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FULL BENCH—Appeals against decision of Commission—

2016 WAIRC 00862

APPEALS AGAINST DECISIONS OF THE COMMISSION IN MATTER NOS U 146 OF 2015 AND U 147 OF 2015 GIVEN
ON 21 APRIL 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2016 WAIRC 00862
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL
HEARD	:	MONDAY, 3 OCTOBER 2016
DELIVERED	:	THURSDAY, 3 NOVEMBER 2016
FILE NO	:	FBA 5 OF 2016
BETWEEN	:	MR ALAN SCICLUNA Appellant AND MR WILLIAM PAUL BROOKS T/AS BAYVIEW MOTEL ESPERANCE, WA Respondent AND MR WILLIAM PAUL BROOKS T/AS BAYVIEW MOTEL ESPERANCE, WA Respondent
FILE NO	:	FBA 6 OF 2016
BETWEEN	:	MRS TRIXIE SCICLUNA Appellant AND MR WILLIAM PAUL BROOKS T/AS BAYVIEW MOTEL ESPERANCE, WA Respondent

ON APPEAL FROM:

Jurisdiction	:	Western Australian Industrial Relations Commission
Coram	:	Commissioner D J Matthews
Citation	:	[2016] WAIRC 00276; (2016) 96 WAIG 509 and [2016] WAIRC 00278; (2016) 96 WAIG 510
File Nos	:	U 146 of 2015 and U 147 of 2015

CatchWords	:	Industrial Law (WA) - Appeals against decisions of Commission - Harsh, oppressive or unfair dismissal referred - Dismissals lawful but found to be unfair - Remedy - Discretion conferred by s 23A of the <i>Industrial Relations Act 1979</i> (WA) to make an award of compensation considered - No error demonstrated
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 23A, s 23A(6), s 23A(7), s 23A(7)(a), s 23A(7)(b), s 23A(7)(c), s 23A(8), s 23A(9), s 26, s 26(1), s 26(1)(a), s 26(1)(c), s 26(1)(d), s 49(2) <i>Labour Relations Reform Act 2002</i> (WA) s 138(1)
Result	:	Appeals dismissed
Representation:		
Appellants	:	Mr J M Nicholas (of counsel)
Respondent	:	Mr W P Brooks, in person
Solicitors:		
Appellants	:	Nicholas Legal

Case(s) referred to in reasons:

Amalgamated Metal Workers and Shipwrights Union of Western Australia v Australian Shipbuilding Industries (WA) Pty Ltd (1987) 67 WAIG 733

AWI Administration Services Pty Ltd v Birnie [2001] WAIRC 04015; (2001) 81 WAIG 2849

Bogunovich v Bayside Western Australia Pty Ltd [No 1] (1998) 78 WAIG 3635

Bogunovich v Bayside Western Australia Pty Ltd [No 2] (1998) 79 WAIG 8

Capewell v Cadbury Schweppes Australia Ltd (1997) 78 WAIG 299

Curtis v Ausdrill Ltd [2006] WAIRC 05656; (2006) 86 WAIG 3133

Epath WA Pty Ltd v Adriansz [2003] WASCA 175; (2003) 83 WAIG 3048

Federated Engine Drivers' and Firemen's Union of Workers of Western Australia v Robe River Iron Associates (1987) 67 WAIG 763

Fisher & Paykel Australia Pty Ltd v Skinner [2006] WAIRC 05839; (2006) 87 WAIG 1

Garbett v Midland Brick Co Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893; (2003) 129 IR 270

Gilmore v Cecil Bros (1996) 76 WAIG 4434

Gronow v Gronow [1979] HCA 63; (1979) 144 CLR 513

Helm v Hansley Holdings Pty Ltd (In Liq) [1999] WASCA 71; (1999) 118 IR 126; (1999) 79 WAIG 1860

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

Lovell v Lovell [1950] HCA 52; (1950) 81 CLR 513

Lynam v Lataga Pty Ltd [2001] WAIRC 02420; (2001) 81 WAIG 986

Malec v J C Hutton Pty Ltd [1990] HCA 20; (1990) 169 CLR 638

Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 136 IR 156; (2004) 84 WAIG 2152

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

Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332

Q-Vis Ltd v Gordon [2001] WAIRC 03671; (2001) 81 WAIG 2537

R v Industrial Court of South Australia; Ex parte General Motors-Holdens Pty Ltd (1975) 10 SASR 582

Sealanes (1985) Pty Ltd v Foley [2006] WAIRC 04110; (2006) 86 WAIG 1239

Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363

Case(s) also cited:

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

*Reasons for Decision***SMITH AP AND SCOTT CC:****Introduction**

1 These appeals are instituted under s 49(2) of the *Industrial Relations Act 1979* (WA) (the Act) against decisions made by the Commission in U 146 of 2015 and U 147 of 2015: [2016] WAIRC 00276; (2016) 96 WAIG 509 and [2016] WAIRC 00278; (2016) 96 WAIG 510.

- 2 By direction of the Commission made on 10 February 2016, U 146 of 2015 and U 147 of 2015 were consolidated and heard together: [2016] WAIRC 00078; (2016) 96 WAIG 392.
- 3 Mr Alan Scicluna and Mrs Trixie Scicluna were employed by Mr William Brooks as managers of the Bayview Motel in Esperance. Both Mr and Mrs Scicluna's employment was terminated by Mr Brooks by one month's notice in writing on 2 July 2015. In accordance with the notice, their employment ended on 2 August 2015. There was no dispute in the proceedings at first instance that it was lawful for Mr Brooks to have terminated the employment of Mr and Mrs Scicluna by the giving of one month's notice. The question before the Commission at first instance was whether the termination of Mr and Mrs Scicluna's employment was harsh, oppressive or unfair.
- 4 After hearing the applications, findings were made in reasons for decision that the dismissals were unfair and orders were made that Mr Brooks pay compensation to Mr Scicluna in the sum of \$9,961.54 and to Mrs Scicluna in the sum of \$11,461.54. Compensation in each case was calculated as eight weeks' salary, being an amount of \$8,461.54 each. Mrs Scicluna was awarded an additional sum of \$3,000 for injury and Mr Scicluna the sum of \$1,500 for injury.

Background

- 5 From 29 March 2013, Mr and Mrs Scicluna were employed by Mr Brooks as a husband and wife team to manage the motel. Initially Mr and Mrs Scicluna were each engaged on a one-year fixed term contract which was terminable after a trial period by either party by four weeks' notice (exhibit 2, AB 56).
- 6 In early 2015, Mr Brooks sent Mr and Mrs Scicluna proposed new contracts of employment, but they did not sign them because there were some conditions they were not happy with. It was common ground that after that time there was no fixed term contract in place.
- 7 Whilst Mr and Mrs Scicluna were employed Mr Brooks mentioned to them on several occasions that he was looking to sell or lease the property and asked if they wanted to lease the business. They, however, declined. Mr Scicluna said this was mainly due to their age.
- 8 In April 2015, Mr and Mrs Scicluna planned to take an overseas holiday. Before they left Mr Brooks again told them that he wanted to sell or lease the motel. At least by that time there was agreement between Mr and Mrs Scicluna and Mr Brooks that, if in the event he sold or leased the property, their employment would end upon the giving of one month's notice.
- 9 In an email Mr and Mrs Scicluna sent to Mr Brooks on 24 May 2015, Mr and Mrs Scicluna informed Mr Brooks they were leaving the next day for their holiday in Malta and that 'Jeanette (Ms Dall) will be operating in our absence and will only get staff in as required'. They also stated in the email that they understood that Mr Brooks had put the property on the market and that their intention was to manage the property until he found someone (exhibit 5, AB 60). Ms Dall was employed at the motel as a receptionist and had in the past carried out Mr and Mrs Scicluna's duties when they were on leave or on days off.
- 10 Mr Brooks was at the time overseas. He responded to the email on the same day and stated words to the effect that:
 - (a) he had not listed the property with anyone, but it was on the market only by word of mouth;
 - (b) he had only shown the figures to one party so far; and
 - (c) it could be a while before anything happens, whilst he was away (exhibit 5, AB 60).
- 11 On 3 June 2015, Mr Brooks sent an email to Mr Scicluna advising them that he was following up the party that had shown some interest on the lease (exhibit 6, AB 62).
- 12 On 11 June 2015, Mr Brooks sent an email to Mr Scicluna in which he stated that he was now back in discussions with a potential lease holder who was suggesting mid to late July may suit them and he thought that he was 90% there. He asked Mr Scicluna what were their thoughts on doing a hand over at that time (exhibit 7, AB 63).
- 13 On 20 June 2015, Mr Brooks sent an email advising Mr and Mrs Scicluna that he thought the people he had for the lease had taken on another property. He told Mr and Mrs Scicluna in the email to 'not pack your bags just yet' and he also said if they had it in their mind to leave he had a manager who would fill in (exhibit 8, AB 64).
- 14 When Mr Brooks gave evidence he stated that he had been in discussions with a Ben and Diane who had previously worked at the hotel, but they had contacted him and told him that they had in fact purchased another property so they would not be proceeding with leasing the motel.
- 15 On 24 June 2015, Mr Scicluna replied to Mr Brooks by email and in that email stated that they would be staying on for a while yet. Mr Brooks responded by email saying, thanks, that he had no one else in the pipeline (exhibit 9, AB 65).
- 16 Mr and Mrs Scicluna arrived back at the motel from their holiday on 30 June 2015. Ms Dall came to see them in the morning on 1 July 2015 and told them that she had had discussions with Mr Brooks about taking over the lease (ts 10). Mr Brooks telephoned Mr and Mrs Scicluna that evening and told them that Ms Dall was taking over the lease of the motel and that they were going to be given one month's notice.
- 17 On the following day, Mr Brooks sent an email to Mr and Mrs Scicluna in which he stated (exhibit 10, AB 66):

Alan and Trixie

I would like to thank you for your time at the Bayview Motel Esperance.

I am giving you both 1 month notice as of today.

As we have discussed Jeanette Dall will be taking over the motel from that time and I should expect an easy handover.

Should you wish to leave any days sooner please discuss with Jeanette.

I wish you the very best in the future and should you want a resume, please contact me any time.

Enjoy being Grandparents in K1W1 land.

Bill Brooks

18 On the same day, Mr Scicluna replied by email as follows (exhibit 10, AB 66):

No problems bill we were expecting it.

We will be out on the 3 august as we need time for packing etc

Please make sure that joy pays us correctly.

We would appreciate a resume as one never knows when one would need it.

Couple of questions

When is Jeanette taking over the property?

What handover is required from us and how long or will Jason be handling it?

Hope you have a great time in Greece and fix the economy and who knows we could meet again sometime.

Alan & Trixie

19 Mr Brooks' son, Jason Brooks, sent an email on 7 July 2015 to Mr Scicluna advising him that Ms Dall had received her paperwork and would be managing the motel as a general manager and not leasing it for now. Jason Brooks also stated in the email:

(a) it had been decided that because of the work required and the fact that Mr Brooks was away;

(b) that will all happen after he (Mr Brooks) is back; and

(c) it would be a normal handover (exhibit 11, AB 68).

20 Mr Scicluna sent an email to Jason Brooks in reply and stated that as Ms Dall was now not leasing the motel but taking over the management this meant that they were being dismissed for no reason at all and he regarded this as an unfair dismissal (exhibit 11, AB 67).

21 Mr Scicluna then spoke to Ms Dall. He asked her why was she stabbing him in the back coming in to manage the motel without leasing it. She told him she was going to manage the property first and see how it went and then sign the lease (ts, hearing 30 March 2016 11).

22 Mr and Mrs Scicluna continued to work at the motel until 2 August 2015. Mr Brooks employed Ms Dall as manager and her partner, Keith, as co-manager from 3 August 2015.

23 When Mr Brooks gave evidence he said that he had a conversation with Ms Dall towards the middle of 2015 and that she was very keen on leasing the property and their discussions resulted in him giving her some financial figures in June or July 2015. At that point in time he understood that she was processing the data with her accountants and she would manage the motel until she viewed the opinion of leasing the motel through her financial adviser (ts 72). Mr Brooks said that his other prospects of being able to lease the hotel to anybody else were very slim as there was not a lot of interest in Esperance. He also said he wanted to move the motel on at that time because he was 60 years of age, retired, and did not need to work.

24 At the time of the hearing at first instance in March 2016, Ms Dall had not taken over the lease of the motel. Mr Brooks said the last time he spoke to Ms Dall she was talking to her financial advisers and waiting for her taxation returns to be completed (ts 73). When Mr Brooks was asked what was the connection between Ms Dall as a prospective lessee and her appointment as manager in 2015, he said it was to give her time for due diligence to form an opinion whether she should lease the motel or not (ts 74).

25 When cross-examined, Mr Brooks maintained that at the time the email was sent to Mr Scicluna from Jason Brooks on 7 July 2015 negotiations for a lease was happening, but that Ms Dall had asked to put matters on hold until she had sorted out her financial situation (ts 86).

26 When Ms Dall gave evidence she said that while Mr and Mrs Scicluna were still on leave she had a discussion towards the end of June 2015 with Mr Brooks about taking over the lease of the motel. She said she told Mr Brooks that she would look into it and see what sort of figures she could come up with and she would get back to him. She made a phone call to her financial adviser and was told there was nothing they could do until her tax returns were complete. She explained that she had to get tax returns done before she could look at where the finance was coming from. She suggested to Mr Brooks that she manage the motel until such time as the lease was signed (ts 95). She had no further discussion with Mr Brooks about the lease after June 2015. When she took over the management of the hotel in early August 2015 it was her intention to take over the lease. At the time of giving evidence in March 2016 she stated it was still her intention to proceed with the lease of the motel but she had only just received her tax returns and her next step was to pay a big tax bill and then get into talks with her financial adviser and accountant to raise the finance to lease the motel.

The Commissioner's reasons for decision

27 The learned Commissioner set out the position of the parties as follows:

(a) Mr and Mrs Scicluna maintained that it was unfair for Mr Brooks to terminate their employment because, as the motel had not been leased out or sold at that time, there was no valid reason for the termination. In the circumstances present at the time of the termination of the employment of Mr and Mrs Scicluna the termination was simply 'convenient' for Mr Brooks rather than necessary. Thus, it was argued that a decision to terminate for the mere convenience of the employer and others is an abuse of the lawful right to terminate. Further, they argued

that it was unfair for Mr Brooks to lead them to believe their employment was ending because the motel had been leased when in fact that was not the case.

- (b) Mr Brooks' position was the termination was not motivated by mere convenience but was part of a strategy to 'move on' the business and that this intention was known to Mr and Mrs Scicluna. Mr Brooks' circumstances are that he wished to retire, that he was having difficulty in leasing the motel, that Ms Dall was his 'best prospect' and it was legitimate to do what he could to pursue that prospect. When all of these circumstances are considered, Mr Brooks' reason for bringing the employment of Mr and Mrs Scicluna to an end was a valid one and the decision a fair one. Given it was accepted by Mr and Mrs Scicluna that their employment would end on the giving of one month's notice in the event the motel was leased, there was nothing unfair about their employment ending if that event was directly related to a genuine attempt to lease the motel.
- 28 When regard is had to the findings made by the learned Commissioner, it is clear that he accepted in part the submission made on behalf of Mr Brooks. He did not, however, entirely reject the submission made on behalf of Mr and Mrs Scicluna.
- 29 The learned Commissioner found that the communication to Mr and Mrs Scicluna that Ms Dall would be taking over the motel, connoted an inference that Mr Brooks was leasing the motel to Ms Dall and it was unfair in all of the circumstances for Mr Brooks to have treated Mr and Mrs Scicluna in the way he did. In particular, it was unfair to terminate their employment in different circumstances.
- 30 The learned Commissioner observed that Mr and Mrs Scicluna had been managing the motel as at July 2015 for over two years and no issues with their conduct or performance had been raised with them during this time. In the face of Mr Brooks' stated intention to cease operating the motel they had been realistic and reasonable, telling Mr Brooks they realised if this occurred it would mean the end of their employment upon the giving of one month's notice. Their reasonable attitude is revealed in the email in exhibit 10, which was Mr Scicluna's initial response to the written notice of termination.
- 31 In these circumstances, the learned Commissioner found that Mr and Mrs Scicluna were not given a fair go. He found that Mr Brooks should have been candid with them about the strategy involving Ms Dall and listened to what they had to say about it in relation to their employment. He also found that given Mr and Mrs Scicluna's attitude until this time some mutually acceptable arrangement may have been arrived at. If not, at that point in time, Mr Brooks could have considered further options. The learned Commissioner qualified this finding by observing that he did not mean to say that fairness meant that Mr Brooks could not have terminated the employment of Mr and Mrs Scicluna until the motel was leased or sold or that termination of their employment could only fairly have been achieved by agreement.
- 32 The learned Commissioner then made the following finding in respect of remedy:
- (a) Reinstatement or re-employment was not sought on behalf of Mr and Mrs Scicluna. In any event, it would be impracticable because Mr and Mrs Scicluna have resumed their lives in New Zealand, the business concerned is a small one, and such orders would disturb Mr Brooks' continuing plans to lease the motel to Ms Dall.
- (b) The evidence establishes that the loss of each of Mr and Mrs Scicluna would exceed six months' remuneration. It was accepted that the cap for both is an amount of \$27,500 as their annual salary was \$55,000 each as at the date of their termination.
- (c) In making an award of compensation under s 23A of the Act regard must be had to s 26 of the Act. The Commission is to act according to equity, good conscience and the substantial merits of the case with regard for the interests of all persons immediately concerned whether directly affected or not (s 26(1)(a) and s 26(1)(c)).
- (d) Section 23A(7)(c) also requires, in deciding the amount of compensation, to have regard to any other matter the Commissioner considers relevant.
- (e) It is allowable and appropriate in light of s 23A(7)(c) and s 26(1) to consider whether the employment of Mr and Mrs Scicluna might have been fairly brought to an end by Mr Brooks in circumstances that would have seen him paying to Mr and Mrs Scicluna an amount less than six months' remuneration.
- (f) Looking at what Mr Brooks could have fairly done in the situation in which he found himself as at July 2015 and taking into account the interests of not only Mr and Mrs Scicluna but also those of Mr Brooks, and to a lesser extent those of Ms Dall, and giving proper attention to overall equity and the substantial merits, it would have been fair for Mr Brooks, in the circumstances that presented themselves as at 2 July 2015, to have brought Mr and Mrs Scicluna's employment at the motel to an end by giving them three months' notice if, after discussion with them, no different arrangement had been arrived at. In particular, Mr Brooks could have told Mr and Mrs Scicluna that, due to the difficulties he was having in finding a lessee for the motel, he was adopting a new strategy of having Ms Dall manage the motel for a period to see whether she wanted to lease it and, if so, to arrange finance and that at the end of a period of three months (if the motel had not been sold or leased in the meantime) that strategy would take effect. If Mr and Mrs Scicluna did not agree to that Mr Brooks could have given them three months' notice.
- 33 The basis for why the learned Commissioner formed the view that this strategy was fair is that the learned Commissioner found that Mr and Mrs Scicluna were, as at July 2015, well aware that Mr Brooks was looking to lease the motel and that process would affect their employment at some time. In all of the circumstances, the primary one being the difficulty in leasing a motel in a regional centre, Mr and Mrs Scicluna could not have complained that Mr Brooks' new strategy was unfair, so long as they had good notice of it coming into effect. Three months would have given them a fair opportunity to plan the next stage of their lives while remaining in gainful employment. Given the difficulty that would have been involved in finding alternative work in Esperance or of a similar nature elsewhere a shorter period would not have been fair.

