was a conquest customer because they had never had an R&M contract before. He later changed that to Plantagenet Wines. Scania produced evidence that on 7 November 2011, Sadleirs contracted with Scania for a service agreement for six vehicles.

138 Mr Berti says that when he started with Scania in 2015, he understood Sadleirs was an existing client, with existing Scania trucks in their fleet. They also had expired service agreements.

139 The evidence, such as it is, indicates that Sadleirs and Plantagenet Wines are part of the Lionel Samson Group. The negotiations were done by Sadleirs' personnel, and the contracts made in the name of Plantagenet Wines. Sadleirs would utilise the trucks. I infer from the evidence that there was some benefit or advantage to the Lionel Samson Group or its constituents to the arrangement.

140 A conquest sale is defined in Part C of the Contracted Services Commission Structure as 'where a buyer has not purchased a new Scania vehicle, from any source, in the last five years … Conquest commission will only apply to the initial conquest sale received per customer'.

141 I find that for all intents and purposes, Sadleirs was the client. It had an R&M contract and had previously purchased Scania vehicles. It was not a conquest customer.

142 Given that conquest commission was payable only on the initial sale, it is arguable that even if Sadleirs was a conquest customer, there would be one amount of $300 due to Mr Grasett, if he otherwise sold the R&M contracts to Sadleirs.

A Matter of Merit

143 Finally, I note that Mr Grasett claimed the commission on two grounds. The first was a contractual entitlement, which I have dealt with. The second was that if there was no contractual entitlement, then as a matter of merit.

144 This is a claim made under s 29(1)(b)(ii) of the *Industrial Relations Act 1979*. It provides:

> (1) An industrial matter may be referred to the Commission —
>
> …
>
> (b) in the case of a claim by an employee —
>
> …
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,
>
> by the employee.

145 It requires that there be an entitlement under the contract of employment and a breach of the contract (see *Hotcopper* op cit). It is not about whether as a matter of fairness the applicant ought to receive a benefit which does not arise under the contract.

146 In any event, I have found that Mr Grasett did not perform the work to obtain the R&M contracts. Therefore, he has no entitlement under the contract or in equity.

147 The claim must be dismissed.

2016 WAIRC 00679

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARTIN GEOFFREY GRASETT
	APPLICANT
	-v-
	SCANIA AUSTRALIA PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 28 JULY 2016
FILE NO/S	B 189 OF 2015
CITATION NO.	2016 WAIRC 00679

Result Application dismissed

Order

HAVING heard Mr G Hoppe as agent on behalf of the applicant and Mr A Mossop of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2016 WAIRC 00664

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00664
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	THURSDAY, 14 JULY 2016
DELIVERED	**:**	TUESDAY, 19 JULY 2016
FILE NO.	**:**	B 22 OF 2016
BETWEEN	**:**	BRIAN JOHN NATHAN
		Applicant
		AND
		HEVBREN PTY LTD AS TRUSTEE OF THE ANNANDALE FAMILY TRUST T/AS LAGOON REALTY
		Respondent

CatchWords	**:**	Denied contractual entitlements – Contract of employment – Commissions for the sale of land – Cause of the listing – Inconsistent evidence
Legislation	**:**	*Industrial Relations Act 1979* s 29(1)(b)(ii)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr P Mullally as agent
Respondent	**:**	Mr I Curlewis of counsel

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings

taken from transcript as edited by the Commission)

The application

1 Mr Nathan claims that the respondent owes him $42,700 in commissions for the sale of 29 blocks of land which he says he listed for sale.

2 The respondent says the effective cause of the blocks of land being listed for sale was a proposal put by the respondent to the receiver and manager of the owner of the land. It says Mr Nathan undertook some administrative work associated with the listing, but was not the cause of the listing and, therefore, is not entitled to the commissions.

Background

3 This is a claim made under s 29(1)(b)(ii) of the *Industrial Relations Act 1979*, by which Mr Nathan says he has been denied by his employer a benefit arising under his contract of employment.

4 Mr Nathan was employed by the respondent as a fulltime real estate sales representative from mid-October 2004 to July 2013.

5 The Principal of the real estate agency operated by the respondent was Mr Brendon Annandale.

6 There is no dispute that Mr Nathan's contract of employment was oral, and that his remuneration was wholly by commissions, to be earned on the following basis:

1. 25% of the respondent's commission on the sale of a property which was listed by Mr Nathan;
2. 50% of the respondent's commission on the sale of a property which was both listed and sold by Mr Nathan; and
3. 25% of the respondent's commission on properties he sold but which had been listed by the respondent.

7 It is under the first arrangement that Mr Nathan claims compensation for the listing of 29 blocks in the development known as the Capricorn Estate.

8 There is also no dispute that the blocks became listed by the respondent for sale following an approach to the respondent in late-July/August 2012, and that Capland Real Estate (Capland) in Brisbane had been retained by Deloitte Touche Tohmatsu in Perth to advise it regarding the property market in Yanchep, where the respondent's business was located.

9 Mr Nathan says that he was unaware that following Mr Annandale's discussions with Capland on 23 August 2012, Mr Annandale had contact from a Mr Boisen and a Mr Kendall, both from Deloitte.

10 Following this call, on 28 August 2012, Mr Annandale received an email from Mr Boisen asking him to put in a detailed proposal for the respondent to sell the blocks. The proposal was to address a range of issues, including the commission and fee structure; proposed listing price per lot; selling strategy; proposed marketing mediums and associated costs; information about recent comparable sales the business had made, and a range of other issues to demonstrate the respondent's ability to deal with the sales.

11 On 3 September 2012, Mr Annandale wrote to Deloitte with a detailed proposal for the sale of the land, setting out information that was required to be included as set out above. Mr Nathan does not claim to have been involved in the preparation of the proposal.

12 On 16 September 2012, Mr Annandale and his wife flew to China for a holiday.

13 In his witness statement, Mr Nathan says that on about 17 September 2012, Mr Boisen telephoned, seeking to speak to one of the directors of the business. Mr Nathan answered the call. He explained that Mr Annandale was on holiday and offered Mr Annandale's mobile telephone number, but Mr Boisen said that he would speak with Mr Nathan. Mr Boisen explained that he had received the proposal and wanted to progress the matter further. Mr Nathan said they discussed Mr Nathan's experience in selling land and his familiarity with the particular land.

14 Mr Nathan says he then telephoned Mr Annandale and told him about the contact from Mr Boisen. He says he offered to Mr Annandale that he, Mr Annandale, deal with Mr Boisen but, he says, Mr Annandale simply wished him good luck.