- 34 The learned Commissioner also found that there would have been no unfairness to Mr Brooks in having to give three months' notice as it was clear that Ms Dall was in no position to lease the motel as at 2 July 2015, a matter that Mr Brooks could have easily discovered. It was not as if Mr Brooks was at risk of losing a potential lessee if Ms Dall had to wait three months to commence managing the motel. On the other hand, even though Ms Dall was not ready to lease the motel, it was a reasonable strategy to have her commence managing the motel after three months as part of a strategy to lease the motel. Mr Brooks could have continued to try and sell or lease the motel in the meantime and if successful, the original understanding with Mr and Mrs Scicluna, that their employment would end on the giving of one month's notice, would come into play.
- 35 After making these findings, the learned Commissioner had regard to the fact that Mr and Mrs Scicluna were paid one month's notice and determined that an award should be made by way of compensation to each of them to a sum equating to eight weeks' salary, being an amount of \$8,461.54 each. The learned Commissioner then went on to make an award to each by way of compensation for injury in the amount of \$3,000 to Mrs Scicluna and \$1,500 to Mr Scicluna. The awards made for injury are not challenged in these appeals.

Grounds of appeal

- 36 The grounds of appeal in each appeal are the same. These grounds are as follows:

1. The learned Commissioner erred in law and in fact in coming to the conclusion that it would have been fair for the Respondent to have terminated the Applicant with 3 months notice and have Mrs Dall commence managing the motel as a part of a strategy to lease the motel: RFD [41], [42], [43], [44].

Particulars

Contrary to the requirements of s.26(1) of the of the [sic] *Industrial Relations Act 1979* (WA) (the Act):

- (a) failing to give proper consideration to the finding that Mrs Dall was in no position to lease the motel as at 2 July 2015 [44];
 - (b) failing to consider or give proper consideration to the evidence that Mrs Dall:
 - (i) in June 2015 asked to put negotiations for any lease 'on hold' until she had sorted out her financial situation;
 - (ii) in June 2015, and at all times up until the hearing of the matter only had the intention to lease the motel 'in the long term' and subject to her being in a financial position to do so;
 - (iii) the evidence to the effect that Mrs Dall was in no position to lease the motel at any time prior to the hearing of the matter, or indeed after that time until she had paid off a 'big tax debt';
 - (iv) had not discussed the lease of the motel with the Respondent at any time since June 2015;
 - (c) failing to consider or give proper consideration to the fact that there was no evidence of any detriment to the Respondent or any risk of losing Mrs Dall as a potential lessee if Mrs Dall had to wait until she commenced leasing the motel before replacing the Applicant;
 - (d) failing to give proper consideration to the finding that there was no detriment to Mrs Dall if she had to wait: RFD [45];
 - (e) failing to consider or give proper consideration to the interests of the Applicant, including in maintaining employment, remuneration, accommodation and connections within the Esperance community.
 - (f) giving primary status, in considering fairness, to what was described by the learned Commissioner as '*the difficulty in leasing a motel in a regional centre*' (RFD [43]), in circumstances where:
 - (i) when proper regard is had to all the circumstances of the matter, the privileging of that proposition was contrary to equity, good conscience and the substantial merits of the case;
 - (ii) the learned Commissioner was in error in failing to give any or proper consideration to the interests of the Applicant;
 - (iii) the learned Commissioner was in error in privileging that proposition without any or sufficient relevant findings of fact;
 - (iv) the learned Commissioner was in error in privileging that proposition in the absence sufficient evidence that supported doing so over the interests of the Applicant;
 - (v) the learned Commissioner was error in treating that proposition as a fact in the absence of any evidence that it was particularly more or less difficult to lease a motel in Esperance and, despite the Respondent not making any particularly significant efforts to lease the motel there was evidence that the Respondent had received other genuine interest in leasing the motel in 2015;
 - (g) the decision was manifestly unreasonable.
2. The Commissioner erred in law and fact in failing to find that Applicant should be paid compensation in a sum equating to 6 months remuneration.

Particulars

- (a) the particulars referred to in paragraph 1;
- (b) the learned Commissioner's finding that it if there were no other factor affecting the amount of compensation to be awarded, the loss of the Applicant would exceed 6 months remuneration.

The appellants' submissions

- 37 Both appellants, Mr and Mrs Scicluna, contend that the learned Commissioner erred in law and in fact in coming to the conclusion that it would have been fair for Mr Brooks to have terminated their employment with three months' notice and have Ms Dall commence managing the motel as a part of a strategy to lease the motel. By making this finding, Mr and Mrs Scicluna say that the learned Commissioner was making a finding of procedural unfairness. However, they say that the termination of their employment resulted in substantive unfairness to them.
- 38 In reaching the three months' notice finding, Mr and Mrs Scicluna say the learned Commissioner erred by failing to consider the following matters:
- (a) There was no strategy or connection between the lease of the motel to Mrs Dall and her taking over from Mr and Mrs Scicluna;
 - (b) Mrs Dall had asked to put the negotiations for any lease 'on hold' - prior to Mr Brooks giving notice to Mr and Mrs Scicluna;
 - (c) Mrs Dall's evidence was that at all relevant times she intended to lease the motel 'in the long term' and the only impediment from her perspective was securing finance;
 - (d) Mrs Dall was not in any position to lease the motel after 3 months, or at any time up to and after the hearing at first instance, because she needed to pay off 'a big tax bill' before talking to her accountant about any finance;
 - (e) Mrs Dall had not discussed the lease of the motel with Mr Brooks at any time since June 2015;
 - (f) There was no evidence of any detriment to Mr Brooks, or risk of losing Mrs Dall as a potential lessee if Mrs Dall had to wait until she commenced leasing the motel before she and her partner replaced Mr and Mrs Scicluna;
 - (g) The legitimate interests of Mr and Mrs Scicluna, including maintaining employment, remuneration, accommodation and connections within the Esperance community.
- 39 They also say the three months' notice finding was manifestly unreasonable (and plainly wrong) because:
- (a) It was based on a false premise;
 - (b) Mrs Dall was in no position to lease the motel as at 2 July 2015;
 - (c) She had asked to put the negotiations for any lease 'on hold';
 - (d) Mrs Dall's evidence was that at all relevant times she intended to lease the motel 'in the long term' and the only impediment from her perspective was securing finance;
 - (e) She was not in any position to lease the motel after 3 months, or at any time up to and after the hearing at first instance, because she needed to pay off 'a big tax bill' before talking to her accountant about any finance;
 - (f) Mrs Dall had not discussed the lease of the motel with Mr Brooks at any time since June 2015;
 - (g) There was no evidence of any detriment to Mr Brooks, or risk of losing Mrs Dall as a potential lessee if Mrs Dall had to wait until she commenced leasing the motel before she and her partner replaced Mr and Mrs Scicluna;
 - (h) It plainly failed to give sufficient, or any, weight to the legitimate interests of Mr and Mrs Scicluna, including maintaining employment, remuneration, accommodation and connections within the Esperance [sic] community;
 - (i) it was plainly wrong and contrary to equity, good conscience and the substantial merits of the case to elevate what was described as 'the difficulty in leasing a motel in a regional centre' to the 'primary' circumstance in considering fairness to Mr and Mrs Scicluna. That elevation unreasonably and (plainly incorrectly) placed Mr Brooks interests over and above Mr and Mrs Scicluna's interests;
 - (j) Further, the evidence did not support a finding of any particular 'difficulty in leasing a motel in a regional centre'.
- 40 Mr and Mrs Scicluna say that the three months' notice finding was based on a false premise that Mr Brooks had an intention or need to adopt a new strategy of having Ms Dall manage the motel for a period to see whether she wanted to lease it. They also point out that Mr Brooks was not seeking at first instance for the Commission to make any such findings. In particular, Mr Brooks did not submit in his evidence or through his counsel that there was any 'try before you buy' arrangement with Ms Dall. In particular, counsel for Mr Brooks, Mr Davies, rejected that proposition when it was put to him by the learned Commissioner when counsel was making their final submissions after the conclusion of evidence (ts 111 - 112, hearing on 30 March 2016). It is also pointed out on behalf of Mr and Mrs Scicluna that Ms Dall also did not give evidence in support of such a strategy or 'try before you buy' arrangement.
- 41 They argue that when one analyses the evidence given by Ms Dall, her evidence was at the highest that she had an intention from June 2015 in the long term to lease the motel which was contingent on her sorting out her taxation affairs, ultimately paying off a tax bill and then obtaining finance. In particular, the evidence clearly established that she was in no position in June 2015 to enter into a lease. Consequently, they say there was no evidence upon which an inference could be drawn that Ms Dall would only consider entering into a lease and negotiating a lease with Mr Brooks if she managed the motel. Her evidence was that she put discussions on hold until she sorted out her finances. Thus, there was no evidential basis on which it could be said that there was a strategy of her managing the motel that was connected with her entering into a lease of the motel or was for a period of due diligence.
- 42 Further, it is argued that the period of three months' notice is an arbitrary period and no assessment was made that there was a probability that Ms Dall would have been in a position to enter into a lease within this period of time and, in any event, there was no evidence upon which such a finding could have been made.

- 43 Consequently, they say there was no connection between the lease of the motel to Ms Dall and her taking over from Mr and Mrs Scicluna. As there was no such connection therefore it was irrelevant to consider whether Mr and Mrs Scicluna's employment could have been terminated by providing more notice than they were (by three months' notice) and, in any event, such notice did not render the termination of their employment fair. Thus, to the extent that the learned Commissioner found that there was such a strategy or connection it represents a mistake of fact.
- 44 It is also argued that by elevating the circumstance of the strategy to lease the motel was to give such a circumstance the most weight and that was a fundamental error by not only according such weight to a particular factor, but a factor that was not substantially founded upon any evidence.
- 45 It is, however, conceded on behalf of Mr and Mrs Scicluna that they did not have an understanding that their employment would be indefinite. However, their understanding was that until the motel was leased or sold they had security of employment and that their access to wages should not have been subrogated to the notion that Mr Brooks wanted to move the motel on so that his desire to do so should not be preferred over their circumstances. In particular, they say that there was no pressing need for Mr Brooks to move the motel on. Mr Brooks' evidence was that he had become a director of a ski resort and spent time in Japan and had passed on the running of motel to other people. Consequently, it is argued that the desire of an employer to move a business on should not be elevated above the interests of employees. This is particularly so in the context of the surrounding circumstances where negotiations had been put on hold for the lease and there was no prospect of Ms Dall entering into a lease when Mr and Mrs Scicluna were given notice to terminate their employment. The difficulty to lease a motel in a regional centre was wrongly given more weight than Mr and Mrs Scicluna's fundamental job security. In the circumstances they say there was no justification for preferring Mr Brooks' interests by making any difficulty of leasing the motel a primary consideration.
- 46 Mr and Mrs Scicluna say ultimately there has been an error in the sense required by *House v The King* [1936] HCA 40; (1936) 55 CLR 499. They say the only reasonable conclusion that a fair mind could reach in this matter was that there was no valid reason for termination of their employment. Further, that their terminations were not just procedurally unfair in a way that could be cured by the giving of further notice.
- 47 In respect of ground 2 of the grounds of appeal, the submissions made in relation to ground 1 are repeated with the submission that there was no basis for reducing the award of compensation below the six-month remuneration cap in s 23A(8) of the Act.
- 48 Consequently, Mr and Mrs Scicluna seek to have the orders made at first instance varied and seek orders that the consolidated appeals be upheld and that the decisions be varied to make an award for compensation of an amount of \$27,500 each.

Assessment of compensation - principles

(a) Exercise of discretion

- 49 The making of an award of compensation pursuant to s 23A of the Act is a discretionary decision. Consequently, the Full Bench cannot interfere with the learned Commissioner's decision and substitute its own decision unless the appellant establishes on grounds set out in *House v The King* that there was an error in the exercise of the discretion at first instance. In *House v The King*, Dixon, Evatt and McTiernan JJ observed (504 - 505):

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

(b) The nature of a harsh, oppressive or unfair dismissal

- 50 A lawful dismissal can be harsh, oppressive or unfair in some circumstances. For example, even if notice is given that complies with an express term of the contract a dismissal may be harsh, oppressive or unfair. Similarly, some unlawful dismissals such as notice that is given that is in breach of a condition of a contract, such as being too short, may also be harsh, oppressive or unfair: see *R v Industrial Court of South Australia; Ex parte General Motors-Holdens Pty Ltd* (1975) 10 SASR 582, (586) (Bray CJ) and *Garbett v Midland Brick Co Pty Ltd* [2003] WASCA 36; (2003) 83 WAIG 893; (2003) 129 IR 270 [104] (EM Heenan J)

(c) Discretion conferred by s 23A to make an award of compensation

- 51 Pursuant to s 23A(6) of the Act if the Commission considers reinstatement or re-employment would be impracticable, it may, subject to s 23A(7) and s 23A(8), order the employer to pay the employee an amount of compensation for loss or injury caused by the dismissal. Section 23A(8) provides an award of compensation is not to exceed six months' remuneration of the employee.
- 52 Pursuant to s 23A(7), in making an award, the Commission is required to have regard to:
- (a) the efforts (if any) of the employer and employee to mitigate the loss suffered by the employee as a result of the dismissal; and
 - (b) any redress the employee has obtained under another enactment where the evidence necessary to establish the claim for that redress is also the evidence necessary to establish the claim before the Commission; and

- (c) any other matter that the Commission considers relevant.
- 53 Of importance in these appeals, s 23A(7)(c) of the Act requires the Commission to have regard to any matter it considers relevant.
- 54 In *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, French CJ observed that every statutory discretion, however broad, is constrained by law [23]. His Honour then went on to say:
- As Dixon J said in *Shrimpton v The Commonwealth* ((1945) 69 CLR 613 at 629-630):
- '[C]omplete freedom from legal control, is a quality which cannot ... be given under our *Constitution* to a discretion, if, as would be the case, it is capable of being exercised for purposes, or given an operation, which would or might go outside the power from which the law or regulation conferring the discretion derives its force.'
- Every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred (*Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368 per Mason J; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 84 [31] per Gaudron and Gummow JJ). Where the discretion is conferred on a judicial or administrative officer without definition of the grounds upon which it is to be exercised then (*Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 per Dixon CJ, McTiernan and Windeyer JJ agreeing at 473-474) 'the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case'. That view, however, must be reached by a process of reasoning.
- 55 Where a statutory provision does not identify specific relevant considerations, it is largely for the decision maker at first instance to determine which matters he or she regards as relevant and the comparative importance to be accorded to matters which he or she so regards: *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, 375 (Deane J). This passage was applied by the Full Bench in *Q-Vis Ltd v Gordon* [2001] WAIRC 03671; (2001) 81 WAIG 2537 [44] to the principles to be applied to an exercise of discretion of an assessment of loss and compensation under s 23A of the Act. At the time the matters in contention in *Q-Vis Ltd* were determined, s 23A of the Act prohibited the Commission from making an order requiring the employer to pay compensation to the employee for loss or injury unless:
- (a) it is satisfied that reinstatement or re-employment is impracticable; or
 - (b) the employer has agreed to pay compensation instead of reinstating or re-employing the employee.
- 56 The Commission was also at that time empowered to make an order for compensation if an employer had failed to comply with an order for compensation or reinstatement. There are, however, no substantial differences between what is required to be considered in an assessment of compensation under the repealed s 23A and the s 23A enacted by s 138(1) of the *Labour Relations Reform Act 2002* (WA): see observations in *Epath WA Pty Ltd v Adriansz* [2003] WASCA 175; (2003) 83 WAIG 3048 [19] (Scott J), [30] (Parker J), [31] (Pullin J); *Fisher & Paykel Australia Pty Ltd v Skinner* [2006] WAIRC 05839; (2006) 87 WAIG 1 [3] (Ritter AP), [77] (Kenner C).
- 57 Section 23A of the Act was amended by s 138(1) of the *Labour Relations Reform Act*. Section 138(1) inserted a new s 23A which made three changes to the preconditions to the power to make an award of compensation. Firstly, the option of an employer to agree to pay compensation instead of reinstating or re-employing an unfairly dismissed employee was repealed. Secondly, s 23A(7) was enacted to specify the matters the Commission must have regard to in deciding an amount of compensation. Thirdly, the power to make an order for compensation if an employer had failed to reinstate or re-employ an unfairly dismissed employee was repealed.
- 58 Whilst it is now a statutory command that the Commission is required under s 23A(7)(a) in deciding an amount of compensation to have regard to the steps if any of the employer and employee to mitigate, whether an employee had taken steps to mitigate is a matter that was taken into account in assessments of compensation prior to the 2002 amendments: *Bogunovich v Bayside Western Australia Pty Ltd [No 2]* (1998) 79 WAIG 8, 11 (Sharkey P), (13) (Kenner C).
- 59 Section 23A(7)(b) is an issue that is not likely to be raised in many matters.
- 60 The requirement in s 23A(7)(c) to have regard to any matter that the Commission thinks is relevant is, in our opinion, simply a restatement of the principle that previously applied that the Commission is conferred with a broad discretion to consider all relevant facts and circumstances that are raised in a particular matter as facts and circumstances will inevitably vary widely from case to case.
- 61 The principles for an assessment of compensation were comprehensively set out in *Bogunovich [No 2]*. *Bogunovich [No 2]* was decided prior to the amendments to s 23A in 2002. The principles set out in *Bogunovich [No 2]* and subsequent decisions of the Full Bench and the Industrial Appeal Court which are referred to below, together with the matters set out in s 23A(7) of the Act which are relevant to the disposition of this appeal, are as follows:
- (a) The powers conferred under s 23A to order payment of compensation must be for a demonstrated loss or injury caused by the dismissal.
 - (b) Such payments are not a means for punishing an employer: *Garbett* [85] (EM Heenan J). However, an award of compensation is not restricted to the damages which might be recovered at law for wrongful dismissal: *Garbett* [85] (EM Heenan J). It is a statutory remedy that is different from the species of relief which may be available under the contract of employment: *Matthews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 136 IR 156; (2004) 84 WAIG 2152 [60] - [61] (EM Heenan J).

- (c) In determining whether an employee has been unfairly dismissed, and in considering whether pursuant to s 23A it should order the employer to pay any, and what amount of compensation to the employee for loss and injury caused by the dismissal, the Commission acts judicially: *Helm v Hansley Holdings Pty Ltd (In Liq)* [1999] WASCA 71; (1999) 118 IR 126; (1999) 79 WAIG 1860 [9] (Kennedy J).
- (d) Like the assessment of an award for general damages, the assessment of compensation under s 23A is not an exact science: *Gilmore v Cecil Bros* (1996) 76 WAIG 4434, 4447 (Sharkey P), (4449) (Gifford C).
- (e) The first step is to assess the total amount of compensation that can be awarded; that is the amount of the remuneration of the employee that would be payable in a period not exceeding six months (see s 23A(8) and s 23A(9) of the Act).
- (f) The employee is to establish his or her loss and/or injury on the balance of probabilities. This involves a finding of fact or mixed law and fact, as to what is the loss and injury established on the evidence: *Bogunovich [No 2]* (9) (Sharkey P), (13) (Kenner C).
- (g) The onus of proof of failure to mitigate rests upon the employer. If it is established that an employee has failed to mitigate his or her loss, then it may be that there has not been a loss of remuneration caused by the dismissal. A finding that an employee has a duty or is required to mitigate his or her loss is a misstatement of the law: see the discussion in *Sealanes (1985) Pty Ltd v Foley* [2006] WAIRC 04110; (2006) 86 WAIG 1239 [99] - [104]; applied in *Curtis v Ausdrill Ltd* [2006] WAIRC 05656; (2006) 86 WAIG 3133 [35] - [38] (Ritter AP and Gregor SC).
- (h) Regard is also to be had to any efforts of the employer to mitigate the loss suffered by the employee as a result of the dismissal (s 23A(7)(a)).
- (i) The Commission must assess the proper amount of compensation for loss and/or injury in light of all the relevant circumstances, but disregarding the cap prescribed by s 23A(8). If the amount is in excess of the cap, the amount to be awarded is the permissible maximum: *Bogunovich [No 2]* (8) (Sharkey P).
- (j) The assessment of compensation:
- (i) is to be made in light of all relevant circumstances;
 - (ii) must not be arbitrary;
 - (iii) must have regard to whether the employee has taken reasonable steps to find alternative employment: *Curtis* [36] - [38], [43] (Ritter AP and Gregor SC);
 - (iv) is a determination pursuant to s 26(1)(a) made according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms. This legislative direction does not enable the Commission to determine the matter without resort to established legal principles, where those principles are established. However, as Beech CC observed in *Curtis*, when considering an award of compensation made pursuant to s 23A [64]:

The Commission should be slow to fetter its own wide discretion under s26(1) to produce an outcome which is just and equitable and not simply lawful. It is not irrelevant to note that the power given to the Commission is to order compensation, not damages; what might be a correct outcome in a court of law may nevertheless be unacceptable according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. There may well be good reason for the inclusion of s23A(7)(c) if it thereby allows the Commission to have regard to any other matter believed to be crucial to achieving a fair go all round to be taken into account in the overall assessment of any compensation ordered in lieu of reinstatement (*Sprigg v. Paul's Licensed Festival Supermarket* (1998) 88 IR 21 at 31).
- (k) The Commission is also bound pursuant to s 26(1)(c) to have regard for the interests of the persons immediately concerned whether directly affected or not.
- (l) To the extent that it is relevant, the Commission is directed to take into account the matters set out in s 26(1)(d) of the Act: *Gilmore* (4447) (Sharkey P), (4449) (Gifford C). Section 26(1)(d) provides:
- In the exercise of its jurisdiction under this Act the Commission —
- (d) shall take into consideration to the extent that it is relevant —
 - (i) the state of the national economy;
 - (ii) the state of the economy of Western Australia;
 - (iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;
 - (iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;
 - (v) any changes in productivity that have occurred or are likely to occur;
 - (vi) the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;

- (vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.

It is notable, however, that it is unlikely that the matters set out in s 26(1)(d) will be raised on the facts as a relevant consideration when determining an assessment of compensation.

- (m) When deciding questions of future loss, assistance can be derived from *Malec v J C Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638 in which it was held by Deane, Gaudron and McHugh JJ that a court must assess the degree of probability that an event would have occurred or might occur, and adjust its award to reflect the degree of probability. Unless the chance is so low as to be regarded as speculative or so high as to be practically certain, the chance is to be taken into account in assessing compensation: *Bogunovich [No 2]* (8) (Sharkey P).
- (n) How long an employee would have remained employed by the employer is a matter that is relevant to an assessment of loss causally connected to an unfair dismissal. In particular, it may be open to find on the evidence that an unfairly dismissed employee could have been fairly dismissed by the employer at a time post the dismissal: *Bogunovich [No 2]* (13) (Kenner C). It may also be open on the evidence that an employee may have left the employer's employment voluntarily at some point in the future following the dismissal: *Bogunovich [No 2]* (13) (Kenner C). However, there would need to be evidence capable of characterisation as more than mere speculation and that there was a real prospect of the employment being terminated fairly at some point thereafter (the dismissal): *Fisher & Paykel Australia Pty Ltd* [79] (Kenner C), [2] (Ritter AP).
- (o) It has been found that unconscionable or culpable conduct on the part of the employer and employee in the employment relationship and the issues that went to the determination of whether the termination of employment was unfair are not relevant in assessing loss and injury; that is, loss or injury is not to be assessed by reference to fault: *Capewell v Cadbury Schweppes Australia Ltd* (1997) 78 WAIG 299, 302 (Sharkey P), (305) (Coleman CC); *Bogunovich [No 2]* (8) (Sharkey P), (13) (Kenner C). This principle must be qualified by the observation made by Kenner C in *Bogunovich [No 2]* at (13), that this principle does not prohibit a finding by the Commission on the evidence that the employment may not have continued for a long period. To this qualification we would add the observation that it is well established by the authorities, in particular *Lynam v Lataga Pty Ltd* [2001] WAIRC 02420; (2001) 81 WAIG 986 [56] - [58] and *AWI Administration Services Pty Ltd v Birnie* [2001] WAIRC 04015; (2001) 81 WAIG 2849 [200] (Coleman CC and Smith C) in which it was accepted that the circumstances in which the dismissal from employment has been effected, such as callous treatment, may be sufficient to demonstrate the injury which is experienced. However, it is the injury itself, not the actual conduct of the employer, including callous treatment, which is the condition precedent for compensation for injury. There may be unreasonable conduct but it may not necessarily lead to the employee suffering an injury. That is a question of fact. For example, in *Lynam*, the evidence was of the stress and injury suffered by Mr Lynam including grinding his teeth at night, feeling hard done by and upset. It was the 'callous, oppressive and humiliating course of conduct *culminating* in a dismissal and injury to Mr Lynam' [58]. (emphasis added)
- 62 The appellant's counsel put forward a submission that to consider whether the unfairly dismissed employee could have been fairly dismissed some time after the dismissal is only open when there has been a finding that the dismissal was procedurally unfair and not where a dismissal is substantively unfair. This submission appears to be drawn as an inference from the following observations made by Kenner C in *Bogunovich [No 2]* (13):
- All the circumstances of the case need to be considered. For example, it well may be that despite the Commission's finding that the dismissal was harsh, oppressive and unfair, it was characterised as such by reason of the manner or process leading to the dismissal rather than the substantive reasons for the dismissal itself, in the sense in which that principle is referred to in *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. In such a case, it may be open to find as a fact on the evidence, that the unfairly dismissed employee could have been fairly dismissed by the employer shortly after the actual dismissal in any event. In a case such as this, it would be open for the Commission to find that the unfairly dismissed employee's loss is limited to that period between the date of the employee's actual dismissal, and when he or she could have been fairly dismissed in any event.
- 63 We do not agree that Kenner C's observations in this passage gives rise to a principle that an assessment of loss calculated by regard to how long the employees' employment would have continued only applies to dismissals that are procedurally unfair. An assessment of how long employment could have continued but for the unfair dismissal, if the dismissal had been fair, cannot be said to be confined to matters of procedural unfairness. This was an issue that could be said to be squarely raised in *Bogunovich [No 2]*. Mr Bogunovich was employed as a state manager of a national recruitment group. The termination of his employment was found to be both substantively and procedurally unfair: (11) (Sharkey P), (13) (Kenner C). Mr Bogunovich was told he was being dismissed because of underperforming business resulting in substantial losses: *Bogunovich v Bayside Western Australia Pty Ltd [No 1]* (1998) 78 WAIG 3635, 3638. President Sharkey found:
- (a) that the dismissal of Mr Bogunovich was harsh, oppressive and unfair because he was not warned of any alleged poor performance issues and was not given sufficient notice to terminate his employment (3647). In particular, it was found that any financial difficulties of the employer were not attributable to Mr Bogunovich: (3645) (Sharkey P), (3647) (Kenner C).
- (b) it would have been reasonable to terminate Mr Bogunovich's contract of employment by giving him nine to 12 months' notice: (3646) (Sharkey P); see also *Bogunovich [No 2]* (12) (Coleman CC), (13) (Kenner C).
- (c) the fact that a period of nine to 12 months' notice was not given contributed an element of substantial industrial unfairness to the dismissal (3643).

(d) Consideration - exercise of discretion at first instance

- 64 We do not agree that the learned Commissioner found the termination of employment of Mr and Mrs Scicluna unfair on grounds of procedural fairness. Matters of procedure which can be characterised as unfair in the industrial sense are a failure to follow a proper procedure, such as a failure to provide an employee with a right to be heard prior to dismissing the employee on grounds of serious misconduct. Such a failure could, in any event, lead to substantive unfairness depending upon the circumstances of the case.
- 65 In these matters, the learned Commissioner found Mr Brooks misled Mr and Mrs Scicluna when giving them notice by email on 2 July 2015 that their employment was terminated. Whilst he found that Mr Brooks did not discuss with Mr and Mrs Scicluna the matters he wished to put in place with Ms Dall and give them an opportunity to respond could be characterised as finding of a denial of procedural fairness, the learned Commissioner also found that the words used in the email Mr Brooks sent on 2 July 2015 unfairly raised an inference that Ms Dall was leasing the motel. The latter finding goes not to procedural unfairness but raises a matter of substantive unfairness. Further, the finding that the giving of one month's notice was in the circumstances unfair is also a finding that raises a matter of substantial unfairness. It is not a matter that raises any procedural unfairness as pursuant to the terms of contract the notice given by Mr Brooks to Mr and Mrs Scicluna was lawful (AB 46 - 47, [29] - [31] reasons for decision [2016] WAIRC 00237; (2016) 96 WAIG 505).
- 66 In any event, whether a termination of employment is found to be harsh, oppressive or unfair on grounds of procedural or substantive unfairness is, in our opinion, immaterial to an assessment of loss and/or injury made pursuant to the power conferred by s 23A of the Act. What may be relevantly raised in one matter may be entirely irrelevant in another. Each assessment will turn on its own facts and requires an assessment of the loss or injury caused by the dismissal. Depending upon the circumstances of each matter the loss or injury, if any, that flows will be different and will not necessarily relate to or be connected with any finding whether a dismissal was procedurally or substantively unfair.
- 67 In these matters, the factual circumstance that was given considerable weight by the learned Commissioner was the uncontroverted fact that Mr Brooks wished to divest himself from the business of the motel. It is not argued on behalf of Mr and Mrs Scicluna that this circumstance is irrelevant, but that this was a matter that was given too much weight by the learned Commissioner.
- 68 However, the Full Bench is required to accord a discretionary decision with significant deference: *Michael v Director General, Department of Education and Training* [2009] WAIRC 01180; (2009) 89 WAIG 2266 [139] (Ritter AP). In *Michael*, Ritter AP observed [141] - [142]

As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19]-[21]. At [19] their Honours explained by reference to the reasons of Gaudron J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76, that a discretionary decision results from a 'decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result"'. Instead 'the decision-maker is allowed some latitude as to the choice of the decision to be made'. At [21] their Honours said that because 'a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process'. Their Honours then quoted part of the passage of *House v King* which I have quoted above.

Similarly, Kirby J in *Coal and Allied* at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with 'caution and restraint'. His Honour said this is 'because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view'. (See also *Norbis v Norbis* (1986) 161 CLR 513 per Mason and Deane JJ at 518 and *Wilson and Dawson JJ* at 535).

- 69 In *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513 (approved in *Gronow v Gronow* [1979] HCA 63; (1979) 144 CLR 513, 534 - 535 (Aickin J)), Latham CJ said at 519:

[W]hen the appellate tribunal is considering questions of weight it should not regard itself as being in the same position as the learned trial judge. In the absence of exclusion of relevant considerations or the admission of irrelevant considerations an appellate tribunal should not set aside an order made in the exercise of a judicial discretion (as to which see *Sharp v Wakefield* ([1891] A.C. 173, at p. 179)) unless the failure to give adequate weight to relevant considerations really amounts to a failure to exercise the discretion actually entrusted to the court. The words used by their Lordships in the House of Lords in this connection are not always easy to apply, but they ought not to be read as denying the long established principle (which, indeed, is expressly recognized in the cases in the House of Lords) that on an appeal from an order founded upon the exercise of a discretion the appellate tribunal has no right to substitute its discretion for the discretion entrusted to the primary tribunal.

- 70 Consequently, unless the matters considered by the learned Commissioner were based upon a mistaken fact or the weight given to a particular circumstance or circumstances is unreasonable or plainly unjust within the criteria specified in *House v The King*, it is not open to the Full Bench to interfere in a decision at first instance.
- 71 It is well established that an employer has the prerogative to organise their business in a way they see fit and the Commission should not interfere in such a decision unless the decision can be said to be industrially unfair: *Amalgamated Metal Workers and Shipwrights Union of Western Australia v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733. However, as the Commission in Court Session observed in *Federated Engine Drivers' and Firemen's Union of Workers of Western Australia v Robe River Iron Associates* (1987) 67 WAIG 763, 766:

Managerial prerogative is not a sword which can be wielded in wanton disregard of the industrial consequences nor is it a shield to hide behind. An employer has a responsibility to manage fairly.

- 72 The fact that Mr Brooks wanted to divest himself of the business of the motel was a relevant circumstance. Further, it was a matter the Commission could properly have regard to as an interest the Commission was bound to have regard to pursuant to s 26(1)(c) of the Act. This is not a proposition that Mr and Mrs Scicluna appear to cavil with. Mr and Mrs Scicluna do, however, take issue with 'the strategy' the learned Commissioner found that Mr Brooks should have implemented to divest himself of the business. This was:
- (a) discussing a strategy of engaging Ms Dall to manage the motel until she was in a position to enter into a lease with Mr and Mrs Scicluna and giving them an opportunity to comment on such a strategy; and
 - (b) in the event there was no agreement Mr Brooks could inform them that he intended to implement this strategy after three months' notice terminating their employment took effect.
- 73 In effect, their argument appears to be simply that this strategy:
- (a) was not in fact considered by Mr Brooks and his counsel at first instance expressly rejected that such a strategy was open; and
 - (b) is speculative and arbitrary.
- 74 Whilst another member of the Commission may have reached a different result, we do not agree that an error in the reasoning of the learned Commissioner can be demonstrated.
- 75 Whilst the evidence establishes that Ms Dall had asked Mr Brooks for the negotiations for a lease to be put on hold prior to notice being given to terminate the employment of Mr and Mrs Scicluna, it was open to the learned Commissioner to have regard to and give primary weight to the fact that Mr Brooks was facing difficulties of leasing the motel in a regional centre. He had regard to the circumstance that Mr and Mrs Scicluna were well aware that their employment could be terminated if Mr Brooks did lease the motel and, if so, their employment would be lawfully terminated (and conceded by them to constitute circumstances of fair termination if given one month's notice). It is clear from the email exchange in exhibits between the parties that termination of Mr and Mrs Scicluna's employment by one month's notice, if Mr Brooks entered into a lease of the motel, could occur at any time.
- 76 The learned Commissioner determined that it would have been fair for Mr Brooks to engage in a frank discussion with Mr and Mrs Scicluna about his discussions with Ms Dall and his plan to place Ms Dall in the position of manager prior to her entering into a lease. The evidence was clear Ms Dall intended to lease the motel. The fact that it could not be found that she could do so within a three-month period was not material to the reasoning of the learned Commissioner. To the contrary, when the reasoning of the learned Commissioner is carefully considered it is clear that he made no finding that Ms Dall could have entered into a lease within a three-month period. No such finding or inference can be drawn from his reasons.
- 77 The learned Commissioner found that when regard was had to the personal circumstances of Mr and Mrs Scicluna, a three-month period would have given them a fair opportunity to plan the next stage of their lives whilst remaining in gainful employment. This period of notice was found by the learned Commissioner not to have caused unfairness to Mr Brooks and would have been no detriment to Ms Dall if she had to wait to manage the motel as part of the strategy to ultimately lease the motel.
- 78 Thus, it was clear that the three-month notice itself was a period that was struck by regard to the circumstances of Mr and Mrs Scicluna, not by the circumstance whether it was open to find on the evidence that Mr Brooks and Ms Dall could enter into a lease in that period or whether Mr Brooks could lease the motel to any other person in that period. It was a mechanism to compensate for the loss due to the dismissal being managed unfairly. That unfairness was that they were misled. Had Mr Brooks taken the approach suggested by the learned Commissioner, they could have been fairly dismissed. It compensated them for the loss suffered as a consequence of the unfairness. This was in the circumstance where they knew their employment could terminate on an associated event, the sale or leasing of the motel.
- 79 For these reasons, we are of the opinion that the grounds of appeal have not been made out and that orders should be made to dismiss the appeals.

EMMANUEL C

- 80 I have had the benefit of reading the draft reasons for decision of Smith AP and Scott CC. I agree and have nothing to add.

2016 WAIRC 00864

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR ALAN SCICLUNA	APPELLANT
	-and- MR WILLIAM PAUL BROOKS T/AS BAYVIEW MOTEL ESPERANCE, WA	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL	
DATE	THURSDAY, 3 NOVEMBER 2016	
FILE NO	FBA 5 OF 2016	
CITATION NO	2016 WAIRC 00864	

Result Appeal dismissed
Appearances
Appellant Mr J M Nicholas (of counsel)
Respondent Mr W P Brooks, in person

Order

This appeal having come on for hearing before the Full Bench on Monday, 3 October 2016, and having heard Mr J M Nicholas (of counsel) on behalf of the appellant and the respondent in person, and reasons for decision having been delivered on Thursday, 3 November 2016, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby dismissed.

[L.S.]

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

2016 WAIRC 00865

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MRS TRIXIE SCICLUNA	APPELLANT
	-and-	
	MR WILLIAM PAUL BROOKS T/AS BAYVIEW MOTEL ESPERANCE, WA	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL	
DATE	THURSDAY, 3 NOVEMBER 2016	
FILE NO	FBA 6 OF 2016	
CITATION NO	2016 WAIRC 00865	

Result Appeal dismissed
Appearances
Appellant Mr J M Nicholas (of counsel)
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Order

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The appeal be and is hereby dismissed.

[L.S.]