15 Mr Nathan says that in the following days, he had numerous telephone discussions with Mr Boisen about arrangements for conjunctional sales with other local real estate agents and other matters. He says Mr Boisen told him that he was also in discussions with a rival of the respondent, and no decision had yet been made.

16 Mr Nathan says he also received a call from Capland, discussing marketing the land.

17 He says that on 20 September 2012, he was asked to meet with Mr Boisen and a senior manager of Deloitte, but this ended up being a telephone conference. He says he used this opportunity to promote the respondent and himself as being a wise choice to sell the land. He says the senior manager thanked him for his presentation and knowledge, and said they would be in touch when a decision was made.

18 At 6.18 am on 20 September 2012, Mr Annandale received a copy of an email from Mr Boisen to Mr Nathan, in which Mr Boisen said he 'look[ed] forward to receiving the agency agreement (incorporating all the details of your selling submission) once you have spoken to [Mr Annandale]' (Exhibit R1, attachment BA4).

19 At 2.29 pm, Mr Annandale received an email from Mr Nathan saying 'we got the blocks Michale[sic] [Mr Boisen] wants to do paperwork asap please advise where proposal is so I can do paperwork or call ASAP' (Exhibit R1, attachment BA5).

20 Mr Nathan says in his witness statement that he telephoned Mr Annandale and either said they were very close to securing the listing or that they had been successful in obtaining the listing. Mr Annandale told Mr Nathan that the hard copy of the submission was in a folder on his desk.

21 A short time later, Mr Nathan again emailed Mr Annandale, asking:

> …should i write up 4 listings for the 4 lots and put in the advertising costs ETC and send to Mikael regards Brian
>
> or do you want me to email you the paperwork to sign off please advise
>
> Exhibit R1, attachment BA6

22 Mr Nathan says he completed the documentation as directed by Mr Boisen, reflecting the proposal, and signed the documents on behalf of the respondent as the selling agent, and forwarded them to Deloitte. Mr Annandale was also sent a copy of the email and the signed documents.

23 There was also a further email from Mr Nathan to Mr Boisen, dated Friday, 21 September 2012, asking when the listing paperwork was likely to be signed off because Mr Annandale and he had a number of clients who were interested in the lots.

24 Mr Boisen then sent an email to Mr Nathan on 25 September 2012, in the following terms:

> As discussed earlier, you may be contacted by a number of sales and marketing agents who will ask you questions about the development. As we will be employing an external agency in due course to assist with the sales and marketing campaign, we ask that you attend to their questions and, if needed, ask them to call back again when Brendon has returned from leave.
>
> The agency agreement and offer and acceptance contract should be with you tomorrow.
>
> Exhibit R1, attachment BA9

25 Mr Nathan says he then received approval from Mr Boisen to have lot signs prepared for the blocks, and he then spent about four hours driving an advertising agent around Yanchep as he was bidding for the work with Deloitte for the blocks.

26 In his oral evidence, Mr Nathan says that he undertook this latter work after the listing documents had been signed.

27 In any event, Mr Nathan received an email from Mr Boisen dated Thursday, 27 September 2012, in which Mr Boisen expressed his appreciation for Mr Nathan's efforts with the marketing agent. He also attached the signed agency agreement with some changes made to the original document and an additional document containing conditions sought by Deloitte. He asked Mr Nathan to sign them and return them to him (Exhibit R1, attachment BA10).

28 Mr Annandale returned from China, and on Monday, 30 September 2012 he notified Mr Boisen and then continued to deal with the matter himself.

29 Twenty-nine of the blocks were sold while Mr Nathan was employed by the respondent.

Issues

The meaning of the contractual term that a property is listed by Mr Nathan?

30 Mr Nathan's contract of employment entitled him to commission on the sale of a property which was listed by him. Therefore, the question is what constitutes the listing. The law on the entitlement to commission for sales obtained by an agent is set out in the *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* [1977] HCA 13; (1977) 138 CLR 52. His Honour Barwick CJ noted at [15] that this is when the agent has been the effective cause of the sale, and he also refers to the introduction to the property of the person who ultimately becomes the purchaser as being another indicator. Jacobs J refers to the factual inquiry being 'whether a sale is really brought about by the act of the agent'.

31 In this case, the references to sales are to be read as references to listings. So the question is whether Mr Nathan was the effective cause of the listing, did he introduce the client to the listing, did he really bring about the listing?

Assessment of the evidence – reliability of Mr Nathan's evidence

32 As the applicant, Mr Nathan, bears the onus of proof. Mr Nathan does not claim to have brought about the listing by introducing the client. It is true that he signed the listing form but I am not satisfied that that was the cause of the listing. This is because having heard and observed Mr Nathan as he gave his evidence, I find that I am unable to rely on that evidence. In coming to that conclusion, I have taken account of Mr Nathan's hearing difficulties; those difficulties made his comprehension of some of the questions in cross-examination problematic. However, he was also intent on telling his sales story rather than answering the questions. Further, I am satisfied that the passage of time has caused some confusion. Mr Nathan's evidence was also inconsistent; in his witness statement, at [9], he said that when Mr Boisen contacted him on 17 September 2012:

I explained that Brendon was away on holidays in China and he enquired who I was. I explained that I was a representative and was Brendon's right hand man. I offered to give Brendon's mobile number but he said that it was OK to speak with me. *He explained that he had received the proposal sent in by Brendon* and he was now looking at progressing the matter further (emphasis added).

33 So in Mr Nathan's own witness statement, he acknowledged that in the first discussion he had with Mr Boisen, Mr Boisen referred to having received the proposal. Yet in his oral evidence, both in examination-in-chief and in cross-examination, he said that he thought that Mr Boisen's phone call was a cold call and he was not aware of Mr Annandale having previous dealings with Mr Boisen about the matter or that Mr Annandale had sent off a proposal. He says that he was not aware of the proposal at all until sometime further down the track.

34 Mr Nathan was also most adamant about his evidence but when challenged, said he was confused about some of the timing. However, not only was his evidence inconsistent within itself, it was also inconsistent with documentary evidence regarding such things as whether he had engaged in email communications with Mr Boisen between 17 and 19 September 2012. He was quite certain that he had. However, Mr Boisen's email of 20 September makes a point of providing his contact details, which strongly suggests that Mr Boisen had not previously provided those email communication details and that they had not previously communicated by email.

35 There is also inconsistency about whether Mr Nathan had telephoned Mr Annandale, either to say that they were very close to securing the listing or that they had won the listing. This is further added to by the fact that Mr Nathan appears to suggest that he sent an email which was in the same terms as the telephone call that he had made to say that they had won the listings.