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

FULL BENCH—Appeals against decision of Industrial Magistrate—

2016 WAIRC 00843

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 117 OF 2015 GIVEN ON 13
APRIL 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
FULL BENCH

CITATION	:	2016 WAIRC 00843
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER D J MATTHEWS
HEARD	:	TUESDAY, 7 JUNE 2016 WRITTEN SUBMISSIONS FRIDAY, 8 JULY 2016 AND FRIDAY, 12 AUGUST 2016

DELIVERED : WEDNESDAY, 26 OCTOBER 2016
FILE NO. : FBA 2 OF 2016
BETWEEN : BAKER HUGHES AUSTRALIA PTY LTD (ABN 20 004 752 050)
 Appellant
 AND
 MARTIN VENIER
 Respondent

ON APPEAL FROM:

Jurisdiction : **Western Australian Industrial Magistrate's Court**
Coram : **Industrial Magistrate G Cicchini**
Citation : **[2016] WAIRC 00210; (2016) 96 WAIG 325**
File No. : **M 117 of 2015**

CatchWords : Industrial Law (WA) - Appeal against decision made by Industrial Magistrate's Court - Finding claimant's prior employment with related body corporates of the appellant and subsequent employment with the appellant was continuous employment with one and same employer for the purposes of calculating long service leave entitlements under s 8 of the *Long Service Leave Act 1958* (WA) - Issue of construction of *Long Service Leave Act* - History of amendments made to *Long Service Leave Act* and Long Service Leave General Order considered - Error established - Words 'one and same employer' not unambiguous and do not include related bodies corporate - Far reaching 'gap' in 2006 amendments to *Long Service Leave Act* found that cannot be filled by reading words into s 8 of the *Long Service Leave Act* - Doctrine of piercing corporate veil considered

Legislation : *Industrial Relations Act 1979* (WA) s 7(1), s 84(2)
Long Service Leave Act 1958 (WA) s 4(1), s 4(2)(b), s 5, s 6, s 6(2), s 6(4), s 6(5), s 8, s 8(1), s 8(2), s 8(3), s 8(4), s 8(5), s 8(6), s 8(7), s 8(8), s 8(9), s 8A, s 9, s 9(1), s 9(1a), s 9(1b), s 9(4), s 10, s 11
Corporations Act 2001 (Cth) s 9, s 46, s 47, s 48, s 50
Industrial Relations Legislation Amendment and Repeal Act 1995 (WA) s 46(1)(f)
Labour Relations Legislation Amendment Act 2006 (WA) pt 7, div 2 of pt 7, s 55(1), s 55(2), s 56(2), s 58(2), s 64, s 65, s 65(1), s 65(2), s 65(4)
Interpretation Act 1984 (WA) s 8, s 10, s 16, s 19, s 19(1), s 19(3)
Long Service Leave Act Amendment Act 1973 (WA) s 6
Industrial Arbitration Act 1912 (WA) (repealed) s 6, s 94A
Companies Act 1961 (WA) (repealed) s 6, s 6(5)
Labour and Industry Act 1958 (Vic) s 150(1), s 154(1)
Labour and Industry (Amendment) Act 1970 (Vic) s 151(1A)
Long Service Leave Act 1956 (Tas) s 8(1)
Industrial Conciliation and Arbitration Act 1952 (Qld) s 10B, s 10B(2)
Long Service Act 1955 (NSW)
Long Service Leave (Amendment) Act 1967 (NSW)
Long Service Leave Act 1957 (SA) (repealed)
Long Service Leave Act 1967 (SA)
Industrial Arbitration Act 1979 (WA)
Labour Relations Reform Act 2002 (WA) s 185

Result : Appeal upheld - Order made

Representation:

Counsel:
Appellant : Mr A K Sharpe
Respondent : Mr M Cox and with him Ms N Barsby
Solicitors:
Appellant : K&L Gates
Respondent : MDC Legal

Case(s) referred to in reasons:

ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron [2005] SASC 204; (2005) 91 SASR 570
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) [2009] HCA 41; (2009) 239 CLR 27
Bropho v Western Australia (1990) 171 CLR 1
CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384
Coco v The Queen [1994] HCA 15; (1994) 179 CLR 427
Damevski v Guidice [2003] FCAFC 252; (2003) 133 FCR 438; (2003) 129 IR 53
Dennis Willcox Pty Ltd v Federal Commissioner of Taxation (1988) 79 ALR 267
DHN Food Distributors Ltd v London Borough of Tower Hamlets [1976] 3 All ER 462
DHN Food Distributors Ltd; Burswood Catering & Entertainment Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch [2002] WASCA 354; (2002) 83 WAIG 201
Director General of Department of Transport v McKenzie [2016] WASCA 147
Du Buisson Perrine v Chan [2016] WASCA 18
Heytesbury Holdings Pty Ltd v City of Subiaco (1998) 19 WAR 440
Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586, 592; [2000] 2 All ER 109
Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567
Kelly v The Queen [2004] HCA 12; (2004) 218 CLR 216
Newcastle City Council v GIO General Ltd [1997] HCA 53; (1997) 191 CLR 85
Pioneer Concrete Services Ltd v Yelnah Pty Ltd (1986) 5 NSWLR 254
Smith, Stone & Knight Ltd v Birmingham Corporation [1939] 4 All ER 116
Taylor v The Owners - Strata Plan No 11564 [2014] HCA 9; (2014) 253 CLR 531
The Commissioner for Corrective Services v RAJ [2014] WASC 338
The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd [No 2] [2014] WASC 345
Van Heerden v Hawkins [2016] WASCA 42
Wentworth Securities Ltd v Jones [1980] AC 74

Case(s) also cited:

Anti-Doping Rule Violation Panel v XZTT [2013] FCAFC 95
Attorney-General (WA) v Her Honour Judge Schoombee [2012] WASCA 29
Australian Education Union v Department of Education and Children's Services (2012) 248 CLR 1
Bermingham v Corrective Services Commission of New South Wales (1988) 15 NSWLR 292
Brooks v Commissioner of Taxation (2000) 100 FCR 117
CFMEU v Endeavour Coal Pty Ltd [2015] FCAFC 76
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 250 CLR 503
Federal Commissioner of Taxation v Unit Trend Services Pty Ltd (2013) 250 CLR 523
IW v City of Perth (1997) 191 CLR 1
Khoury v Government Insurance Office (NSW) (1984) 165 CLR 622
Lindner Pty Ltd v Builders Licensing Board [1982] 1 NSWLR 612
Marshall v Watson (1972) 124 CLR 640
Mills v Meeking [1990] HCA 6; (1990) 169 CLR 214
Moody v French [2008] WASCA 67
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
R v Gee [2003] HCA 12
R v Lavender [2005] HCA 37
R v Young [1999] NSWCCA 166
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252
Sandoval v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 71
SM v R [2013] VSCA 342

SM v The Queen (2013) 237 A Crim R 14
 The Pilbara Infrastructure Ltd v Brockman Iron Pty Ltd [2016] WASCA 36
 Thiess v Collector of Customs (2014) 250 CLR 664
 Travellex Ltd v Federal Commissioner of Taxation [2010] HCA 33; (2010) 241 CLR 510
 Victims Compensation Fund Corporation v Brown (2003) 77 ALJR 1797
 Victims Compensation Fund v Brown (2002) 54 NSWLR 668
 Waller v Hargraves Secured Investments Ltd (2012) 245 CLR 311
 Wik Peoples v Queensland (1996) 187 CLR 1

Reasons for Decision

SMITH AP:

Introduction

- 1 This appeal is instituted under s 84(2) of the *Industrial Relations Act 1979* (WA) (the IR Act). Baker Hughes Australia Pty Ltd (ABN 20 004 752 050) (the appellant) appeals against a decision of the Industrial Magistrate's Court in M 117 of 2015 on grounds that the learned Industrial Magistrate erred in determining a preliminary issue.
- 2 By consent the learned Industrial Magistrate answered the following question as a preliminary issue:
 Is the applicant's (claimant's) prior employment with related body corporates (as that term is defined in section 50 of the Corporations Act (Cth)) of the respondent, and his subsequent employment with the respondent, 'continuous employment with one and the same employer' for the purposes of calculating long service leave entitlements under section 8(1) of the Long Service Leave Act 1958 (WA)?
- 3 After hearing argument the learned Industrial Magistrate answered the question 'Yes'. In this appeal the appellant argues that the answer should have been given as 'No'.
- 4 The relevant facts asserted by the respondent are as follows:
 - (a) The respondent was employed by 'Baker Hughes' or its related body corporates from 28 November 1988 until 16 July 2015.
 - (b) Whilst in the United Kingdom, on 28 November 1988 the respondent began employment with Teleco Oilfield Services. In 1992, Teleco Oilfield Services became a division of Baker Hughes but that did not interrupt the continuity of his service. In December 1996, the respondent was promoted to a position within INTEQ Drilling Services, a division of Baker Hughes. On 29 July 2005, the respondent assumed a different role with International Professional Resources, S, de R.L. (IPRS), another related body corporate of Baker Hughes. On 7 May 2006, the respondent was promoted within IPRS and relocated to China. On 30 July 2008, the respondent was transferred in his employment to the appellant.
 - (c) The respondent entered into a written employment agreement with the appellant prior to commencing with it. Clause 12 of that employment agreement provides that he is entitled to long service leave in accordance with the legislation applicable in Western Australia.
 - (d) The respondent claims he is entitled to 23.01 weeks' long service leave, not taken or paid out, on the basis of 26.64 years' continuous service with the appellant and/or its related body corporates.
- 5 The appellant denies the respondent is entitled to long service leave and says that the respondent has not met the threshold requirement of seven years' continuous service with the respondent. In particular, it says that the respondent's previous service with various Baker Hughes entities prior to 30 July 2008 cannot be considered for the purposes of calculating long service leave entitlements under the *Long Service Leave Act 1958* (WA) (LSL Act).
- 6 For the purpose of determining the preliminary issue, the parties agreed the following facts:
 - (a) The respondent entered into an employment agreement with the appellant on 30 July 2008 and had commenced employment by or about 2 November 2008.
 - (b) The termination of the respondent's employment with the appellant was effected on 16 July 2015.
 - (c) The respondent's employment with the appellant was for a term of less than seven years.
 - (d) The appellant is a related body corporate (as defined in s 50 of the *Corporations Act 2001* (Cth)) of Baker Hughes Incorporated, a company incorporated in the United States of America.
- 7 Section 8(1) of the LSL Act provides:
 An employee is entitled in accordance with, and subject to, the provisions of this Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer, or with a person who, being a transmittee, is deemed pursuant to section 6(4) to be one and the same employer.
- 8 The respondent argued at first instance that the concept of related entities in s 50 of the *Corporations Act* is a current and convenient version of an aid to inform the interpretation and application of the phrase 'one and the same employer' in s 8(1) of the LSL Act.
- 9 The respondent's argument about the proper construction of the words 'one and the same employer' in s 8(1) of the LSL Act turns substantially on the effect of amendments made to the LSL Act in 1995 and 2006.
- 10 In 1995, the definition of 'employer' in the LSL Act was amended from the 'singular' to 'plural' by s 46(1)(f) of the *Industrial Relations Legislation Amendment and Repeal Act 1995* (WA).
- 11 Since 1995, s 4(1) of the LSL Act provides:
 In this Act unless the context requires otherwise —
employer includes —
 - (a) persons, firms, companies and corporations; and
 - (b) the Crown and any Minister of the Crown, or any public authority, employing one or more employees;
- 12 In 2006, pt 7 of the *Labour Relations Legislation Amendment Act 2006* (WA) amended the LSL Act to improve long service leave entitlements under the LSL Act and abolish and preserve entitlements to long service leave by employees covered by the Long Service Leave General Order ((1978) 58 WAIG 120) as set out in the schedule to the LSL General Order ((1978) 58 WAIG 1). In these reasons, the schedule is referred to as the LSL General Order.

- 13 The respondent put an argument that given that 'employer' has been defined in s 4(1) of the LSL Act since 1995 to include the plural of person, firm, company and corporation, and when regard is had to the history of the 2006 amendments and when a purposive approach together with the principle that legislation is to be interpreted as always speaking is applied to the construction of the words 'one and the same employer', they should be given an ambulatory operation so as to include employment with related entities.

The Industrial Magistrate's reasons for decision

- 14 His Honour firstly set out the following basic principles of statutory construction:
- (a) statutory construction must begin with a consideration of the statutory text;
 - (b) context and purpose are also important as surer guides to meaning; and
 - (c) the modern approach to statutory interpretation uses "context" in its widest sense.
- 15 His Honour then found that regard must be had to the statutory text as a starting point. After setting out s 8(1) of the LSL Act his Honour had regard to the provisions of s 6(4) and s 6(5) of the LSL Act which define a period of employment with a transmitter to be deemed to be employment of the employee with the transmittee.
- 16 His Honour observed that the LSL Act does not define 'one and the same employer', but it does in s 4(1) define 'employer' to include persons, firms, companies and corporations.
- 17 The learned Industrial Magistrate found that:
- (a) it is of considerable significance that the definition of employer is framed in plurals;
 - (b) it could quite easily have been framed in the singular but was not; and
 - (c) it contemplates more than one.
- 18 His Honour then found that as s 6(4) and s 6(5) of the LSL Act are couched in the singular, there would have been no need for the term 'employer' to have been defined in those provisions as those provisions include any number of previous employers. Thus, the circumstance of transmission does not require plurality in the definition of employer.
- 19 His Honour went on to find that:
- (a) the phrase 'one and the same employer' is not as clear and unambiguous as is suggested;
 - (b) what is meant by it having regard to the definition of employer is obscure and requires construction; and
 - (c) the phrase is not so definitive so as to import the limitations which the appellant asserts.
- 20 The learned Industrial Magistrate then found that:
- (a) it was necessary to construe the term having regard to context and purpose;
 - (b) the objects of the LSL Act must be considered and resort may be had to its historical context in order to achieve that end;
 - (c) when regard is had to the principle that a liberal construction is necessary to give the words used an ambulatory operation that process is neither unreasonable nor unnatural given that the LSL Act is beneficial legislation;
 - (d) resort may be had to extrinsic material which assists in the construction process. Such is permitted by s 19 of the *Interpretation Act 1984* (WA); and
 - (e) the phrase 'one and the same employer' must be construed according to its true specific intent and meaning (s 8 of the *Interpretation Act*).
- 21 The learned Industrial Magistrate had regard to the following matters which he regarded as having historical significance and gave context to the meaning of s 8(1) of the LSL Act:
- (a) The LSL Act commenced operation on 24 December 1958 and s 8(1) of the LSL Act has, other than for a stylistic change, remained unchanged since then. However, the current meaning of employer is different to the meaning given to that term when the LSL Act was first enacted.
 - (b) In 1973, s 8A (now repealed) was inserted into the LSL Act by s 6 of the *Long Service Leave Act Amendment Act 1973* (WA). Section 8A provided:

Notwithstanding any other provision in this Act in the event of an agreement between the Western Australian Employers' Federation (Incorporated) and the Trades and Labor Council of Western Australia or a determination of the Commission in Court Session varying from time to time any of the provisions for qualifications or entitlement to long service leave as contained in volume fifty-two of the *Western Australian Industrial Gazette* at pages sixteen to twenty-one, both inclusive, for the majority of awards which those provisions have been incorporated in and from part of, the qualifications and entitlement of employees to long service leave shall forthwith thereafter be varied accordingly.
 - (c) On 15 December 1977, the Commission in Court in Session, under s 94A of the (now repealed) *Industrial Arbitration Act 1912* (WA), made the LSL General Order varying awards and industrial agreements to incorporate new long service leave provisions ((1978) 58 WAIG 120). The LSL General Order expressly stated an intention that service with related entities be considered as service with 'one and the same employer'.
 - (d) Section 6 of the *Companies Act 1961* (WA) (repealed) defined when a corporation was deemed to be a subsidiary of another and when corporations were deemed to be related. That definition was adopted for the purpose of cl 4 of the LSL General Order.
 - (e) During the whole period of the operation of the LSL General Order from 1977 to 2006, at which time cl 4 applied, the original phrase in s 8 of the LSL Act of 'one and the same employer' was constant. An employee's service with related entities was deemed continuous service with 'one and the same employer'.
 - (f) Section 8A of the LSL Act was repealed in 2006 and the LSL General Order ceased to have effect. The stated intention of the repeal was to consolidate and incorporate all long service leave entitlements under the LSL Act, without loss of any entitlements to employees.
 - (g) In the explanatory memorandum to its repealing legislation a statement was made in cl 247 that employees are not disadvantaged if their LSL entitlement becomes governed by the LSL Act rather than the LSL General Order.
 - (h) Parliament's intention in repealing the LSL General Order was to remove the duplication of long service leave entitlements in various instruments and consolidate them and the LSL General Order into the LSL Act. The explanatory memorandum stated this intention in cl 271.
 - (i) As the terms of the LSL General Order were to be incorporated into the LSL Act, Parliament considered the continued operation of s 8A of the LSL Act to be unnecessary.
 - (j) The fact that Parliament did not amend the LSL Act to expressly incorporate cl 4 of the LSL General Order is attributable to the term 'one and the same employer' including related companies. Otherwise, the effect of the

amendment would have left some employees worse off. Such an outcome is inconsistent with Parliament's intention, reflected in the second reading speech where it was stated:

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

- (k) In consolidating long service leave entitlements and incorporating the LSL General Order into the LSL Act, Parliament had the intention that service with related entities be considered service with 'one and the same employer' under the LSL Act, just as it did in the LSL General Order.
 - (l) Denying long service leave to long serving employees of related entities is inconsistent with the historical application of the LSL Act and is inconsistent with the stated purpose of the amending legislation.
- 22 Alternatively, the learned Industrial Magistrate found that even if the LSL Act lacks the words required to give effect to the claimant's contentions, it was an inadvertent oversight which is explicable by the following:
- (a) the LSL General Order provided coverage of service with related entities from 1977 until 2006;
 - (b) Parliament's intention in 2006 was to consolidate all long service leave entitlements without disadvantaging employees whose long service leave entitlements had been governed by the LSL General Order; and
 - (c) there was a lack of transitional provisions dealing with the loss of entitlement for those who had accumulated continuous service working for related entities.
- 23 The learned Industrial Magistrate had regard to the principle that it would be permissible to read in the words that the Parliament would have used to overcome the omission, provided that there is certainty about the words. He then found that it was possible to state with certainty the words Parliament would have used. These words were 'related company', as expressed in the LSL General Order. In particular:
- (a) the reference in the LSL General Order to the *Companies Act* could be deemed to include a reference to that law as amended by applying s 16 of the *Interpretation Act*; and
 - (b) as the *Companies Act* was repealed and replaced and superseded by the Commonwealth *Corporations Act* defining 'related body corporate' by reference to s 50 of the *Corporations Act* was entirely appropriate.

The grounds of appeal

24 The grounds of appeal are as follows:

1. In the absence of any reference to the concept of 'related body corporate' or the *Corporations Act 2001* (Cth) in the *Long Service Leave Act 1958* (WA), the learned Magistrate's construction is inconsistent with:
 - (a) the principle that the task of statutory construction must both begin and end with the statutory text; and
 - (b) the requirement that a court construe a written law and not rewrite it by reference to its purpose or objects.
2. The learned Magistrate erred in concluding that it was of considerable significance to the construction of the phrase 'one and the same employer' that the definition of 'employer' in the *Long Service Leave Act* is framed in plurals because:
 - (a) the definition of 'employer' in section 4(1) of the *Long Service Leave Act* applies 'unless the context requires otherwise' and the context given by 'one and the same' requires otherwise; and
 - (b) further and alternatively, section 10(c) of the *Interpretation Act* provides that 'words in the singular number include the plural and words in the plural number include the singular'.
3. The learned Magistrate erred in concluding that the meaning of the expression 'one and the same employer' is obscure when the expression is actually an emphatic reference to a single legal entity and this error, in turn, led the learned Magistrate to err by having regard to extrinsic materials pursuant to section 19(1)(b)(i) of the *Interpretation Act*.
4. Alternatively to ground 3:
 - (a) the learned Magistrate should not have given consideration to the extrinsic materials referred to by the learned Magistrate because of the desirability of persons being able to rely on the ordinary meaning conveyed by the text of a provision as specified in section 19(3)(a) of the *Interpretation Act*, and
 - (b) further and alternatively, the learned Magistrate should not have taken the extrinsic materials into account because they did not correctly state the law as provided in the *Long Service Leave Act*.
5. The learned Magistrate erred in concluding that it was necessary to give the phrase 'one and the same employer' a liberal interpretation because the *Long Service Leave Act* is beneficial legislation when the Magistrate should have concluded that 'one and the same' are words of limitation which should be interpreted according to their terms.
6. The learned Magistrate erred in concluding that employment with a related body corporate was an implied exception to the requirement that employment must be for 'one and the same employer' when the *Long Service Leave Act* already provides for an express exception to this requirement in section 6(4) of the Act and so no other exception could be implied.
7. Given that the Parliament did not amend section 8(1) in 2006, the learned Magistrate:
 - (a) erred in construing section 8(1) by reference to Parliament's intention in 2006 rather than Parliament's intention when section 8(1) was enacted; and
 - (b) further and alternatively, erred in concluding that the meaning of section 8(1) changed in 2006.
8. The learned Magistrate erred in 'reading in' words to the *Long Service Leave Act* to address the Parliament's perceived 'inadvertent oversight' in failing to amend section 8(1) in 2006 because:
 - (a) it was not permissible for the learned Magistrate to 'read in' the concept of a 'related company' to fill a perceived gap in the legislation; and
 - (b) further and alternatively, the learned Magistrate erred in concluding that it was possible to state with certainty the words which the Parliament would have used to address the perceived oversight.
9. The learned Magistrate erred in 'reading in' to the *Long Service Leave Act* the definition in section 50 of the *Corporations Act* when:
 - (a) section 8(1) of the *Long Service Leave Act* was enacted prior to section 50 of the *Corporations Act* and so the Parliament could not have intended section 50 of the *Corporations Act* was to be 'read in' to section 8(1) of the *Long Service Leave Act* when section 8(1) was enacted;
 - (b) further and alternatively, the term 'read in' by the learned Magistrate was 'related company' and section 50 of the *Corporation Act* defines when 'bodies corporate' are related; and

- (c) further and alternatively, it is not permissible to 'read in' to Western Australian legislation a definition enacted by another Parliament, namely the Commonwealth Parliament.

Relevant principles of statutory construction - did the learned Industrial Magistrate err in his approach?

25 Meaning must be determined not only within the statute as a whole but also in context. Thus, it is artificial to focus on words in a statute in isolation.