36 Most significantly though, the listing agreement form which Mr Nathan sent to Deloitte was solely based upon Mr Annandale's proposal. The terms of this proposal were what Mr Boisen instructed Mr Nathan to include, and he did so. None of the matters which Mr Nathan says he discussed with Mr Boisen was included in that document. Deloitte then sent back the document prepared by Mr Nathan on direction from Mr Boisen, but it contained some changes to the document itself and added conditions sought by Deloitte.

37 In all the circumstances then, I am unable to be satisfied about what work Mr Nathan did to secure the listing, other than prepare the paperwork as directed. I am unable to conclude that Mr Nathan was responsible for the respondent obtaining the listing. The evidence points strongly to Mr Annandale's work being the cause of the listing. It may be that Mr Nathan's telephone and email communications with Deloitte assisted in some way, but I am unable to conclude what those communications were, what assistance, if any, they might have been and whether they were in any way a trigger for the listing, based on my concerns regarding the reliability of the evidence.

38 In all of the circumstances, as I am unable to find that Mr Nathan was the cause of the listings, I am unable to find that he is entitled to the commission.

39 Therefore, the application must be dismissed.

2016 WAIRC 00665

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIAN JOHN NATHAN
	APPLICANT
	-v-
	HEVBREN PTY LTD AS TRUSTEE OF THE ANNANDALE FAMILY TRUST T/AS LAGOON REALTY
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 19 JULY 2016
FILE NO/S	B 22 OF 2016
CITATION NO.	2016 WAIRC 00665

Result Application dismissed

Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr I Curlewis of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

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

2016 WAIRC 00235

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL OCONNOR
	APPLICANT
	-v-
	SHIRE OF CUE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 19 APRIL 2016
FILE NO.	U 23 OF 2016
CITATION NO.	2016 WAIRC 00235

Result	Directions issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr S Roffey as agent

Directions

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

(1) THAT the respondent do file and serve an amended notice of answer and counter proposal with full particulars in answer to the herein application by 10 May 2016.

(2) THAT each party shall give informal discovery.

(3) THAT the application be listed for hearing for two days on dates to be fixed.

(4) THAT the parties have liberty to apply on short notice.

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

2016 WAIRC 00675

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL OCONNOR
	APPLICANT
	-v-
	SHIRE OF CUE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 27 JULY 2016
FILE NO/S	U 23 OF 2016
CITATION NO.	2016 WAIRC 00675

Result	Discontinued by leave
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr A Sinanovic of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Julia Spice	Mario Strbac trading as Delta Legal	U 79/2016	Commissioner D J Matthews	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2016 WAIRC 00669

INTERPRETATION OF CLAUSE 9.3(A) OF THE SCHOOL EDUCATION ACT EMPLOYEES' (TEACHERS AND ADMINISTRATORS) GENERAL AGREEMENT 2014; INTERPRETATION OF CLAUSE 12(4)(A) OF THE TEACHERS (PUBLIC SECTOR PRIMARY AND SECONDARY EDUCATION) AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES STATE SCHOOL TEACHERS' UNION OF W.A. (INC.)

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT

DATE THURSDAY, 21 JULY 2016

FILE NO/S APPL 29 OF 2016

CITATION NO. 2016 WAIRC 00669

Result Order issued

Representation

Applicant Mr S Millman of counsel, and with him Ms P Byrne and Mr D Scaife of counsel

Respondent Mr R Andretich of counsel, and with him Mr J Chapman and Mr T Marsh

Order

WHEREAS this is an application to the Commission pursuant to s 46 of the *Industrial Relations Act 1979* (the Act);

WHEREAS the applicant provided minutes of proposed consent order, programming the matter through to hearing, which the respondent agreed to as amended; and

WHEREAS the Commission has formed the opinion that the issuing of the order will assist in the conduct of the hearing of the matter.

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

1. THAT the matter be listed for two days' hearing on dates to be fixed during the week commencing 3 October 2016.
2. THAT the applicant file and serve any witness statements on which it wishes to rely by 18 August 2016.
3. THAT the respondent file and serve any witness statements on which it wishes to rely by 15 September 2016.
4. THAT the applicant file and serve an outline of submissions by 15 September 2016.
5. THAT the respondent file and serve an outline of submissions by 22 September 2016.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2016 WAIRC 00685

APPLICATION FOR DECLARATION PURSUANT TO SECTION 42H

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00685
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 28 JULY 2016 & TUESDAY, 2 AUGUST 2016
DELIVERED	**:**	MONDAY, 8 AUGUST 2016
FILE NO.	**:**	APPL 44 OF 2016
BETWEEN	**:**	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
		Applicant
		AND
		COMMISSIONER OF POLICE
		Respondent

CatchWords	**:**	Application for declaration pursuant to section 42H - Dispute as to initiation of bargaining - Steps to initiate bargaining set out in *Industrial Relations Act 1979* (WA) - Steps not followed - Held bargaining not initiated - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) sections 42, 42(1), 42(3), 42(3)(a), 42(3)(b), 42(3)(c), 42(7), 42H, 42H(1)
		Industrial Relations (General) Regulations 1997 (WA) regulations 12, 12(b)
		Police Act 1892 (WA) Part IIIB
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr P Hunt, and with him Ms J Moore (of Counsel)
Respondent	**:**	Mr T Clark, and with him Ms C Pickering

Reasons for Decision

1 By application filed on 18 July 2016, the Western Australian Police Union of Workers sought a declaration under section 42H *Industrial Relations Act 1979* (WA) that bargaining had ended between it and the Commissioner of Police for a replacement industrial agreement to the *Western Australia Police Auxiliary Officers Industrial Agreement 2013*.

2 A directions hearing was held on 28 July 2016. At the directions hearing the Commissioner of Police said that no declaration under section 42H *Industrial Relations Act 1979* could be made because bargaining had never been initiated under the *Industrial Relations Act 1979*. The Commissioner of Police acknowledged that bargaining had occurred but said that it was not under the auspices of section 42 to section 42F *Industrial Relations Act 1979*.

3 The Western Australian Police Union of Workers maintained that bargaining had been initiated under section 42(1) *Industrial Relations Act 1979* and that matter was argued before me on 2 August 2016.

4 At the conclusion of the hearing I held that bargaining had not been initiated under section 42(1) *Industrial Relations Act 1979* and said my reasons for that decision would follow shortly. These are my reasons.

5 Section 42(1) *Industrial Relations Act 1979* provides as follows:

> Bargaining for an industrial agreement may be initiated by an organisation or association of employees, an employer or an organisation or association of employers giving to an intended party to the agreement a written notice that complies with subsection (3).

6 Section 42(3) *Industrial Relations Act 1979* provides as follows:

> A notice complies with this subsection if it is accompanied by particulars of —
>
> (a) the types of employment to be covered by the agreement; and
>
> (b) the area in which the agreement is to operate; and
>
> (c) the intended parties to the agreement; and
>
> (d) any other matter prescribed by regulations made by the Governor under section 42M.

7 Regulation 12 *Industrial Relations (General) Regulations 1997* provides as follows:

> A notice given under section 42(1) of the Act —
>
> (a) may be given in the form of GFB 1 in Schedule 3; and

(b) must be accompanied by all of the particulars set out in that form.

8 The Western Australian Police Union of Workers argues that it substantially complied with section 42(3) *Industrial Relations Act 1979* and regulation 12(b) *Industrial Relations (General) Regulations 1997*. It refers to a letter it sent to the Commissioner of Police dated 26 April 2016. I reproduce the letter in full:

> Our current Police Auxiliary Officer Industrial Agreement operates to 30 June 2016 and will continue in force after then until such time as either party withdraws from the Agreement or until it is replaced.
>
> Given the Government's Public Sector Wages Policy does not allow for any retrospective salary adjustments if agreement is not reached by 30 June 2016, it is in my view important that discussions between the three parties (WA Police Union, CPSU/CSA and WA Police) for our 2016 Agreement commence immediately.
>
> To commence discussions the Union has workshopped a list of initiatives, each of which has its industrial merits, and reduced this list to those in the attached schedule. No other initiatives will be pursued in the normal negotiation process unless the Union is forced into arbitration.
>
> The Union undertakes to endeavour to negotiate a fair deal collaboratively and cooperatively without conflict and is prepared to negotiate in good faith on any variations to the proposals contained in the attached schedule.
>
> As the employer of Police Auxiliary Officers, your support in approaching Government to achieve reasonable increases in salaries and improved working conditions in a timely manner will be crucial to achieving an outcome which is satisfactory to us both.
>
> Secretary Mr Paul Hunt will represent WAPU at these negotiations. He can be contacted via telephone on (phone numbers given) or email (email address given) to arrange meetings and discuss matters arising during the course of negotiations.

9 The Western Australian Police Union of Workers contends that if the letter is read with the *Western Australia Police Auxiliary Officers Industrial Agreement 2013*, and in particular the "Application and Parties Bound" clause of that industrial agreement, it would be clear to the reader of the letter that it was initiating bargaining for an agreement to cover police auxiliary officers appointed under Part IIIB of the *Police Act 1892* (in compliance with section 42(3)(a) *Industrial Relations Act 1979*) in Western Australia (in compliance with section 42(3)(b) *Industrial Relations Act 1979*) to which the Commissioner of Police, the Western Australian Police Union of Workers and the Civil Service Association of Western Australia Incorporated were the intended parties (in compliance with section 42(3)(c) *Industrial Relations Act 1979*).

10 I reject that contention. The notice under section 42(1) *Industrial Relations Act 1979* is to comply with section 42(3) *Industrial Relations Act 1979*. Section 42(3) *Industrial Relations Act 1979* provides that the notice must be accompanied by certain particulars. It is my view that for a notice to comply with section 42(3) *Industrial Relations Act 1979* the particulars provided for therein must actually be expressly given. It is not enough for the particulars to be easy or reasonably easy to work out from all of the surrounding circumstances. I consider that section 42(3) *Industrial Relations Act 1979* must be actually, and not substantially, complied with.

11 My reasons for holding this to be the case are twofold, as follows:

(1) compliance with section 42(3) *Industrial Relations Act 1979* is not difficult. Government has provided a form for a party to assist in compliance (Form GFB 1 found in Schedule 3 to the *Industrial Relations (General) Regulations 1997*). If compliance was a complex matter it might leave open an argument that failure to strictly comply with section 42(3) *Industrial Relations Act 1979* was not intended by Parliament to necessarily be fatal to an argument that bargaining had been initiated under section 42(1) *Industrial Relations Act 1979*. However, compliance is not a complex matter;

(2) the initiation of bargaining under section 42(1) *Industrial Relations Act 1979* triggers the operation of a detailed statutory regime for conciliation, including conciliation assisted by the Western Australian Industrial Relations Commission, and, in certain circumstances, one circumstance which is a failure to respond to a notice under section 42(1) *Industrial Relations Act 1979*, arbitration. It is vital that parties know exactly where they stand in terms of the application of that statutory regime. If anything other than strict compliance with section 42(3) *Industrial Relations Act 1979* is accepted as compliance with the subsection that certainty is removed. I do not consider that Parliament contemplated that the statutory regime might apply where an applicant has left considerable, or any, room for doubt as to whether bargaining had been initiated under section 42(1) *Industrial Relations Act 1979*. The only way to ensure there is no uncertainty is to insist on strict compliance with section 42(3) *Industrial Relations Act 1979*.

12 In this case, section 42(3) *Industrial Relations Act 1979* has not been complied with strictly or in my view, if it were relevant, substantially. The Western Australian Police Union of Workers essentially argues that any gap in compliance may be filled by knowledge it assumes, and says I may assume, the Commissioner of Police holds. That is not a good argument for the reasons I have given above. This is especially so in light of section 42(7) *Industrial Relations Act 1979* making it clear that bargaining may occur when bargaining has not been initiated under section 42(1) *Industrial Relations Act 1979*. Knowledge on the part of a party which might allow it to anticipate the content of the particulars referred to in section 42(3) *Industrial Relations Act 1979* is quite irrelevant to the question of whether bargaining is being initiated under or outside of the *Industrial Relations Act 1979*.

13 As bargaining has not been initiated under section 42(1) *Industrial Relations Act 1979*, I cannot make a declaration under section 42H(1) *Industrial Relations Act 1979* and I therefore dismiss the application.