26 The proper general approach to statutory construction is purposive. The general principles that apply to the construction of a statute were recently summarised by Buss P in *Director General of Department of Transport v McKenzie* [2016] WASCA 147 wherein his Honour observed [45] - [48]:

In *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503, French CJ, Hayne, Crennan, Bell and Gageler JJ observed:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text' (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]). So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself [39].

See also *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 [31] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ); *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 [22] (French CJ, Hayne, Kiefel, Gageler & Keane JJ).

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The statutory text is the surest guide to Parliament's intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of the provision, in particular the mischief it is seeking to remedy. See *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby & Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 [47] (Hayne, Heydon, Crennan & Kiefel JJ).

The context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed. See *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ).

The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. See *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 [26] (French CJ & Hayne J). The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose. See *Minister for Employment and Workplace Relations (Cth) v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194 [21] (Gleeson CJ, Hayne, Callinan & Heydon JJ).

27 Similar observations were made by Buss JA in *Van Heerden v Hawkins* [2016] WASCA 42 [93] - [96].

28 When construing the words in a statute regard can be had to extrinsic materials when permitted to do so pursuant to s 19 of the *Interpretation Act*. Section 19(1) and s 19(3) of the *Interpretation Act* expressly provides for the following circumstances where regard can be had to extrinsic material to assist in the ascertainment of the meaning of a provision:

- (1) Subject to subsection (3), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —
 - (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or
 - (b) to determine the meaning of the provision when —
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or is unreasonable.
- (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to —
 - (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; and
 - (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

29 Section 19 of the *Interpretation Act* does not constitute a code. At common law, regard can be had to extrinsic materials to ascertain the mischief to be remedied by a statute: *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Newcastle City Council v GIO General Ltd* [1997] HCA 53; (1997) 191 CLR 85, 99 - 100 (Toohey, Gaudron and Gummow JJ), (112 - 113) (McHugh J).

30 Yet, caution must be exercised when regard is had to extrinsic materials. Explanations in extrinsic materials cannot supplant the meaning conveyed by the text. In *Van Heerden*, Buss JA observed [102]:

As Crennan J noted in *Northern Territory v Collins* [2008] HCA 49; (2008) 235 CLR 619, '[s]econdary material seeking to explain the words of a statute cannot displace the clear meaning of the text of a provision (*Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ), not least because such material may confuse what was 'intended ... with the effect of the language which in fact has been employed' (*Hilder v Dexter* [1902] AC 474 at 477 per Earl of Halsbury LC)' [99]. That statement of principle applies to extrinsic evidence admissible at common law and also to extrinsic evidence admissible under s 19 of the *Interpretation Act*. In other words, the statutory text, and not non-statutory language seeking to explain the statutory text, is paramount. See *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11; (2006) 228 CLR 529 [22] (Gleeson CJ, Gummow, Hayne & Heydon JJ).

31 When construing legislation, regard is also to be had to an express provision in the legislation that defines terms within the legislation. Definitions are, however, merely aids to interpretation. As Buss JA said in *Van Heerden* [103]:

The function of a definition in a statute is not, except in rare cases, to enact substantive law. Rather, its function is to provide aid in construing the substantive enactment that contains the defined term. The meaning of the definition depends on the context, and the purpose or object, of the substantive enactment. See *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 [103] (McHugh J); *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [2005] HCA 26; (2005) 221 CLR 568 [12] (McHugh J); s 6 of the *Interpretation Act*.

- 32 In *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216, McHugh J explained [84]:
 [A] legislative definition is not or, at all events, should not be framed as a substantive enactment. In *Gibb v Federal Commissioner of Taxation* ((1966) 118 CLR 628 at 635), Barwick CJ, McTiernan and Taylor JJ stated:
 'The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense - or are to be taken to include certain things which, but for the definition, they would not include ... [Definition] clauses are ... no more than an aid to the construction of the statute and do not operate in any other way.' (Emphasis added.)
- 33 Then in *Kelly* McHugh J said [103]:
 As I earlier pointed out, the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better - I think the only proper - course is to read the words of the definition into the substantive enactment and then construe the substantive enactment - in its extended or confined sense - in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.
- 34 Also of importance in construction of legislative provisions where terms are defined is the principle that definitions can be displaced by an express or implied contrary intention. In this matter, the definition of 'employer' in s 4(1) of the LSL Act is expressly subject to a contrary intention.
- 35 As French CJ observed in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 [6]:
 The exclusion of a particular definition where a 'contrary intention' appears would be implied in any event (*In the Matter of The Fourth South Melbourne Building Society* (1883) 9 VLR(E) 54 at 58 per Holroyd J; *Buresi v Beveridge* (1998) 88 FCR 399 at 401 per Hill J). A contrary intention may appear from context or legislative purpose. But, as Pearce and Geddes observe (Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 196 [6.1]):
 'A good drafter will indicate 'the contrary intention' clearly.'
- 36 Thus, the question to ask is whether there is a contrary intention shown in the provision where the expression as defined in the Act is used: Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) (318 - 319) [6.67].
- 37 In this matter, it could be said that it is not necessary to determine whether a contrary intention is shown in s 8(1) of the LSL Act so as to require the term 'one and the same employer' to be construed as the singular. This is because pursuant to s 10 of the Interpretation Act words in the plural include the singular. However, the test whether the singular will include the plural and vice versa is whether a contrary intention appears. Consequently, s 10 of the Interpretation Act does not add to the task of construction in this appeal.
- 38 Another issue that must be considered is the definition of 'employer' in s 4(1) of the LSL Act is expressed to be defined not by the word 'means' but by the word 'includes'. In *Du Buisson Perrine v Chan* [2016] WASCA 18 Newnes JA observed [56] - [57]:
 It is the case that where 'includes' (as opposed to 'means') is used in a statutory definition it will ordinarily not be intended to be exhaustive but rather simply to enlarge the ordinary meaning of the term to bring within it something that would otherwise not be within it: *Owen v Menzies* [2012] QCA 170; [2013] 2 Qd R 327 [106]; *Transport Accident Commission v Hogan* [2013] VSCA 335 [47]. It may also be used to avoid possible uncertainty by expressly providing for the inclusion of particular borderline cases: *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201, 206 - 207.
 Nevertheless, 'includes' may be exhaustive if the context in which it appears reveals that intention: *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395, 398 - 399, 402; *Dilworth v Commissioner of Stamps* [1899] AC 99, 106. Ultimately the question is always one of the proper construction of the statute.
- 39 That is, whether the word 'includes' is intended to enlarge the matters defined turns on what is the proper construction of the definition. Consequently, in this matter the intention conveyed by the words 'one and the same employer' in s 8(1) of the LSL Act is to be determined by:
- (a) whether the definition of 'employer' in s 4(1) of the LSL Act should be construed as singular or plural, and, in any event, regard is to be had to the definition as an aid to the construction of the material words in s 8(1) of the LSL Act and not as an independent substantive enactment without being read as part of s 8(1); and
 - (b) within the context of the LSL Act as a whole having regard to the general purpose and policy of the provision and history of legislative amendments to the LSL Act, including extrinsic materials. As Buss JA said in *Van Heerden*, when undertaking this task of construction the statutory language is paramount [102].

Long service leave legislation in other States

- 40 The precondition of service created by the words with 'one and the same employer' is language that was used across Australia in statutory provisions in Victoria, Tasmania and Queensland when legislation was enacted in the mid-20th century to provide for entitlements to long service leave in these States. It is notable that subsequent amendments were made to legislation in Victoria, Tasmania, Queensland, New South Wales and South Australia to provide for service with related bodies corporate as continuous service.
- 41 The table in attachment B to the appellant's further submissions filed on 8 July 2016 comparing amendments to long service leave provisions in State and Territory legislation concerning related or associated bodies corporate shows that:
- (a) (i) Section 150(1) of the *Labour and Industry Act 1958* (Vic) when enacted provided that:
 'Employer' means any person employing a worker and includes the Crown.
 - (ii) Section 154(1) provided that:
 Subject to this Division every worker shall be entitled to long service leave on ordinary pay in respect of continuous employment with one and the same employer.
 - (iii) By the enactment of the *Labour and Industry (Amendment) Act 1970* (Vic), s 151(1A) was inserted to provide:
 In respect of a worker employed by a corporation, any period of employment with a corporation which by virtue of subsection (5) of section 6 of the *Companies Act 1961* is deemed to be related to the first-mentioned corporation shall, for the purpose of calculating the period of continuous employment of that worker, be deemed to be employment with that first mentioned corporation.
 - (b) The *Long Service Leave Act 1956* (TAS) when enacted contained the same definition of employer in s 2(1) as the Victorian Act. Section 8(1) of the Tasmanian Act was also in the same terms as s 154(1) of the Victorian Act. In 1972, the Tasmanian Act was amended to provide for employment to be regarded as continuous when an employee transferred to an associated company.

- (c) Section 10B(2) of the *Industrial Conciliation and Arbitration Act 1952* (Qld) provided that the entitlement of any and every employee to long service leave on full pay shall be in respect of his continuous service with one and the same employer. Section 10B was amended in 1958 to deem service of an employee transferred to another employer as if they were the one and same employer.
- (d) The *Long Service Act 1955* (NSW) when enacted referred to service with an employer. By the enactment of the *Long Service Leave (Amendment) Act 1967* employment with a holding company or a subsidiary was deemed not to break continuity of service with an employer.
- (e) Similar amendments were made to the *Long Service Leave Act 1957* (SA). When enacted, continuous service was referred to as service with an employer. In 1967, this Act was repealed and replaced with the *Long Service Leave Act 1967* which deemed associated companies or related companies to be deemed one employer.
- 42 It appears, however, that the words 'one and the same employer' have not been judicially considered in any reported decisions of courts and tribunals in these States. Yet, it is clear as the appellant points out in its supplementary written submissions that the other State jurisdictions which used the phrase 'one and the same employer' amended their legislation to provide that service with related or associated bodies corporate be included in the calculation of any entitlement to long service leave. The appellant also points out that one of these amendments were made as early as 1958, the year the LSL Act was originally enacted.

Relevant history of amendments to the entitlements of employees employed by private employers to long service leave in Western Australia

- 43 It appears from the reasons for decision of the learned Industrial Magistrate that when the explanatory memorandum to the 2006 amendments to the LSL Act are considered in the context of the LSL Act as a whole together with specific amendments to the text of the LSL Act in 1995 and 2006 and the relevant history of the differences between the provisions of the LSL Act and the LSL General Order, that his Honour erred in the findings his Honour made about the mischief the 2006 amendments sought to remedy. Further, importantly for the disposition of this appeal, in my opinion his Honour erred in the interpretation of 'one and the same employer' in s 8(1) of the LSL Act.
- 44 In 1958, the Parliament of Western Australia enacted the LSL Act. The LSL Act came into force soon after the Commission made an order, by consent, inserting into most awards and industrial agreements long service leave provisions to provide for 13 weeks' long service leave after 20 completed years of continuous service to workers employed in private industry ((1958) 38 WAIG 261).
- 45 In 1964, by consent, long service leave clauses in awards and industrial agreements were amended by a Commission in Court Session applicable in private industry to provide for 13 weeks' leave after 15 years' continuous service ((1964) 44 WAIG 606 (1964 consolidation)).
- 46 By operation of amendments made to the LSL General Order on 27 January 1978, by consolidation by the Commission in Court Session, the terms prescribed in the LSL General Order were prescribed in each award and industrial agreement in force on 31 December 1977 ((1978) 58 WAIG 120).
- 47 Prior to the 2006 amendments, the LSL Act only applied to certain private sector employees whose employment was not regulated under the IR Act, that is it did not apply to employees whose employment was regulated by an award or industrial agreement made by the Commission.
- 48 Of particular importance, prior to 2006, both the LSL Act and the LSL General Order created an entitlement to long service leave for 'continuous service' for specified periods with 'one and the same employer'.
- 49 Also, importantly, the entitlements to long service leave under the LSL Act and the LSL General Order were not identical at any material time. Nor did the amendments made to the LSL Act in 2006 reflect an enactment of all entitlements and conditions of taking of long service leave as provided for in the LSL General Order.

(a) The LSL General Order

- 50 Pursuant to cl 2(1) of the LSL General Order an employee (described as a worker) was entitled to long service leave as provided in the order for 'continuous service' with 'one and the same employer'.
- 51 Prior to the enactment of the IR Act in 1979, employees were described in s 6 of the *Industrial Arbitration Act 1912* as a 'worker'. A 'worker' was defined to mean if not inconsistent with the context, a person of not less than 14 years of age of either sex employed or usually employed by an employer. An 'employer' was defined in the plural, if not inconsistent with the context, to include among others, persons, firms, companies and corporations.
- 52 Prior to the consolidation of the LSL General Order by the Commission in Court Session on 27 January 1978, the LSL General Order was last consolidated on 23 September 1964. The 1964 consolidation of the LSL General Order was reprinted each year in the Industrial Gazettes. In a reprint of the 1964 consolidation, published on 26 January 1977, the only circumstance where service with another employer was deemed to be 'continuous service' was where a business had been transmitted from one employer to another ((1977) 57 WAIG 1). The terms of the 1964 consolidation applied unamended until the Commission in Court Session made substantial amendments to the LSL General Order on 27 January 1978 ((1978) 58 WAIG 120) published on 25 January 1978 ((1978) 58 WAIG 1) which took effect from 1 January 1978.
- 53 In the 1978 consolidation (which remained unamended until abolished by the *Labour Relations Legislation Amendment Act 2006* (WA)), an amendment to cl 2 of the 1964 consolidation was made by inserting a new subclause (4) to deem service by an employee as 'continuous service' in employment with a related company to be in fact service with the company by whom he or she is last employed. The subclauses within cl 2(4) of the LSL General Order appear to be a replication of s 6 of the *Companies Act*. Clause 2(5) was renumbered to cl 2(6) and also amended. Clause 2(4) of the 1978 consolidation provided:

Where, over a continuous period, a worker has been employed by two or more companies each of which is a related company within the meaning of Section 6 of the *Companies Act 1961* the period of the continuous service which the worker has had with each of those companies shall be deemed to be service of the worker with the company by whom he is last employed.

Section 6 reads-

- (1) For the purposes of this Act, a corporation shall, subject to the provisions of subsection (3) of this section, be deemed to be a subsidiary of another corporation, if,
- (a) that other corporation-
- (i) controls the composition of the board of directors of the first mentioned corporation;
 - (ii) controls more than half of the voting power in the first mentioned corporation; or
 - (iii) holds more than half of the issued share capital of the first mentioned corporation excluding any part thereof which carries no right to participate beyond a specified amount in a distribution of either profits or capital; or
- (b) the first mentioned corporation is a subsidiary of any corporation which is that other corporation's subsidiary.

- (2) For the purpose of subsection (1) of this section, the composition of a corporation's board of directors shall be deemed to be controlled by another corporation if that other corporation by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove all or a majority of the directors; and for the purposes of this provision that other corporation shall be deemed to have power to make such an appointment if-
- (a) a person cannot be appointed as a director without the exercise in his favour by that other corporation of such a power;
- or
- (b) a person's appointment as a director follows necessarily from his being a director or other officer of that other corporation.
- (3) In determining whether one corporation is subsidiary of another corporation-
- (a) any shares held or power exercisable by that other corporation in a fiduciary capacity shall be treated as not held or exercisable by it;
- (b) subject to paragraphs (c) and (d) of this subsection, any shares held or power exercisable-
- (i) by any person as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity): or
- (ii) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary which is concerned only in a fiduciary capacity;
- shall be treated as held or exercisable by that other corporation;
- (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned corporation or of a trust deed for securing any issue of such debentures shall be disregarded; and
- (d) any shares held or power exercisable by, or by a nominee for, that other corporation or its subsidiary (not being held or exercisable as mentioned in paragraph (c) of this subsection) shall be treated as not held or exercisable by that other corporation if the ordinary business of that other corporation or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is so exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.
- (4) A reference in this Act to the holding company of a company or other corporation shall be read as a reference to a corporation of which that last-mentioned company or corporation is a subsidiary.
- (5) Where a corporation-
- (a) is the holding company of another corporation;
- (b) is a subsidiary of another corporation;
- (c) is a subsidiary of the holding company of another corporation,
- that first-mentioned corporation and that other corporation shall for the purposes of this Act be deemed to be related to each other.

54 Clause 2(6)(b) of the 1978 consolidation also inserted a new provision. This subclause provided:

Service shall be deemed to be continuous notwithstanding-

...

(b) the employment with related companies as referred to in paragraph (4) of this subclause;

55 In reasons for decision for making these amendments in 1978, members of the Commission in Court Session did not address this extended deeming provision with a great deal of clarity. In the reasons for decision of Kelly SC, he referred to a claim made by the unions seeking 'portability' of service from one employer to another ((1978) 58 WAIG 116, 117). At (119) he made the following observations and findings:

[I]t is not readily apparent why it is unjust for the Commission to refuse to remove differences which have been created by the parties and developed over lengthy periods of time, when the only basis of the claim is in reality, that those differences exist.

The situation is otherwise, of course, if conditions are shown to be inherently unjust, and I now turn to those submissions of the unions which were directed to that aspect of the matter. I refer, in particular, to that part of the submissions which asserted that long service leave was, for most workers, an illusory benefit, and to the material put before the Commission in support of that assertion. To the extent that such a submission might refer to workers who do not qualify for long service leave because they voluntarily leave their employment before serving for the prescribed period it could, of course, carry no weight in a case which is predominantly concerned, not with a question of additional paid leisure in respect of employment generally, but with a particular period of leisure for long service with the same employer. However, to the extent that the submission refers to workers who, through no fault of their own, are deprived of the opportunity of qualifying for long service leave, I believe it shows up an injustice in the present conditions which should be remedied in one or more ways. In several States this injustice has been recognized in respect of some kinds of employment the very nature of which would render it almost impossible for the overwhelming majority of workers engaged therein to qualify for long service leave under the standard provisions. Those States which have recognized this injustice namely, New South Wales, Victoria, South Australia and Tasmania have done so by way of legislation and as it is clear in my view, that that is the only way in which appropriate machinery can be set up to cater for employment of that sort I believe that is the course of action which should be followed in this State.

But in addition to those workers whose employment is rendered intermittent by the nature of the industry in which they are employed, many workers are similarly disadvantaged in respect of long service leave by the closing down of the business in which they are employed, or by the introduction of labour saving equipment or by business amalgamations, or by other business decisions made by employers. The existing conditions recognize the principle that such employees are entitled to pro rata payment, but limit the entitlement to those employees who have completed 10 years' service. I find great difficulty in accepting that it is fair that an employee who has completed, say, 7, 8 or 9 years of service with an employer can have the whole of that service nullified for long service leave purposes by a decision over which he has no control and for which he is in no way responsible. Such a situation can, I think, only be accepted as fair if one takes the view first, that no worker should be entitled to any benefit by way of leave or payment in respect of long service leave unless he has completed a period of service with the one employer of such length that it may be described appropriately as 'long service' and secondly that any period of service less than 10 years cannot be appropriately so described. It is, perhaps, easier to take such a view of the matter now that the annual leave standard has become four weeks, and, with the exception of the South Australian legislation, that does seem to be the prevailing viewpoint not only in the Australian Commission but also in the legislation of the States. Noting, as I do, that in redundancy cases the Commission has not considered itself to be bound to the letter of the award provisions and being conscious of the recency of the decision of

the Full Bench of the Australian Commission in which it varied the pro rata payment provision to extend that benefit to employees who terminate their employment for any reason after 10 years' service, I think we should not on this occasion depart from the prevailing Australian viewpoint on this matter.

In addition to the foregoing variation, the Full Bench also varied the Federal standard by substituting an employee's actual rate of pay for his award rate in the provisions relating to payment for long service leave and by adding provisions which treat service with associated companies as if it were service with the one company.

56 From this passage it can be seen that two material matters emerge:

- (a) regard was had by the Commission in Court Session in its reasons for decision in 1978 to amendments to legislation in Victoria, Tasmania, New South Wales and South Australia remedying an injustice to employees who were unable to access long service leave through no fault of their own and the Commission in Court Session determined this injustice should be remedied through a variation to the LSL General Order; and
- (b) variations were made to treat service with associated companies as if it were service with the one company.