2016 WAIRC 00684

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 8 AUGUST 2016
FILE NO/S	APPL 44 OF 2016
CITATION NO.	2016 WAIRC 00684

Result	Application Dismissed
Representation	
Applicant	Mr P Hunt, and with him Ms J Moore (of Counsel)
Respondent	Mr T Clark, and with him Ms C Pickering

Order

HAVING heard Mr P Hunt on behalf of the applicant and Mr T Clark on behalf of the respondent on 2 August 2016; and

HAVING given reasons for decision in which I determined to dismiss the application;

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

THAT the application be and is hereby dismissed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2016 WAIRC 00667

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 16 MARCH 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR JEFFERY MOSS
	APPELLANT
	-v-
	DEPARTMENT OF FIRE & EMERGENCY SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL – CHAIRMAN
	MR G LEE - BOARD MEMBER
	MS G CAMARDA - BOARD MEMBER
DATE	WEDNESDAY, 20 JULY 2016
FILE NO	PSAB 4 OF 2016
CITATION NO.	2016 WAIRC 00667

Result	Appeal dismissed for want of prosecution
Representation	
Appellant	No appearance
Respondent	Mr A Mason (of counsel)

Order

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

WHEREAS the matter was listed for a directions hearing on 27 June 2016; and

WHEREAS the appellant advised the Public Service Appeal Board about 30 minutes before the directions hearing listed on 27 June 2016 that he was unable to attend the directions hearing; and

WHEREAS the matter was listed again for a directions hearing on 11 July 2016; and

WHEREAS the appellant did not attend the directions hearing listed on 11 July 2016; and

WHEREAS the Public Service Appeal Board wrote to the appellant on 11 July 2016 to inform him that if he did not contact the Public Service Appeal Board by 14 July 2016 with acceptable reasons for why he did not appear at the directions hearing listed that day then his application may be dismissed for want of prosecution; and

WHEREAS the appellant has not contacted the Public Service Appeal Board to explain why he did not appear at the directions hearing listed on 11 July 2016;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders –

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

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2016 WAIRC 00694

CLEANERS AND CARETAKERS (GOVERNMENT) AWARD 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE HON MINISTER FOR EDUCATION AND TRAINING AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 11 AUGUST 2016
FILE NO/S	APPL 36 OF 2016
CITATION NO.	2016 WAIRC 00694

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Mr C Bretnall and Mr R Heaperman, as agent

Order

HAVING heard Mr S Dane on behalf of the applicant and Mr C Bretnall and Mr R Heaperman, as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders –

THAT the *Cleaners and Caretakers (Government) Award 1975* be varied in accordance with the following schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after the 11th day of August 2016.

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

SCHEDULE

1. Clause 3. – Hours of work: Delete subclause 3.2.3(a) and insert the following in lieu thereof:

3.2.3 (a) Any employee who, without being notified the previous day, is required to continue working for more than one hour after the usual ceasing time shall be provided with a meal by the employer or be paid $13.05 in lieu of the meal.

2. Clause 5. – Allowances and Facilities:

A. Delete subclause 5.1 and insert the following in lieu thereof:

5.1. – SPECIAL RATES AND PROVISIONS

5.1.1 (a) All employees called upon to clean closets connected with septic tanks or sewerage shall receive an allowance of $0.87 cents per closet per week.

(b) For the purposes of 5.1 – Special Rates and Provisions, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

5.1.2 Employees called upon outside the ordinary working hours to wash towels shall be paid $5.40 per dozen for ordinary towels, and $4.00 per dozen for dusters, hand towels and tea towels.

5.1.3 All materials and appliances required in connection with the performance of the employee's duties shall be supplied by the employer.

5.1.4 (a) An employee shall not be required to work from the top of a ladder more than 3.5 metres long which rests on the ground or floor level unless provided with an assistant.

(b) (i) When window cleaning is done from a ladder and any portion of a window to be cleaned is more than seven metres from the nearest horizontal plane, the employee shall be paid an allowance of 15 cents per window.

(ii) The allowance prescribed in 5.1.4(b)(i) shall not be paid where adequate safety equipment such as fall-arrest and restraint systems is supplied. Where such equipment is supplied, it must be used by the employee.

5.1.5 Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours, shall be paid an allowance of $5.05 per day.

5.1.6 An employee who is required to open and close classrooms, halls and other school facilities for any activities authorised by the Principal, shall be paid an allowance according to the following scale:

		Per Day $
(a)	Evenings – Monday to Friday	
	Up to 40 rooms per week	$8.55
	41 rooms to 100 per week	$12.95
	Over 100 rooms per week	$17.00
(b)	Saturday and Sunday	$16.30

(c) An additional allowance of $5.05 shall be paid to a caretaker on each occasion they are required to open or close a school facility after 11.00 pm, Monday to Friday, or for any opening or closing required on a Saturday or Sunday after the initial opening and closing. Provided that on a Saturday or Sunday the additional allowance shall not be paid if the duty is performed less than one hour after the initial or any subsequent opening or closing.

5.1.7 (a) Where practicable, suitable dressing accommodation shall be provided by the employer. Cleaning materials, tools and appliances shall not be kept in such rooms.

(b) All employees shall be provided with the facilities for boiling water.

(c) Employees shall be permitted to eat their meals in a convenient and clean place protected from the weather and employees shall remove all litter and foodstuffs after use.

(d) In the event of a dispute concerning the provisions of 5.1, the matter shall be resolved in accordance with the dispute resolution procedure of this award.

5.1.8 (a) Any wood chopping duties carried out by the employee shall be by agreement between the employer and the employee.

(b) Any employee performing wood chopping duties shall be paid an allowance of $19.25 per tonne to a maximum of:

(i) 100% of the weight of bushwood supplied or 50% of the weight of mill-ends supplied for enclosed fireplaces such as Wonderheats.

(ii) 50% of the weight of bushwood supplied or 20% of the weight of mill-ends supplied for open fireplaces.

5.1.9 (a) An estate attendant (Homeswest) who, in their privately owned vehicle, commutes from estate to estate and is required to carry sundry cleaning and/or gardening implements and/or supplies shall be paid $9.70 per week for all purposes of this award.

(b) The amount and type of equipment to be carried as prescribed in 5.1.9(a) will be agreed between the union and employer.

5.1.10 The rates expressed in 5.1 shall be adjusted by a percentage derived from the ASNA amount divided by the key minimum classification rate of a cleaner – level 1, year 1.

B. Delete subclause 5.4 and insert the following in lieu thereof:

5.4. - FIRST AID

5.4.1 The employer shall provide at each worksite, an adequate first aid kit for the use of the employees in case of accident, and this first aid kit shall be kept renewed and in proper condition.

5.4.2 (a) The employer shall, wherever practicable, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all sites or depots where employees are employed. Such employees shall, in addition to first aid duties, be responsible, under the general supervision of the foreperson, for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

(b) Employees so appointed shall be paid the following rates in addition to their prescribed wage:

10 employees or less	In excess of 10 employees
$1.80 per day	$2.95 per day

(c) The rates expressed in 5.4.2(b) shall be adjusted by a percentage derived from the ASNA amount divided by the key minimum classification rate of a cleaner – level 1, year 1.

2016 WAIRC 00695

CULTURAL CENTRE AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

THE LIBRARY BOARD OF WESTERN AUSTRALIA AND OTHERS

RESPONDENTS

CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 11 AUGUST 2016
FILE NO/S	APPL 37 OF 2016
CITATION NO.	2016 WAIRC 00695

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Mr C Bretnall and Mr R Heaperman, as agent

Order

HAVING heard Mr S Dane on behalf of the applicant and Mr C Bretnall and Mr R Heaperman, as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders –

THAT the *Cultural Centre Award 1987* be varied in accordance with the following schedule and that the variations in the attached schedule shall have effect from the beginning of the first pay period commencing on or after the 11th day of August 2016.

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

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (9)(a) and insert the following in lieu thereof:

(9) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $13.05 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each meal by the employer or be paid $7.65 for each meal so required.

2. Clause 15. – Special Rates and Provisions: Delete this clause and insert the following in lieu thereof:

15. - SPECIAL RATES AND PROVISIONS

(1) The employer shall, where practicable, make suitable provisions for employees to change their clothing on the employer's premises.

(2) Uniforms and/or clean overalls shall be supplied by the employer free of charge, where the employer requires such to be worn. Such items shall always remain the property of the employer.

(3) (a) All employees called upon to clean closets connected to septic tanks or sewers shall be paid an allowance of 85 cents per closet per week.

(b) For the purpose of this subclause one metre of urinal or three urinal stalls shall count as one closet.

(4) An employee shall not be required to work from the top of a ladder more than 3.5 metres long which rests on the ground or floor level, unless he/she has an assistant.

(5) An allowance of $3.15 per day or part thereof shall be paid to an employee required to use an airlift in the course of their duties.

(6) An allowance of $12.10 per day shall be paid in addition to the ordinary rate to an attendant required to operate audio visual equipment.

(7) (a) Except as provided for in paragraph (b) of this subclause an allowance of $6.60 per day shall be paid to an employee required to carry keys and be responsible for securing the premises at the close of business.

(b) Where it is agreed between the employer and the Union in writing then an alternative arrangement may exist in respect of this subclause.

(8) (a) An employee who is required to work away from his/her usual place of work shall be paid for any fares in excess of those normally incurred in travelling from his/her home to his/her usual place of work and return, except where an allowance is paid in accordance with Clause 17. – Fares and Travelling Allowances of the Miscellaneous Government Conditions and Allowances Award No. A4 of 1992.

(b) Travelling time in excess of that normally incurred in travelling from his/her home to his/her usual place of work and return shall be paid at the rate of ordinary time.

(c) An employee who commences or completes a shift at or between the hours of 11.00 pm and 5.00 am, shall in addition to the ordinary rate of pay for that shift be paid an allowance of $14.95 per shift.

3. Clause 16. – Wages: Delete subclause (2) and insert the following in lieu thereof:

(2) Leading Hands: In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid:

		$
(a)	if placed in charge of not less than one and more than five other employees	$29.60
(b)	if placed in charge of more than six and not more than ten other employees	$45.40
(c)	if placed in charge of more than 11 other employees	$58.20

2016 WAIRC 00693

GARDENERS (GOVERNMENT) 1986 AWARD NO. 16 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE HON. MINISTER FOR EDUCATION AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 11 AUGUST 2016
FILE NO/S	APPL 35 OF 2016
CITATION NO.	2016 WAIRC 00693

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Mr C Bretnall and Mr R Heaperman, as agent

Order

HAVING heard Mr S Dane on behalf of the applicant and Mr C Bretnall and Mr R Heaperman, as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders –

THAT the *Gardeners (Government) 1986 Award No. 16 of 1983* be varied in accordance with the following schedule and that the variations in the attached schedule shall have effect from the beginning of the first pay period commencing on or after the 11th day of August 2016.

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

SCHEDULE

1. Clause 12. – Overtime: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) When an employee without being notified on the previous day or earlier is required to continue working after his usual knock off time for more than two hours, the employee shall be provided with a meal or be paid $13.05 in lieu thereof.

2. Clause 16. – First Aid - Kits and Attendants: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) The employer shall, wherever practicable and where there are two or more employees, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the supervisor or foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

Employees so appointed shall be paid the following rates in addition to their prescribed rate per day:

Qualified Attendant	$ Per Day
10 employees or less	1.80
In excess of 10 employees	2.80

3. Clause 25. – Wages:

A. Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) A Senior Gardener/Ground Attendant who is required to maintain turf wickets, bowling greens or tennis courts shall be paid in addition to the rates prescribed an amount of $8.00 per week. Occasional off-season attention shall not qualify an employee for payment under this subclause.

B. Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Leading Hands

Leading Hands and Senior Gardener/Ground Attendants if placed in charge of:

(a) five and not more than ten other employees shall be paid $28.40 per week extra;

(b) more than ten but not more than 20 other employees shall be paid $41.60 per week extra;

(c) more than 20 other employees shall be paid $55.20 per week extra.

C. Delete subclause (10) of this clause and insert the following in lieu thereof:

(10) Toilet Cleaning Allowance (Zoological Gardens)

(a) Employees of the Zoological Gardens Board covered by this award who are required to clean public toilets shall be paid 88 cents per closet, per week.

(b) For the purposes of this subclause one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

(c) All such employees shall be supplied with rubber gloves on request.

2016 WAIRC 00696

HOSPITAL WORKERS (GOVERNMENT) AWARD NO. 21 OF 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

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

RESPONDENTS

CORAM CHIEF COMMISSIONER P E SCOTT
DATE THURSDAY, 11 AUGUST 2016
FILE NO/S APPL 38 OF 2016
CITATION NO. 2016 WAIRC 00696

Result Award varied

Representation

Applicant Mr S Dane

Respondent Mr C Bretnall and Mr R Heaperman, as agent

Order

HAVING heard Mr S Dane on behalf of the applicant and Mr C Bretnall and Mr R Heaperman as agent on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders -

THAT the *Hospital Workers (Government) Award No.21 of 1966* be varied in accordance with the following schedule and that such variations in the attached schedule shall have effect from the beginning of the first pay period commencing on or after the 11th day of August 2016.

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

SCHEDULE

1. Clause 15. – Overtime: Delete subclause (4) and insert the following in lieu thereof:

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work, the employee shall be provided with a meal free of cost, or shall be paid the sum of $11.10 as meal money.