57 In the 1978 consolidation, the Commission in Court Session essentially only made two variations which could be characterised to be of remedial character. The first was an amendment of cl 3(3) of the 1964 consolidation. Clause 3(3) of the 1964 consolidation provided ((1977) 57 WAIG 1, 3):

Subject to the provisions of paragraph (6) of this subclause, where a worker has completed at least ten years' service but less than fifteen years' service since its commencement and his employment is terminated—

- (i) by his death; or
- (ii) by the employer for any reason other than serious misconduct; or
- (iii) by the worker on account of sickness of or injury to the worker or domestic or other pressing necessity where such sickness or injury or necessity is of such a nature as to justify or in the event of a dispute is, in the opinion of the Special Board of Reference, of such a nature as

the amount of the leave shall be such proportion of thirteen weeks' leave as the number of completed years of such service bears to fifteen years.

58 In 1978, the Commission in Court Session amended this clause by deleting cl 3(3)(iii). Consequently, the circumstances for payment of pro rata long service leave following termination of employment after at least 10 years' service but less than 15 years' service were made less restrictive in that the only grounds of disqualification of payment of long service leave was to be termination on grounds of serious misconduct.

59 The only other variation made in 1978 which could be said to provide access to long service leave to employees who were unable to access long service leave through no fault of their own are the provisions that provide for the deeming of service with related companies to be service of the employee by whom he or she is last employed and such service to be continuous service with one and the same employer within the meaning of cl 2(1) of the LSL General Order: cl 2(6)(b).

(b) The LSL Act

60 Section 8(1) of the LSL Act has substantially remained unamended since it was first enacted in 1958. The pre-condition for accrual of long service leave has remained the same, that is an employee is entitled to long service leave in accordance with the provisions of the LSL Act, in respect of continuous employment with one and the same employer, or a transmittee deemed to be one and the same employer.

61 When the LSL Act was first enacted, leaving aside exemptions which are not relevant to the determination of the issues raised in this appeal, an employer was defined in s 4(1) in the singular to mean unless the context requires otherwise, a person by whom an employee is employed.

62 In 1995, s 46(1)(f) of the *Industrial Relations Legislation Amendment and Repeal Act* amended the definition of 'employer' to the plural, to include persons, firms, companies and corporations.

63 This amendment was substantially the same insofar as it applied to employers in the private sector as the definition of employer in the *Industrial Arbitration Act 1912* and also the definition of employer in s 7(1) of the IR Act, when the IR Act was first enacted in 1979 as the *Industrial Arbitration Act 1979* (WA). The definition of employer in s 7(1) of the IR Act is also expressed to apply 'unless the contrary intention appears', and was subsequently amended to include employers of employees of labour hire agencies or group training organisations (s 185 of the *Labour Relations Reform Act 2002* (WA)).

64 The explanatory notes to the *Industrial Relations Legislation Amendment and Repeal Bill 1995* states the amendment to the definition of employer in the LSL Act was made to bring it into line with the definition of employer under the IR Act by using the same wording (cl 54, page 27).

65 Other amendments were made to the LSL Act in 1995 by the *Industrial Relations Legislation Amendment and Repeal Act*. These amendments included new entitlements by the insertion of a new s 5 which provided for limited contracting-out of long service leave and the insertion of a new s 9(1), s 9(1a) and s 9(1b). The amendments to s 9 enable an employee:

- (a) with the agreement of the employer to take long service leave in separate periods of not less than one week;
- (b) to give two weeks' notice of the period during which the employee intends to take leave.

66 The LSL General Order contained no equivalent to s 5 of the LSL Act as enacted in 1995. In addition, cl 5 of the LSL General Order could have been construed as less flexible to employees than the conditions for taking long service leave under s 9 of the LSL Act. Clause 5(1)(a), cl 5(1)(b) and cl 5(1)(c) of the 1978 consolidation of the LSL General Order provided:

In a case to which placita (a) and (b) of paragraph (2) of subclause (3) apply:—

- (a) Leave shall be granted and taken as soon as reasonably practicable after the right thereto accrues due or at such time or times as may be agreed between the employer and the worker or in the absence of such agreement at such time or times as may be determined by the Special Board of Reference having regard to the needs of the employer's establishment and the workers' circumstances.
- (b) Except where the time for taking leave is agreed to by the employer and the worker or determined by the Special Board of Reference the employer shall give to a worker at least one month's notice of the date from which his leave is to be taken.
- (c) Leave may be granted and taken in one continuous period or if the employer and the worker so agree in not more than three separate periods in respect of the first thirteen weeks' entitlement and in not more than two separate periods in respect of any subsequent period of entitlement.

67 Thus, employees covered by the LSL General Order prior to 2006 could only take 13 weeks' long service leave as a block of three separate periods, whereas employees covered by the LSL Act could take long service leave in blocks of a week at a time. Further, an employee covered by the LSL General Order had to give one month's notice to take long service leave, whereas an employee whose entitlement to long service leave arose under the LSL Act only had to give two weeks' notice.

- 68 When regard is had to this legislative history, prior to the 2006 amendments, it is apparent that the terms of the LSL General Order could be regarded in some respects less beneficial to an employee than the conditions that attached to the taking of long service leave under the LSL Act.
- 69 In 2006, substantial amendments were made to the LSL Act by the enactment of div 2 of pt 7 of the *Labour Relations Legislation Amendment Act*. Whilst s 64 of that Act repealed the LSL General Order, the amendments made to the LSL Act did not replicate the provisions of the LSL General Order. To the contrary, leaving aside the issue whether an entitlement to long service leave in s 8(1) of the LSL Act in respect of 'continuous employment with one and the same employer' could be said to extend to continuous employment with related employers, some amendments were made to the LSL Act that were more beneficial than entitlements to long service leave pursuant to the terms of the LSL General Order. Other provisions enacted changes to the LSL Act that were different to provisions of the LSL General Order. In addition, some amendments effected changes to entitlements that were more beneficial than entitlements that accrued under either instrument. For example:

- (a) Section 55(1) of the *Labour Relations Legislation Amendment Act* amended the definition of 'ordinary pay' in s 4(1). This amendment removed commissions and bonuses from the list of exclusions from ordinary pay. Section 55(2) also amended s 4(2)(b) the effect of which was consistent with the definition of 'pay' in the LSL General Order. However, the amendment provided for a definition that defined 'pay' in a way that results in a different method of calculation for piece or bonus work from the LSL General Order provision and the existing terms of the LSL Act. This amendment once enacted provides:

For the purpose of the interpretation of '**ordinary pay**' in subsection (1) —

...

- (b) where the employee is employed on piece or bonus work or any other system of payment by results, the employee's rate of pay during any period when the employee is on long service leave is the average weekly rate earned by him while in employment during the period of 12 months —
- (i) ending on the day immediately preceding that on which he commences long service leave or would but for payment in lieu of long service leave have commenced long service leave, if he is then in employment; or
- (ii) ending on the day immediately preceding that on which he was last in employment, if he is not then in employment; or
- (iii) ending on the day immediately preceding that of his death,
- as the case requires; and

This difference emerges clearly from the express terms of cl 4(5) of the LSL General Order which had provided:

In the case of workers employed on piece or bonus work or any other system of payment by results the rate of pay shall be calculated by averaging the worker's rate of pay for each week over the previous three monthly period.

Under the amendment to the LSL Act pay for piece or bonus work is to be averaged over a 12-month period, whereas under the LSL General Order pay for piece or bonus work was to be averaged over a three-month period.

- (b) One amendment made to the LSL Act in 2006 which created a more beneficial entitlement than the existing terms of the LSL Act and the LSL General Order was an amendment to s 8(3) of the LSL Act. Prior to the amendment, an entitlement to long service leave or payments in lieu under the LSL Act and the LSL General Order did not accrue in specific circumstances until at least 10 years of continuous service. Pursuant to s 56(2) of the *Labour Relations Legislation Amendment Act* this qualifying period was reduced to seven years.
- (c) Another amendment made to the LSL Act in 2006 that was more beneficial than the existing terms of the LSL Act and the LSL General Order was an amendment to s 9(4) of the LSL Act. Prior to the amendment, long service leave taken during a period that any public holidays occurred were deemed to be inclusive of long service leave under the LSL Act and the LSL General Order. Section 58(2) of the *Labour Relations Legislation Amendment Act* amended s 9(4) of the LSL Act to provide that where a public holiday occurs during a period of long service leave the period of long service leave is increased by one day for each public holiday.

Explanatory memorandum to the 2006 amendments to the LSL Act

- 70 When the text of the amendments made to the LSL Act by the Labour Relations Legislation Amendment Act set out in [69] and [83] of these reasons are considered, it can be seen that the mischief the learned Industrial Magistrate found in the enactment of the 2006 amendments is not correct.
- 71 The learned Industrial Magistrate found that the stated intention of the repeal of the LSL General Order (when regard was had to statements made in the explanatory memorandum) was to consolidate and incorporate all long service leave entitlements under the LSL Act, without any loss of entitlements to employees. He also found that the terms of the LSL General Order were incorporated into the LSL Act. In my respectful opinion, these findings are in error.
- 72 As the statutory text is paramount, the statements made in the explanatory memorandum to the 2006 amendments must be read with regard to specific provisions of the text it seeks to explain. When this task is undertaken it can be seen that the 2006 amendments did not have the effect to 'consolidate and incorporate all long service leave entitlements under the LSL Act without loss of entitlements'.
- 73 When regard is had to the fact that the entitlements under the LSL Act as amended in 2006 were different in some material respects, such as shortened periods to accrue an entitlement and the fact that 'ordinary pay' was to be calculated differently to that provided in the LSL General Order in some respects it could not be said that all long service leave entitlements under the LSL General Order were incorporated by the 2006 amendments.
- 74 In making the finding that the 2006 amendments incorporated and consolidated the long service leave entitlements under the LSL Act without loss of entitlements, the learned Industrial Magistrate relied upon statements made in the explanatory memorandum that were either quoted out of context or wrongly stated the effect of amendments.
- 75 In [62] of his reasons for decision the learned Industrial Magistrate stated:

In the Explanatory Memorandum to its repealing legislation it was said, at cl 247:

It is important that, with the abolition of the LSL General Order, employees are not disadvantaged if their LSL entitlement becomes governed by the LSL Act rather than the LSL General Order.

- 76 This sentence in the explanatory memorandum was quoted out of context. This statement was made in relation to the removal of commission and bonuses from the list of matters to be excluded from the calculation of ordinary pay. Clause 247 and cl 248 of the explanatory memorandum explained the amendments made to the definition of 'ordinary pay' in s 4(2)(b) of the LSL Act. Clause 247 stated:

Section 55(1)(c) of the Bill will remove commissions and bonuses from the list of exclusions from ordinary pay. It is important that, with the abolition of the LSL General Order, employees are not disadvantaged if their LSL entitlement becomes governed by the LSL Act rather than the LSL General Order. The LSL General Order does not exclude commissions or bonuses from its definition of ordinary pay. Retaining this exclusion in the LSL Act would disadvantage employees who are paid regular commissions or bonuses as part of their wages.

77 Clause 248 stated:

Section 55(2) of the Bill is also concerned with increasing parity between the LSL Act and the LSL General Order. The LSL Act will be amended to provide that employees who are paid on piece work, bonus work, or any other system of payment by results receive payment for long service leave based on the employee's average rate over the past year. Previously employers could pay employees the rate of pay that would have been applicable to the employee if they were employed on a time basis. This system is inconsistent with the LSL General Order and penalises employees whose productivity is sufficient to award them greater pay on a piece rate than they would earn on an hourly rate.

78 Section 64 and s 65 of the *Labour Relations Legislation Amendment Act* repealed the LSL General Order and deemed a person's long service leave rights, entitlements and obligations to arise, after commencement of the 2006 amendments, under the LSL Act. Section 64 provided:

The LSL General Order is repealed.

79 Section 65 provided:

- (1) The object of this section is to ensure that where, before commencement, a person's long service leave rights, entitlements or obligations arose under an industrial instrument by reference to the LSL General Order that person's long service leave rights, entitlements or obligations arise, after commencement, under the instrument by reference to the *Long Service Leave Act 1958*.
- (2) Unless the contrary intention appears or the context otherwise requires, a reference in an industrial instrument to the LSL General Order, or a provision of that Order, is, after commencement, to be read as a reference to the *Long Service Leave Act 1958*, or the corresponding provision of that Act, (whichever is relevant) and the instrument is to be construed so as to give effect to the object of this section.
- (3) Subsection (2) applies to references that, after commencement, have ongoing effect.
- (4) A provision of the *Long Service Leave Act 1958* corresponds to a provision of the LSL General Order if the provisions deal with substantially the same matter.
- (5) In this section —

'commencement' means the coming into operation of the *Labour Relations Legislation Amendment Act 2006 Part 7 Division 2*.

80 In [63] of his Honour's reasons for decision, the learned Industrial Magistrate set out in full cl 271 of the explanatory memorandum to s 64 of the *Labour Relations Legislation Amendment Act* (which explained the reasons for the repeal of the LSL General Order). Clause 271 stated:

The LSL Act and the LSL General Order do not differ substantially in the entitlements that they offer. However, the minor differences can be confusing for employers and employees alike. This duplication of LSL instruments is unnecessary and cumbersome. An independent review of Western Australian industrial relations legislation recommended that the LSL Act and the LSL General Order be consolidated to remedy this duplication of instruments (Commissioner G.L. Fielding, *Review of Western Australian Labour Relations Legislation*, July 1995).

81 Of importance is an acknowledgement in cl 271 that prior to the enactment of the 2006 amendments the entitlements offered under the LSL Act and the LSL General Order were not the same. Leaving aside for the moment whether proper construction of the words in s 8(1) of the LSL Act 'one and the same employer' did not encompass service by related companies, this statement does not state that it was intended to consolidate the LSL General Order into the LSL Act, only that such a recommendation had been made by Fielding C in the review he conducted of labour relations legislation in 1995.

82 In [65] of his reasons for decision the learned Industrial Magistrate found:

The fact that Parliament did not amend the LSL Act to expressly incorporate order 4 of the General Order is attributable to the term *one and the same employer* including related companies. Otherwise, the effect of the amendment would have left some employees worse off. Such an outcome is inconsistent with Parliament's intention, reflected in the second reading of the *Labour Relations Legislation Amendment Bill 2006*, where on 24 May 2006 it was stated:

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

83 With respect in my opinion, this quote was considered out of context. On 30 March 2006, the Minister for Employment Protection stated in the second reading speech when introducing the *Labour Relations Legislation Amendment Bill 2006*:

The bill will amend the Long Service Leave Act 1958 and the Construction Industry Portable Paid Long Service Leave Act 1985 to improve long service leave entitlements. Private sector long service leave entitlements in Western Australia lag behind those in all the other states and territories. Western Australia has enjoyed unprecedented economic growth in recent times, growth that should be rightly shared by those who contributed to it - not the least of whom are long-serving employees and their families. The point at which an employee becomes entitled to long service leave could be the difference between retaining and losing a valued worker. It could be a powerful selling point when recruiting a new employee, particularly from the eastern states or overseas. The benefit of these amendments to employers should not be underestimated. Employees will be entitled to eight and two-thirds weeks' long service leave after 10 years' service. A pro rata entitlement will accrue after seven years' service. Transitional arrangements will ensure that employees do not become immediately entitled to take long service leave upon 10 years' service. This will give employers sufficient time to comply with the changes. The commission's long service leave general order will be abolished. The Long Service Leave Act will replace the general order as the primary instrument governing long service leave in the Western Australian private sector. There will be minor adjustments to the Long Service Leave Act as a result of the general order being abolished.

84 When the Minister made the statement that the long service leave entitlements were to be improved as they lagged behind entitlements in the Eastern States, it appears that the Minister was speaking about the improvements to the entitlements to long service leave by enacting the amendments to s 8(2), s 8(3), s 8(4), s 8(5), s 8(6), s 8(7), s 8(8) and s 8(9) of the LSL Act. The Minister made no reference to service by employees with related bodies corporate being deemed continuous service. The effect of the amendments the Minister was speaking of was explained in cl 250 to cl 259 of the explanatory memorandum as follows:

Section 56(1) of the Bill will amend section 8(2) of the LSL Act to provide 8½ weeks of LSL after 10 years of continuous service rather than the current entitlement of 13 weeks after 15 years.

Section 8(2)(b) of the LSL Act will also be amended by section 56 of the Bill to provide 4½ weeks of LSL after completing a further 5 years of service with the same employer (after the 10 years referred to above). Previously, 8½ weeks of LSL were provided after a further 10 years of service.

Section 56(2) of the Bill will amend section 8(3) of the LSL Act to provide pro rata LSL payment on termination of employment after 7 years of service rather than the current 10 years.

Section 56(3) of the Bill will repeal and replace the current transitional provisions in sections 8(4), 8(5), and 8(6) of the LSL Act. The new provisions are designed to ensure that entitlements that have been accrued prior to the commencement of the Amendment Act are preserved. The provisions will also prevent the undesirable situation in which all employees who have completed between 10 and 15 years' service are entitled to proceed on long service leave as soon as the Amendment Act commences.

New section 8(4) details when employees who were employed prior to the commencement of the Amendment Act are able to take LSL. Employees with less than 6 years' continuous service will be able to proceed on LSL after completing 10 years' continuous service.

Section 8(5) clarifies that the transitional provisions do not apply any period of employment in respect of which the employee was entitled to take LSL prior to the commencement day.

Section 8(6) clarifies that employees to whom the transitional provisions apply, may take all the LSL that they have accrued (based on an accrual rate of 0.8667 weeks of LSL per year of service) at the time they are entitled to proceed on LSL in accordance with section 8(4). This allows employees who, under the transitional provisions, have been required to complete more than 10 years' service to take more than 8 $\frac{2}{3}$ weeks of LSL.

Section 8(7) clarifies that employees to whom the transitional provisions do not apply (those who complete 15 years' service before the commencement day) are unable to take advantage of section 8(6).

Section 8(8) allows employees who have taken more than 8 $\frac{2}{3}$ weeks of LSL under section 8(6) to take further leave (to make up 13 weeks of leave) once they have completed 15 years of service.

Section 8(9) clarifies that the term 'commencement day' means the day on which Part 7 Division 2 comes into operation. Part 7 Division 2 of the Bill will come into effect in accordance with section 2(1) of the Bill.

- 85 Thus, when the text of the 2006 amendments is considered, it is clear that the terms of the LSL General Order were not preserved by the transitional provisions. Once the 2006 amendments came into force the rights and entitlements to long service leave of persons to whom the LSL General Order applied were to be calculated as if those rights and entitlements arose under the LSL Act.
- 86 Consequently, the statements in cl 253 and cl 272 of the explanatory memorandum that the transitional provisions in s 65 of the Bill (s 65 of the Labour Relations Legislation Amendment Act) 'are designed to ensure that entitlements that have been accrued prior to the commencement of the Amendment Act are preserved' and 'the LSL Act will apply to people in the same manner as the LSL General Order' are not correct statements of the effect of s 65 as the entitlements to long service leave under the amended LSL Act are different to the entitlements to long service leave under the LSL General Order. Thus, these statements cannot be relied upon as an aid to interpretation of the text of 2006 amendments.

Proper construction of words 'one and the same employer'

- 87 I do not agree that the words 'one and the same employer' are ambiguous. Nor am I of the opinion that the word 'employer' in s 8(1) of the LSL Act should be construed as plural.
- 88 The 2006 amendments made no amendment to the LSL Act which could be properly construed as an enactment to extend the meaning of 'employer' in s 8(1) of the LSL Act to include related bodies corporate. This becomes clear when regard is had to the specific amendments that were made to the LSL Act by the enactment of the 2006 amendments. Other than revealing a 'gap' in the 2006 amendments by failing to preserve the entitlement to long service leave by persons whose employment was covered by the LSL General Order who had been employed by related bodies corporate prior to the enactment of the 2006 amendments, I am not satisfied the text of the 2006 amendments, nor the explanatory memorandum to the 2006 amendments, sheds any light on the fixing of the meaning of the words 'one and the same employer' in s 8(1) of the LSL Act.
- 89 The explanation of the amendment of the definition of 'employer' in the explanatory memorandum to s 46(1)(f) of the Industrial Relations Legislation Amendment and Repeal Act is also of no assistance in fixing the meaning of the use of the word 'employer' in s 8(1) of the LSL Act. In my opinion, the word 'employer' must be construed in the textual context of all of the words used in s 8(1) and the LSL Act as a whole as follows:
- (a) Section 8(1) commences with the words 'An employee is entitled in accordance with, and subject to, the provisions of this Act, to long service leave'. Leaving aside the conditions which attach to accrual of long service leave, when one examines the provisions that provide for the conditions of taking long service leave it can be seen that arrangements are to be made with a singular employer and obligations to allow an employee to take long service leave is cast upon a single employer (see, for example, s 9, s 10 and s 11 of the LSL Act).
 - (b) The words in s 8(1) creating an entitlement to long service leave are circumscribed by the following conditions:
 - (i) the leave arises out of continuous employment;
 - (ii) the continuous employment is to be 'with one and the same employer'.
 - (c) The concept of 'continuous employment' connotes employment without a break in service. Specified events that could be considered a break in the continuity of employment are expressly deemed to be continuous (s 6 of the LSL Act). One of those circumstances is the transmission of business (s 6(2) and s 6(4) of the LSL Act). The only express exception to employment with another employer in s 8(1) that is deemed to be employment with one and the same employer is employment with an employer who is a transmittee.
- 90 When regard is had to all of these textual indications in the LSL Act it is plain that the words continuous employment with 'one and the same employer' means continuous employment with a single employer. As the appellant points out in its supplementary submissions, this meaning is consistent with the definition of the phrase 'one and the same' in *The New Shorter Oxford English Dictionary on Historical Principles* (4th ed, 1993) which is 'one and the same, (arch.) the selfsame the same, the identical'. As the appellant points out the words 'one and the same' are words of limitation; that is, those words limit the meaning of the word 'employer' to the singular.
- 91 Consequently, there is no room to read the words qualifying continuous employment in s 8(1) of the LSL Act with 'one and the same employer' when the employer is a company, as encompassing and including any related bodies corporate.

Was there a 'gap' in the 2006 amendments?

- 92 The intention in enacting the 2006 amendments must be found in the amending text, construed in light of its context and purpose. The text of s 65 of the *Labour Relations Legislation Amendment Act* reveals that it was intended that for each provision in the LSL General Order there would be a corresponding provision of the LSL Act, as:
- (a) section 65(1) requires that after commencement of the 2006 amendments that rights, entitlements and obligations that had arisen under an industrial instrument (by the LSL General Order) before commencement, arise under the LSL Act; and
 - (b) section 65(2) requires that after commencement of the 2006 amendments a provision in the LSL General Order is to be read as corresponding provision of the LSL Act; and
 - (c) section 65(4) provides a corresponding provision as a provision that deals substantially with the same matter.
- 93 This intention is reflected in and confirmed in cl 271 of the explanatory memorandum of the 2006 amendments which stated that the LSL Act and the LSL General Order do not differ substantially in the entitlements that they offer. Insofar as this statement relates to employees who prior to the commencement of the 2006 amendments had been employed by a company and had for a period of time prior to the commencement been continuously employed by a related body corporate it cannot be said that the difference in entitlements in the LSL Act and the LSL General Order did not differ substantially.

- 94 Further, it was, as the learned Industrial Magistrate correctly found, Parliament's stated intention in making consequential amendments to the LSL Act to prevent disadvantage to those employees previously covered by the LSL General Order (cl 218(e) of the explanatory memorandum to the 2006 amendments). When regard is had to all of the improvements made to the entitlements to long service leave by the 2006 amendments and to the history of the coverage of the LSL General Order, it appears that in 2006 Parliament overlooked the fact that there was no provision in the LSL Act that provided for employment with a related body corporate to be deemed as continuous employment with the employer to whom it was related. Consequently, as the 2006 amendments did not enact any amendment which dealt with this matter there was and there is no provision in the LSL Act which can be characterised as a provision which deals with this matter. In other words, there is no corresponding provision.
- 95 There are three pre-conditions that must be satisfied before words can be read into legislation to give effect to its purpose or object to avoid an irrational, absurd or capricious result. The conditions were identified by Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74; and reformulated in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592; [2000] 2 All ER 109, 115 (Lord Nicholls of Birkenhead); applied by the High Court in *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 [22] - [24] (French CJ, Crennan and Bell JJ). These are the court must:
- (a) be able to identify the precise purpose of the provision (that is the mischief that Parliament intended to deal with);
 - (b) be satisfied that by inadvertence Parliament has overlooked an eventuality that must be dealt with if the provision is to achieve its purpose; and
 - (c) identify the words that the legislature would have included in the provision had the deficiency been detected before its enactment. In particular, the court must be abundantly sure of the words Parliament would have used: *The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd [No 2]* [2014] WASC 345 [144] (Edelman J).
- 96 To these three conditions, the High Court in *Taylor* approved a fourth condition. That is, the modification must be consistent with the wording otherwise adopted by the draftsman [25] - [26].
- 97 In *The Commissioner for Corrective Services v RAJ* [2014] WASC 338 (approved by Edelman J in *Brockman Iron Pty Ltd [No 2]* [145]) Beech J explained these conditions are guidelines. At [43] - [46] Beech J in *RAJ* said:
- Satisfaction of these three conditions is not, in itself, sufficient to sustain reading additional words into a provision. The task remains one of construction of the words the legislature has enacted. Any modified meaning must be consistent with the language in fact used by the legislature (*Taylor* [39]). If the legislature 'uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured or unrealistic manner to cover another set of circumstances' (*Newcastle City Council* (113); *Taylor* [39]).
- Even when Lord Diplock's three conditions are met, 'the court may be inhibited from interpreting a provision in accordance with what it is satisfied with the underlying intention of Parliament: the alteration of the language of the provision may be too far-reaching' (*Taylor* [40]).
- This suggests that, in the end, the three conditions may be in the nature of guidelines to be considered in the process of statutory construction in accordance with conventional construction techniques, giving appropriate weight to text, context, object and consequences.
- Statutory texts enacted by the same legislature are to be construed so far as possible to operate in harmony and not in conflict (*Commissioner of Police v Eaton* [2013] HCA 2 [98]).
- 98 That whether words should be read into legislation involves a judgment of matters of degree was made clear by French CJ, Crennan and Bell JJ in *Taylor* when their Honours stated [38]:
- The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision (*Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630 per Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ; *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 at 651-652 [9] per French CJ and Bell J). It is answered against a construction that fills 'gaps disclosed in legislation' (*Marshall v Watson* (1972) 124 CLR 640 at 649 per Stephen J) or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature' (*Western Bank Ltd v Schindler* [1977] Ch 1 at 18 per Scarman LJ, cited by Lord Nicholls of Birkenhead in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115).
- 99 Their Honours also said in *Taylor* [40]:
- Lord Diplock's speech in *Wentworth Securities* laid emphasis on the task as construction and not judicial legislation (*Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-106). In *Inco Europe* Lord Nicholls of Birkenhead observed that even when Lord Diplock's conditions are met, the court may be inhibited from interpreting a provision in accordance with what it is satisfied with the underlying intention of Parliament: the alteration to the language of the provision in such a case may be 'too far-reaching' (*Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115). In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the *Constitution* (*Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [102] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28] per French CJ, Gummow, Crennan, Kiefel and Bell JJ).
- 100 For example, where a provision that requires something to be done but no time to do so is specified, the words 'within a reasonable time' could be read in: Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (8th ed, 2014) [2.32] and cases cited therein.
- 101 In this matter, whilst the first two conditions identified by Lord Diplock can be said to be satisfied, I am not satisfied the third condition can be met as whilst it is not necessary to be aware of the exact words that would be used, I am not satisfied there is sufficient certainty of the words or the extent of creation of a deeming provision Parliament would have used to fill the gap. Further, even if the third condition could be said to have been met or can be disregarded as a mere guideline, the words used by the learned Industrial Magistrate to fill the gap are too far-reaching. The effect of the learned Industrial Magistrate's decision was to add the words that employment with related bodies corporate as defined in s 50 of the *Corporations Act* is to be deemed continuous employment within the meaning of employment with one and the same employer in s 8(1) of the LSL Act.
- 102 Clause 2(4) and cl 2(6)(b) of the LSL General Order (set out in full in [53] - [54] of these reasons) were far more comprehensive in their terms. The terms of s 6 of the *Companies Act* set out in cl 2(4) of the LSL General Order not only referred to the State *Companies Act* (now repealed) it defined subsidiary of another corporation a holding company and specified the circumstances constituting the control by another corporation.
- 103 Whilst the text of s 65 of the *Labour Relations Legislation Amendment Act* makes it clear that corresponding provisions in the LSL Act were not to be identical but merely to deal substantially with the same manner, with respect it is difficult to contemplate the specific language a draftsman would have used to deem employment with related bodies corporate, employment with the same employer.

104 Section 50 of the *Corporations Act* provides:

Where a body corporate is:

- (a) a holding company of another body corporate; or
 - (b) a subsidiary of another body corporate; or
 - (c) a subsidiary of a holding company of another body corporate;
- the first-mentioned body and the other body are related to each other.

105 The provision is substantially the same as s 6(5) of the repealed *Companies Act*. However, by reading in the reference to s 50 of the *Corporations Act*, the learned Industrial Magistrate does not make clear whether the following provisions in the *Corporations Act* would apply when determining whether a corporate body is related to another:

- (a) the definition of holding company in s 9 of the *Corporations Act*;
- (b) section 46 of the *Corporations Act*;
- (c) what circumstances will constitute 'control' of another body corporate within the meaning of s 46 of the *Corporations Act* (s 47 of the *Corporations Act*); and
- (d) matters to be disregarded when determining whether a body corporate is a subsidiary of another body corporate (s 48 of the *Corporations Act*).

106 Whether a draftsman would include references to these provisions is not clear. A draftsman may do so or they may wish to simply refer to a related body corporate of a corporation as defined in the *Corporations Act*.

107 By implying the words the learned Industrial Magistrate did would have the effect of making an extensive and unacceptable amendment to the LSL Act. Such an amendment in my opinion is not permissible. Leaving aside the effect on employees whose employment was covered by the LSL General Order prior to the 2006 amendments, to do so would be a far-reaching change which would create new rights and obligations which in my opinion would usurp the role of Parliament.

108 As counsel for the appellant pointed out in his oral submissions at the hearing of the appeal, the learned Industrial Magistrate's construction ultimately ends too far away from the text to be said to be a construction which has begun and ended with the text (ts appeal 17).

Does the LSL Act exclude the doctrine of piercing the corporate veil?

109 At the hearing of the appeal on 7 June 2016, the Full Bench put the question whether the LSL Act leaves open a factual analysis of whether by application of the doctrine of piercing the corporate veil there is no separate legal entity between related bodies corporate.

110 The appellant in its supplementary submissions poses the question whether s 8(1) of the LSL Act require the lifting or piercing of the corporate veil when determining who is the employer of an employee.

111 With respect to the comprehensive and thoughtful submissions set out in the supplementary submissions of the appellant, the determination of this issue requires analysis in a different way. Legislation is presumed not to alter common law doctrines unless the presumption is displaced by implication: *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, 437; applying *Bropho v Western Australia* (1990) 171 CLR 1, 18, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

112 As the appellant properly points out at law a company is a separate legal entity separate from the legal persons who become associated for its formation or who are its members: Austin RP and Ramsay IM, *Ford's Principles of Corporations Law* (15th ed, 2013) [4.140]. A parent company is also a separate legal entity from its subsidiaries: *Industrial Equity Ltd v Blackburn* [1977] HCA 59; (1977) 137 CLR 567.

113 However, it is open for courts in particular circumstances to look behind the corporate veil and find that in fact the actions of one company is in fact the actions of another by application of the common law doctrine of piercing or lifting the corporate veil.

114 Justice Young in *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254, 264 explained that lifting the corporate veil as:

[W]henver each individual company is formed a separate legal personality is created courts will on occasions look behind the legal personality to the real controllers. As John H Farrar says in his *Company Law*, Butterworths London (1985) at 57:

'... It is difficult to rationalise the cases except under the broad, rather question-begging heading of policy and by describing the main legal categories under which they fall. These are (1) agency; (2) fraud; (3) group enterprises; (4) trusts; (5) enemy; (6) tax; (7) the Companies Act itself.'

115 In *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462, Lord Denning MR set out the grounds for lifting the corporate veil. At (467) he said:

A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law (*Principles of Modern Company Law* (3rd Edn, 1969), p 216) says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdworth & Co (Wakefield) Ltd v Caddies* ([1955] 1 All ER 725; [1955] 1 All ER 352). So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly.

116 In *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267; Jenkinson J (Woodward and Foster JJ agreeing) set out this passage of Lord Denning MR in *DHN Food Distributors Ltd* and then went on to observe at (272):

In *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 11 ACLR 108 a submission was advanced that a contractual promise by a subsidiary company should be treated, for the purposes of a claim by the promisee that there had been breach of that contractual term, as a promise also by the parent company. One ground of submission was the reasoning of Lord Denning MR in the *DHN* case, supra, which I have quoted. Young J observed that the separate legal personality of a company is to be disregarded only if the court can see that there is, in fact or in law, a partnership between companies in a group, or that there is a mere sham or facade in which that company is playing a role, or that the creation or use of the company was designed to enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated: 11 ACLR at 119-20.

- 117 Perhaps of particular relevance in this matter, courts have lifted or pierced the corporate veil in circumstances where a subsidiary has been found to be a mere manifestation of the parent company or an agent of the parent company where the parent company has such a degree of control over its subsidiary, the acts of the subsidiary have been found to be acts of the parent company: *Smith, Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116; *DHN Food Distributors Ltd; Burswood Catering & Entertainment Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch* [2002] WASCA 354; (2002) 83 WAIG 201. Consequently, an employee could be found to be an employee of a former employer on grounds that when a contract of employment was entered into by a second company the second company did so as an agent of a former employer: see *Damevski v Guidice* [2003] FCAFC 252; (2003) 133 FCR 438; (2003) 129 IR 53. Whether such a relationship of agency can be found to exist turns upon the facts of each particular case.
- 118 In any event, the fact that a parent company exercises control over its subsidiary does not of itself justify treating acts of the subsidiary as being those of the parent company: *Heytesbury Holdings Pty Ltd v City of Subiaco* (1998) 19 WAR 440, 451 (Steytler J). There may be a good commercial purpose for having a separate subsidiary performing different functions even if it is controlled by the parent company: *Yelnah Pty Ltd* (267) (Young J), *Heytesbury Holdings Pty Ltd* (451) (Steytler J); *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron* [2005] SASC 204; (2005) 91 SASR 570.
- 119 In this matter, there is nothing in the text of the LSL Act construed within its context and purpose upon which it could be found an intention to override the common law doctrine which in an appropriate case on the facts could allow the learned Industrial Magistrate to lift or pierce the corporate veil and find that a corporate body is in fact the employer of an employee, despite the fact that another company claims to be the employer of the employee.
- 120 The agreed facts before the learned Industrial Magistrate are insufficient for any determination of whether it would be appropriate to embark upon a hearing to consider on the facts whether the veil between the appellant and its related body corporate, Baker Hughes Incorporated, or any other related body corporate, be lifted or pierced. If this is not a matter that the respondent says could be raised on the facts it alleges, it would necessarily follow that the application before the learned Industrial Magistrate in M 117 of 2015 be dismissed.

Conclusion - Grounds of appeal

121 For these reasons, I am of the opinion that the following grounds of appeal have been made out:

- (a) ground 1;
- (b) ground 2(a);
- (c) ground 3, insofar as the learned Industrial Magistrate found that the meaning of the expression 'one and the same employer' is obscure, but not otherwise;
- (d) ground 4(b), insofar as the learned Industrial Magistrate took into account statements in the extrinsic material that did not correctly state the law;
- (e) ground 5; and
- (f) ground 6.

122 Consequently, I am of the opinion that orders should be made to:

- (a) uphold the appeal; and
- (b) remit the matter to the learned Industrial Magistrate for further hearing and determination according to law.

SCOTT CC:

123 I have had the benefit of reading the draft reasons for decision of the Acting President. I agree and have nothing to add.

MATTHEWS C:

124 The learned Magistrate was asked by the parties to answer the following question as a 'preliminary' question in the matter before him:

Is the [respondent's] prior employment with related bodies corporate (as that term is defined in section 50 of the *Corporations Act 2001* (Cth)) of the [appellant], and his subsequent employment with the [appellant], 'continuous employment with one and the same employer' for the purposes of calculating long service leave entitlements under section 8(1) of the *Long Service Leave Act 1958* (WA)?

125 In my respectful view his Honour should have declined the request.

126 In my respectful view his Honour should have heard all of the evidence and then decided whether the claimant's various employers were, in fact, 'one and the same employer' as that term is used in s 8(1).

127 It may have appeared to make sense to ask, and answer, the question as a preliminary question against the following background.

128 The claimant had stated, at [5] of the document attached to his Originating Claim and described as a 'Statement of Claim' (appearing at (7) of the Appeal Book) that:

At all material times the claimant was employed by Baker Hughes Incorporated (Baker Hughes) or its related body corporates (as that term is defined in s.50 of the *Corporations Act 2001* (Cth)), including but not limited to Baker Hughes Australia Pty Ltd (ABN 20 004 752 050) (BH Australia).

129 The respondent had stated, at [5] of the document attached to its Response and described as 'Defence of the Respondent' ((18) of the Appeal Book) that:

The Respondent admits the allegation made in paragraph 5 of the SofC.

130 Of course, those pleadings do not tell us much about the facts. The actual entities which employed the claimant are not pleaded. Nor are the relationships of those entities to each other, of the several different kinds referred to in s 50 of the *Corporations Act*, pleaded.

131 Nonetheless, it may have been the case that it was thought an answer to the preliminary question might be determinative of the claim or at least highly relevant to its determination.

132 With respect, I do not see the matter in that way.

133 Section 8(1) of the *Long Service Leave Act* provides that long service leave is payable in relation to continuous employment 'with one and the same employer'.

134 The obvious start point is that s 8(1) requires a court faced with a situation where a claimant has had several employers but the claimant says they were, as a matter of fact, 'one and the same employer' to determine whether, as a matter of fact, this is or is not the case.

135 The question raised by this appeal is whether that factual enquiry is answered if it is admitted that there was more than one employer but those employers were 'related' in one of the ways described in s 50 of the *Corporations Act*.