2. Clause 16. – Shift Work: Delete subclauses (1) and (2) and insert the following in lieu thereof:

(1) Subject to subclause (2) of this clause, a loading of $2.97 per hour or pro rata for part thereof shall be paid for time worked on afternoon or night shift as defined hereunder:

(2) A loading of $4.48 per hour or pro rata for part thereof shall be paid for time worked on permanent afternoon or night shift.

3. Clause 17. – Weekend Work: Delete subclauses (1) and (2) and insert the following in lieu thereof:

(1) In addition to the ordinary rate of wage prescribed by this award an employee shall be paid a loading of $11.98 per hour or pro rata for part thereof for ordinary hours worked between midnight on Friday and midnight on Saturday.

(2) In addition to the ordinary rate of wage prescribed by this award an employee shall be paid a loading of $23.91 per hour or pro rata for part thereof for ordinary hours worked between midnight on Saturday and midnight on Sunday.

4. Clause 19. – Allowances and Special Provisions: Delete this clause and insert the following in lieu thereof:

In addition to the rates prescribed in Clause 39. - Wages of this award, the following allowances shall be paid:

(1) (a) Employees handling foul linen in the course of their duties shall be paid $1.30 per hour or any part thereof, to a maximum of $4.10 per day.

(b) Employees handling materials such as carpet tile s, curtains, sealed bags or fabrics, which have become soiled in the same manner as foul linen as defined in Clause 5. - Definitions, shall be paid an allowance according to subclause (1)(a) of this clause.

(2) Orderlies employed on boiler firing duties - $2.70 per day.

(3) Orderlies required to handle a cadaver - $2.33 per hour with a minimum payment of one hour.

(4) Orderlies - Sir Charles Gairdner Hospital, sterilising sputum mugs - $2.70 per day.

(5) (a) A storeman required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk-beside power operated high lift stacker in the performance of his/her duties shall be paid an additional 60 cents per hour whilst so engaged.

(b) A storeman required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties shall be paid an additional 77 cents per hour whilst so engaged.

(6) A Food Service Attendant who is required to reconstitute frozen food and/or reheat chilled food, in addition to or in substitution of their normal duties, shall be paid an allowance of 97 cents per hour or part thereof whilst so engaged.

5. Clause 21. – Public Holidays: Delete subclause (3) and insert the following in lieu thereof:

(3) Any employee who is required to work on a day observed as a public holiday shall be paid a loading of $36.02 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage or if the employer agrees be paid a loading of $11.98 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage and be entitled to observe the holiday on a day mutually acceptable to the employer and employee.

6. Clause 22. – Public Holidays – Graylands and Selby Lodge/Lemnos Hospitals: Delete subclause (3)(c) and insert the following in lieu thereof:

(c) Any employee who is required to work on the day observed as a holiday as prescribed in this clause in his/her normal hours work or ordinary hours in the case of a rostered employee shall be paid a loading of $11.98 per hour or pro rata for part thereof and be entitled to observe the holiday on a day mutually acceptable to the employer and the employee.

Provided that in any specified 12 monthly period, after an employee has accumulated five days in lieu of public holidays, by agreement between the employee and the employer, the employee may be paid for work performed on a day observed as a holiday as prescribed in this clause a loading of $36.02 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage in lieu of the foregoing provisions of this subclause.

7. Clause 28. – Uniforms: Delete subclause (8)(d) and insert the following in lieu thereof:

(d) All washable clothing forming part of the uniforms supplied by the employer shall be laundered free of cost to the employee. Provided that in lieu of such free laundering the employer may pay the employee $2.50 per week to partly cover the cost of same.

8. Clause 39. – Wages: Delete subclause (4)(b) and insert the following in lieu thereof:

(b) Except where this clause specifies classifications which require the employee to be in charge of other employees, any employee who is placed in charge of:

(i) not less than three and not more than ten other employees shall be paid $28.00 per week in addition to the ordinary wage prescribed by this clause;

(ii) more than 10 and not more than twenty other employees shall be paid $41.60 per week in addition to the ordinary wage prescribed by this clause;

(iii) more than 20 other employees shall be paid $55.60 per week in addition to the ordinary wage prescribed by this clause.

2016 WAIRC 00697

PARLIAMENTARY EMPLOYEES AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE SPEAKER OF THE LEGISLATIVE ASSEMBLY AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 11 AUGUST 2016
FILE NO/S	APPL 39 OF 2016
CITATION NO.	2016 WAIRC 00697

Result	Award varied
Representation	
Applicant	Mr S Dane, for the applicant and as agent for The Civil Service Association of Western Australia Incorporated
Respondents	Mr C Bretnall and Mr B Heaperrman, as agent for the employer respondents

Order

HAVING heard Mr S Dane on behalf of the applicant and as agent for The Civil Service Association of Western Australia Incorporated, and Mr C Bretnall and Mr R Heaperman, as agent on behalf of the employer respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders -

THAT the *Parliamentary Employees Award 1989* be varied in accordance with the following schedule and that such variations in the attached schedule shall have effect from the beginning of the first pay period commencing on or after the 11th day of August 2016.

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

SCHEDULE

1. Clause 16. – Parliamentary Support Services Employee Wages: Delete subclauses (3) and (4) and insert the following in lieu thereof:

(3) The following allowances shall be paid to PSSEs indexed according to State Wage decisions and shall be:-

(a)	Chef	
	1st year	$147.70 per fortnight
	2nd year	$295.20 per fortnight
(b)	Tradesperson Cook (Sous Chef)	
	1st year	$95.90 per fortnight
	2nd year	$147.70 per fortnight
(c)	Stewards to Speaker and President	$73.80 per fortnight

(4) An allowance of $42.70 per fortnight shall be paid to all PSSEs employed in the kitchen, dining room and bar areas.

2. Clause 19. – Meal Allowance: Delete subclause (1) and insert the following in lieu thereof:

(1) An employee who is required to work overtime under Clause 10. – Overtime, and where such overtime extends beyond 5.00 p.m., a meal allowance shall be paid in accordance with the provisions of Clause 22. - Overtime of the Public Service Award 1992 as amended. Provided that where such overtime extends beyond 6.00 a.m. the following day, an allowance of $16.30 or the amount charged by the House, whichever is the higher, for such a three course meal shall be paid.

3. Clause 23. – Uniforms and Clothing: Delete subclause (2) and insert the following in lieu thereof:

(2) Such uniforms supplied shall be laundered and/or dry cleaned by the employer and remain the property of the employer, provided that in lieu of the employer laundering and/or dry cleaning same, an employee shall be paid $9.20 per week for such laundering and/or dry cleaning, excepting any person employed as a Cook who shall be paid $14.10 per week for laundering and/or dry cleaning.

2016 WAIRC 00692

RANGERS (NATIONAL PARKS) CONSOLIDATED AWARD 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE CHIEF EXECUTIVE OFFICER (EXECUTIVE DIRECTOR) OF THE DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 11 AUGUST 2016
FILE NO/S	APPL 34 OF 2016
CITATION NO.	2016 WAIRC 00692

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Mr C Bretnall and Mr R Heaperman, as agent

Order

HAVING heard Mr S Dane on behalf of the applicant and Mr C Bretnall and Mr R Heaperman, as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under *the Industrial Relations Act, 1979* hereby orders –

THAT the *Rangers (National Parks) Consolidated Award 2000* be varied in accordance with the following schedule and that the variations in the attached schedule shall have effect from the beginning of the first pay period commencing on or after the 11th day of August 2016.

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

SCHEDULE

1. Clause 9. – Overtime:

A. Delete subclause (7)(a) and insert the following in lieu thereof:

(7) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $13.05 for a meal, and if owing to the amount of overtime worked, a second or subsequent meal is required he/she shall be supplied with each such meal by the employer or be paid $7.65 each meal so required.

B. Delete subclause (7)(d) and insert the following in lieu thereof:

(d) An employee required to work continuously from midnight to 6.30am and ordered back to work at 8.00am the same day shall be paid $6.70 breakfast.

2. Clause 14. – Conditions and Allowances: Delete this clause and insert the following in lieu thereof:

(1) The provisions of the *Miscellaneous Government Conditions and Allowances Award No. A 4 of 1992* shall apply mutatis mutandis to all employees covered by this Award.

(2) Subject to the provisions of this Award, the provisions of the Public Service Award 1992 PSA NO. 4 of 1989 at:

(a) Clause 30. - Camping Allowance and Schedule C - Camping Allowance; and

(b) Clause 33. - Diving Allowance, Clause 34, - Flying Allowance and Schedule K - Diving, Flying and Seagoing Allowance.

as amended from time to time, shall apply mutatis mutandis to employees covered by this Award.

(3) Mobile Rangers shall, in addition to their normal rate of pay, be paid an allowance of $133.10 per week to offset the costs associated with living in and maintaining a caravan.

This allowance is to be moved year to year to reflect the change in CPI for Perth.

(4) The following conditions shall apply to Rangers Assistants on vermin, plant or noxious weed control who are required to use a toxic substance.

(a) The employee shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(b) The employee using such materials shall be provided with, and shall use, all safeguards as are required by the appropriate government authority or, in the absence of such requirement, such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(c) The employee using toxic substances or materials of a like nature shall be paid 66 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 59 cents per hour extra.

(d) For the purposes of this subclause toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(5) (a) An employer who requires a Rangers Assistant to use a pesticide shall:

(i) Inform the employee of any known health hazards involved; and

(ii) Ascertain from the Department of Health and Medical Services whether and, if so, what protective clothing or equipment should be worn during its use.

(b) Pending advice from that department the employer may require the pesticide to be used if the employer informs the employee of any safety precautions specified by the manufacturer of the pesticide and instructs the employee to follow those precautions.

(c) The employer shall supply the employee with any protective clothing or equipment required pursuant to paragraphs (a) and (b) of this subclause and, where necessary, instruct the employee in its use.

(d) An employee required to wear protective clothing or equipment for the purpose of this subclause shall be paid 74 cents per hour or part thereof while doing so unless the Union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while wearing it or, in the event of disagreement, the Western Australian Industrial Relations Commission so determines.

(e) An allowance is not payable under this clause if the Department of Health and Medical Services advises the employer in writing that protective clothing or equipment is not necessary.

(6) Where agreement is reached between the employer and the employee, payment of wages may be made in cash and a signature of the employee shall be obtained for such cash payment.

NOTICES—Award/Agreement matters—

2016 WAIRC 00714

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 42 of 2016

APPLICATION FOR A NEW AGREEMENT TITLED

"ANGLICAN SCHOOLS COMMISSION SUPPORT STAFF ENTERPRISE AGREEMENT 2015"

NOTICE is given that an application has been made to the Commission by *The Anglican Schools Commission*, *The Independent Education Union of Western Australia, Union of Employees* and *United Voice WA* under the *Industrial Relations Act 1979* for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

3. - PARTIES TO THE AGREEMENT

This Agreement is made between the Anglican Schools Commission (the ASC) the Independent Education Union of Western Australia, Union of Employees (the IEUWA) and United Voice WA.

4. - SCOPE OF AGREEMENT

(1) This Agreement shall apply to those employees employed by the ASC in Western Australia in the classifications referred to in Clause 17 – Salary Rates who are members or are eligible to be members of the Unions party to this agreement.

(2) This Agreement shall be read in conjunction with the following Awards and where there is any inconsistency between this Agreement and the relevant awards, the Agreement will prevail to the extent of the inconsistency:

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Member Award;

(c) School Employees (Independent Day & Boarding Schools) Award 1980;

(d) Teachers' Aides' (Independent Schools) Award 1988;

(e) Child Care (Out of School Care – Play leaders) WA Award 2003;

(f) Children's Services (Private Award) 2006;

(g) Independent Schools Psychologists and Social Workers Award.

(3) The number of employees covered by this Agreement is 600.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

12 August 2016

CUMULATIVE CONTENTS HEADINGS

* Denotes New Heading

CUMULATIVE CONTENTS

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CUMULATIVE CONTENTS—*continued*

CUMULATIVE CONTENTS—*continued*

CUMULATIVE CONTENTS—*continued*

CUMULATIVE CONTENTS—*continued*

CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF THE INDUSTRIAL APPEAL COURT, INDUSTRIAL RELATIONS COMMISSION AND INDUSTRIAL MAGISTRATES COURT CONTAINED IN VOL. 96 PART 2, SUB PARTS 1 - 5.

Digest Headings

* Denotes New Heading

Industrial Appeal Court
Full Bench
Commission In Court Session
President
Industrial Magistrate
Public Service Appeal Board
Public Service Arbitrator
Commissioner
Board of Reference
Police Appeal

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Editor's Note: The Registrar wishes to advise that as from January 2004, the format of the "Cumulative Digest" published at the back of the Western Australian Industrial Gazette has changed to incorporate "Catchword Phrases", please refer to the Notice at (83WAIG3937).

All documents within the above headings are in chronological order.

CUMULATIVE DIGEST—*continued*

By Authority: SUSAN BASTIAN, Registrar, Western Australian Industrial Relations Commission