- 136 In my respectful view the factual enquiry required by s 8(1) cannot be avoided or assisted by deciding, as the preliminary question asked of his Honour, whether or not the corporate relationships described in s 50 of the *Corporations Act* are, in the abstract, descriptions of circumstances in which multiple entities are 'one and the same'.
- 137 In my respectful view the factual enquiry required by s 8(1) must be undertaken once the evidence is known and, in this case, there was not sufficient 'known' as a result of the pleadings to complete the enquiry.
- 138 The competing arguments, both before his Honour and the Full Bench, made the answering of the question superficially attractive.
- 139 Mr Sharpe for the appellant says that if the construction for which the appellant contends, that s 8(1) of the *Long Service Leave Act* cannot apply to multiple entities, then the respondent's claim must fail.
- 140 Mr Cox for the respondent says that if the construction for which the respondent contends, that s 8(1) can apply to employment with multiple entities where those entities are 'related' as per s 50 of the *Corporations Act*, then the respondent clears a significant hurdle.
- 141 When put in these terms answering the question seems to be a useful exercise.
- 142 However, when examined more closely, Mr Sharpe asks us to answer a question not raised by the preliminary question. To say that s 8(1) of the *Long Service Leave Act* does not allow consideration of employment by multiple entities is a much broader proposition than that employment by multiple entities having one of the relationships described in s 50 of the *Corporations Act* is not within s 8(1).
- 143 For instance, a claimant may wish to argue that they were employed by two entities which had the same directorship and shareholders or which had other features, not covered by s 50 of the *Corporations Act*, which made a factual finding that they were 'one and the same' open. I do not see why, by my decision on this matter, I should rule out such an argument being made in a later matter on the facts established in that matter.
- 144 Similarly, although the question being answered in the affirmative may assist the respondent, it being answered in the negative is really neither here nor there so far as the facts are concerned. While I may decide that the relationships described by s 50 of the *Corporations Act* do not, as a matter of course, mean that employment for entities so related is employment for 'one and the same' employer (and the reasons for decision of Acting President Smith in this matter with which Chief Commissioner Scott agrees decides this) this would not rule out evidence being led to establish, nonetheless, the entities in this case were one and the same for other reasons.
- 145 For instance, there may be some evidence relating to direction or control that could be relied upon to argue for a finding that the entities concerned in this matter were, in fact, one and the same even though the mere fact of them being 'related' in the sense used on s 50 of the *Corporations Act* is found to be insufficient to establish this.
- 146 In other words, I am of the view that the arguments need to be made after the evidence has been led so that the decision maker can arrive at a decision on the facts of the case before it, which is what, in my view, the factual enquiry invited by s 8(1) requires.
- 147 As the matter currently stands the effect of his Honour's decision, given it was made without the benefit of full evidence (and I have already said I do not consider the pleaded matters to amount to full evidence), has been to judicially amend the *Long Service Leave Act* to include words similar to those other State Parliaments have inserted into equivalent legislation relating to 'related' entities.
- 148 This outcome should have, with respect, been avoided by his Honour.
- 149 That the Western Australian Parliament has not inserted such words into the *Long Service Leave Act* cannot be ignored. The Western Australian Parliament considers that the test is whether the employee has been employed by 'one and the same employer' but has not gone further to provide that the factual enquiry invited by the subsection is not required in certain circumstances. I do not think the courts should effectively so provide.
- 150 For these reasons I would allow the appeal and suspend the decision of the learned Magistrate and remit the matter back to his Honour for further hearing and determination.

2016 WAIRC 00850

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	BAKER HUGHES AUSTRALIA PTY LTD (ABN 20 004 752 050)	APPELLANT
	-and-	
	MARTIN VENIER	RESPONDENT
CORAM	FULL BENCH	
	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
	CHIEF COMMISSIONER P E SCOTT	
	COMMISSIONER D J MATTHEWS	
DATE	FRIDAY, 28 OCTOBER 2016	
FILE NO.	FBA 2 OF 2016	
CITATION NO.	2016 WAIRC 00850	

Result	Appeal upheld - Order made
Appearances	
Appellant	Mr A K Sharpe (of counsel)
Respondent	Mr M Cox (of counsel) and with him Ms N Barsby (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 7 June 2016, and having received written submissions on 8 July 2016 and 12 August 2016 and having heard Mr A K Sharpe (of counsel) on behalf of the appellant and Mr M Cox (of counsel) and with him Ms N Barsby (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 26 October 2016, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is upheld.
2. The decision made by the Industrial Magistrate in matter M 117 of 2016 on 13 April 2016 [2016] WAIRC 00210; (2016) 96 WAIG 325 is remitted to the Industrial Magistrate's Court for further hearing and determination according to law.

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

[L.S.]

FULL BENCH—Unions—Declarations made under Section 71—

2016 WAIRC 00838

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH	APPLICANT
	-and- (NOT APPLICABLE)	
		RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL	
DATE	THURSDAY, 20 OCTOBER 2016	
FILE NO.	FBM 5 OF 2015	
CITATION NO.	2016 WAIRC 00838	

Result Application discontinued by leave

Order

WHEREAS on 20 November 2015, the applicant filed a notice of application to the Full Bench; and
WHEREAS on 5 October 2016, the applicant filed a notice of application for leave to discontinue this application; and
NOW THEREFORE, the Full Bench 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.

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

[L.S.]

NOTICES—Award/Agreement matters—

2016 WAIRC 00868

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 49 of 2016

APPLICATION FOR A NEW AGREEMENT TITLED

“SHIRE OF BRIDGETOWN-GREENBUSHES OUTSIDE WORKS STAFF ENTERPRISE BARGAINING AGREEMENT 2016”

NOTICE is given that an application has been made to the Commission by *the Western Australian Municipal, Road Boards, Parks and Racecourses Employees' Union of Workers, Perth*, 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.

2. – DEFINITIONS

...

2.1.1 “Award” means the Municipal Employees (Western Australia) Interim Award, 2011.

This agreement shall come into force from 1 July 2016 and shall remain in force until 30 June 2019.

...

3. – OPERATION OF AGREEMENT (INCIDENCE AND DURATION)

3.1 This agreement shall be binding upon the Shire of Bridgetown-Greenbushes, the Western Australian Municipal Road Boards, Parks and Racecourse Employees' Union of Workers, Perth including its officers and employees and those employees of the Shire who are eligible to be members of the Union.

3.2 This agreement shall come into force from 1 July 2016 and shall remain in force until 30 June 2019.

6. – RELATIONSHIP TO AWARD AND OTHER AGREEMENTS

6.1 This agreement shall be read and interpreted wholly in conjunction with the Award and where there is any inconsistency between this agreement and the Award, the agreement shall prevail to the extent of the inconsistency.

6.2 This Agreement replaces the Shire of Bridgetown-Greenbushes Outside Works Staff Australian Workplace Agreement 2013.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2016 WAIRC 00819

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2016 WAIRC 00819
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	WEDNESDAY, 24 AUGUST 2016
DELIVERED	:	WEDNESDAY, 12 OCTOBER 2016
FILE NO.	:	U 33 OF 2016, B 33 OF 2016
BETWEEN	:	NICOLAS BONIFASSI
		Applicant
		AND
		E.J FILLAUDEAU AND J.J MAINDOK TRADING AS FILLAUDEAU'S
		Respondent

CatchWords	:	Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Principles applied - Summary dismissal for alleged misconduct - Lack of warnings - Applicant harshly and unfairly dismissed - Compensation awarded - Contractual benefits claim - Claim for payment in lieu of notice and annual leave accrual - Applicant entitled to benefits claimed - Applications upheld - Declaration and order made
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Legislation	:	Industrial Relations Act 1979 (WA) s 23A, s 29(1)(b)(i), s 29(1)(b)(ii)
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Result	:	<i>Applications upheld</i>
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Representation:

Applicant	:	Mrs S Bonifassi (as agent)
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Respondent	:	Mr G McCorry (as agent)
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Case(s) referred to in reasons:

AWI Administration Services Pty Ltd v Birnie (2001) 81 WAIG 2849

BGC (Australia) Pty Ltd v Phippard [2002] WASCA 191

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

Blyth Chemicals Ltd v Bushnell [1933] HCA 8; (1933) 49 CLR 66
Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635
Bogunovich v Bayside Western Australia Pty Ltd (1999) 79 WAIG 8
Capewell v Cadbury Schweppes Australia Ltd (1997) 78 WAIG 299
Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893
Golding v PIHA Pty Ltd [2004] WAIRC 12971; (2004) 84 WAIG 3639
Hotcopper Australia Ltd v Saab [2001] WAIRC 03827; (2001) 81 WAIG 2704
Lynam v Lataga Pty Ltd [2001] WAIRC 02420; (2001) 81 WAIG 986
Margio v Fremantle Arts Centre Press (1990) 70 WAIG 2559
Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 136 IR 156
Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (1988) 68 WAIG 677
Re Loty and Holloway v Australian Workers' Union (1971) AR (NSW) 95
Sealanes (1985) Pty Ltd v Foley [2006] WAIRC 04110; (2006) 86 WAIG 1239
Shire of Esperance v Mouritz (1991) 71 WAIG 891
The Governing Council of Kimberley Training Institute v The State School Teachers' Union of WA (Inc) [2016] WAIRC 00104; (2016) 96 WAIG 241
The Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203
The Undercliffe Nursing Home v the Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Reasons for Decision

Background

- 1 Mr Bonifassi started full-time work as a waiter at the respondent's restaurant (**Fillaudeau's**) on 20 August 2015. About three months later he signed an employment contract with Fillaudeau's, which stated that he was employed as a Bar Manager (**employment contract**) (Exhibit A1). He was dismissed on 1 February 2016.
- 2 On 26 February 2016, Mr Bonifassi referred applications to the Commission claiming that his dismissal was unfair and that he had been denied contractual benefits. Fillaudeau's denies that the dismissal was unfair and that it owes any benefits to Mr Bonifassi.
- 3 Mr Bonifassi says his dismissal was unfair because he was given no reasons for dismissal, no warnings and no notice. Fillaudeau's says that it dismissed Mr Bonifassi because of a series of events culminating in Mr Bonifassi's summary dismissal for serious misconduct.
- 4 Mr Bonifassi seeks 2 months' compensation, one month in lieu of notice and 11.4 hours of annual leave.
- 5 During the hearing, Mr Bonifassi gave evidence, called Mr Pierre Corbion as a witness and tendered 12 documents. Mr Corbion is Fillaudeau's Events Manager. Fillaudeau's called Mr Fillaudeau and Ms Maindok as witnesses and tendered two documents.
- 6 Mr Bonifassi was represented by his wife. Fillaudeau's was represented by an industrial agent.

Questions to be decided

- 7 I must decide whether or not Fillaudeau's:
 - a. unfairly dismissed Mr Bonifassi; and
 - b. denied contractual benefits to Mr Bonifassi.
- 8 I turn to the question of unfair dismissal first.

The law – unfair dismissal

- 9 The test in a claim of harsh, oppressive or unfair dismissal is whether the employer has exercised its legal right to dismiss so harshly or oppressively against the employee as to amount to an abuse of that right: *The Undercliffe Nursing Home v the Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385, 386 (Brinsden J). It involves considering whether the employee got 'a fair go all round': *Re Loty and Holloway v Australian Workers' Union* (1971) AR (NSW) 95, 99 (Sheldon J). The test is objective and the onus of proof is on the employee.
- 10 A failure to have a fair process can lead to a finding that the dismissal was harsh, oppressive or unfair: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 but a lack of procedural fairness may not always have this result: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891, 899 (Nicholson J). In *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36; (2003) 83 WAIG 893 EM Heenan J notes that the distinction between substantive and procedural issues can be useful but the 'decision for the Commission, or a court in any particular case, is simply whether the individual termination of employment was harsh, oppressive or unfair and that test must always be applied without any gloss' [72].

- 11 The Full Bench in *Margio v Fremantle Arts Centre Press* (1990) 70 WAIG 2559 held that '[a]n employee should, so far as is practicable, not be dismissed without warning as to the possibility of dismissal' (2561).
- 12 Where misconduct is alleged, there is a burden on the employer to demonstrate that the alleged incident occurred and also to evaluate any mitigating circumstances: *Garbett* [72]. How the employer satisfies this burden depends on the test that is applied. The Full Bench observed in *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677, 679 that the employer must show on balance that the misconduct occurred. The Industrial Commission of South Australia observed in *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 that it is enough if the employer demonstrates that, before dismissing the employee, it conducted a full and extensive investigation, it gave the employee every reasonable opportunity and sufficient time to answer all allegations, and that, having done those things, the employer honestly and genuinely believed, and had reasonable grounds for believing, that the employee was guilty of the misconduct alleged. In *The Minister for Health v Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203 the Full Bench observed that the *Bi-Lo* test is applied 'where the misconduct alleged is theft, other acts of dishonesty or matters where the gravity of an offence is such that damage can be done to an employer's business' [56].
- 13 To be misconduct, the employee's conduct must be incompatible with the fulfilment of his duty, or involve a conflict between the employee's interest and his duty to his employer, or impede the faithful performance of the employee's obligation, or be destructive of the necessary confidence between employer and employee: *The Governing Council of Kimberley Training Institute v The State School Teachers' Union of WA (Inc)* [2016] WAIRC 00104; (2016) 96 WAIG 241 [97], referring to Dixon & McTiernan JJ in *Blyth Chemicals Ltd v Bushnell* [1933] HCA 8; (1933) 49 CLR 66, 81-82.

Evidence – credibility

- 14 To the extent that the evidence conflicts, I generally prefer Mr Bonifassi's evidence to that of Mr Fillaudeau and Ms Maindok. This is because Mr Fillaudeau's and Ms Maindok's evidence was frequently inconsistent, either with their own testimony during examination-in-chief or cross-examination or with Fillaudeau's letter of termination. Mr Bonifassi's testimony was consistent. It was also supported by his documents and Mr Corbion's evidence in a number of important respects.

Termination letter

- 15 Fillaudeau's sent Mr Bonifassi a letter dated 1 February 2016 (**termination letter**) (Exhibit A5), referring to a long list of issues it says were discussed at a meeting on that day, namely Mr Bonifassi's:
 - a. 'theft' of the American Express (**Amex**) surcharge;
 - b. 'theft' of a Gladwrap roll;
 - c. personal hygiene;
 - d. cleanliness of workspace;
 - e. refusal to work as required under his contract, such as carrying out food and drinks;
 - f. lateness;
 - g. attitude towards Fillaudeau's owners;
 - h. damage to Fillaudeau's plants and equipment;
 - i. requests for time off work;
 - j. behaviour towards female staff and guests; and
 - k. service of 40 ml rather than 30 ml of alcohol to a customer (also referred to as 'theft').
- 16 The termination letter describes incidents which occurred between November 2015 to January 2016 and states that Mr Bonifassi was summarily dismissed for serious misconduct. It is not clear from the letter which of the incidents is the serious misconduct for which Mr Bonifassi was summarily dismissed, though I understand from Fillaudeau's submissions that the Amex surcharge incident was the main basis for his dismissal.
- 17 Mr Fillaudeau gave evidence that he did not give Mr Bonifassi an official warning about the behaviour outlined in the termination letter because Mr Bonifassi did not want to work at Fillaudeau's anymore. He said Mr Bonifassi had told him 'two weeks prior' that Mr Bonifassi was going to quit. This was not put to Mr Bonifassi in cross-examination.
- 18 Mr Fillaudeau gave evidence that Mr Mr Bonifassi wasn't given any written warnings before 31 January 2016 because Fillaudeau's thought that Mr Bonifassi was 'just...having a bad week', that it was 'the wrong timing' and that 'he [sic] will...not occur again'.
- 19 In cross-examination, Mr Fillaudeau said that Fillaudeau's dismissed Mr Bonifassi without any notice because Mr Bonifassi refused to carry out food and drinks to tables. He then clarified that Mr Bonifassi was dismissed for an extensive list of problems that arose in the two weeks before dismissal.
- 20 In its submissions, Fillaudeau's says that its reasonable belief that Mr Bonifassi and Mr Corbion had 'conspired to waive the Amex surcharge' justified Mr Bonifassi's summary dismissal. It says that there are ample grounds to justify Mr Bonifassi's dismissal.

Dates in the termination letter

- 21 The termination letter mentions incidents that happened on Tuesday 1 December 2015 and Wednesday 27 January 2016.

- 22 Mr Bonifassi gave evidence that he did not work on those dates because the restaurant was closed on Monday evenings, Tuesdays and Wednesdays. Mr Corbion gave evidence that the restaurant was closed on Tuesdays and Wednesdays.
- 23 Mr Fillaudeau conceded that these dates in the termination letter may be wrong, because he could not find his diary when he wrote the termination letter. He said he was sure that the events described as occurring on 1 December 2015 in the termination letter occurred on a Monday. He agreed that Mr Bonifassi was not at work on 27 January 2016.
- 24 I find that the reference to 1 December 2015 and 27 January 2016 in the termination letter likely means 30 November 2015 and 28 January 2016, respectively.

Reason for dismissal – lateness

- 25 The termination letter mentions Mr Bonifassi's 'lateness at work on a regular basis' and states that on 1 December 2015 Mr Bonifassi 'took a cigarette break without permission' and on 27 January 2016 Mr Bonifassi 'show[ed] up late to work again without an excuse or apologies'.

Mr Bonifassi's case

- 26 Mr Bonifassi gave evidence that he was not late to work. He said that there was no clock in, clock out system or roster at Fillaudeau's. He started work at 10:30 am, took a break at 3 pm and was back at work at 5:30 pm until the business closed.
- 27 Mr Corbion's evidence was that he never gave Mr Bonifassi a roster.

Fillaudeau's case

- 28 Mr Fillaudeau gave evidence that after Mr Bonifassi signed his employment contract with Fillaudeau's, Mr Bonifassi started showing up late to work. He clarified that what he meant was that Mr Bonifassi would arrive on time but would then go to the toilet for half an hour or go out for a cigarette. He said he spoke to Mr Bonifassi about this.

Consideration

- 29 Mr Bonifassi's lateness was not put to him in cross-examination.
- 30 I make no finding that Mr Bonifassi was late to work on a regular basis.
- 31 Even if Mr Bonifassi had been, I do not find Fillaudeau's warned him about lateness. Further, in the circumstances, I do not consider it to be a valid reason to dismiss Mr Bonifassi.

Reason for dismissal – leave

- 32 The termination letter mentions that Mr Bonifassi twice asked for time off work. On 27 November 2015 Mr Bonifassi asked for 4 December 2015 off work 'to spend it with [his] wife and kids', which was refused. The letter states that on 4 December 2015, Mr Bonifassi called in sick because he had gastritis, but that Mr Bonifassi returned to work on 5 December 2015, did not provide a medical certificate and was 'not sick like someone with gastritis'. On 28 January 2016, Mr Bonifassi took the morning off work 'to look after [his] kid'.

Mr Bonifassi's case

- 33 Mr Bonifassi said that 'three weeks before' 4 December 2015, he verbally requested 4 December 2015 off work because his wife and children were returning from France. Fillaudeau's did not approve his leave. On 4 December 2015, he was sick with gastritis. At 4:30 am Mr Bonifassi sent a text message to Mr Fillaudeau letting Fillaudeau's know that he was not coming to work. Mr Bonifassi said he was not asked for, and did not provide, a medical certificate.
- 34 Mr Bonifassi gave evidence that in the morning on 28 January 2016 he called Fillaudeau's to let the restaurant know he needed to take the morning off work to look after his unwell child. He went into work on that day at about 5:30 pm.

Fillaudeau's case

- 35 Mr Fillaudeau said that on 4 December 2015, when Mr Bonifassi texted at 4:30 am to say that he had gastritis, Mr Fillaudeau knew that Mr Bonifassi was picking up his wife and children from the airport. He said that Mr Bonifassi knew it was the restaurant's busiest day of the year, and that is why Mr Fillaudeau refused Mr Bonifassi's leave request.
- 36 Mr Fillaudeau said that he expected that a person with hospitality experience would have provided a medical certificate after an illness such as gastritis to confirm that he or she was not sick anymore and could serve food and drinks.
- 37 Mr Fillaudeau conceded he did not ask Mr Bonifassi for a medical certificate on either 4 December 2015 or 28 January 2016 when Mr Bonifassi asked for personal leave.

Consideration

- 38 I do not think Fillaudeau's could reasonably conclude that Mr Bonifassi was not unwell on 4 December 2015. Taking a day of personal leave, in the circumstances, would not give rise to a reason to dismiss Mr Bonifassi.
- 39 Fillaudeau's cannot reasonably rely on Mr Bonifassi's failure to provide a medical certificate on these two occasions as a valid reason for dismissal, particularly in circumstances where Mr Fillaudeau did not ask Mr Bonifassi for a medical certificate on either occasion.
- 40 Mr Bonifassi's evidence, supported by a translated series of text messages between him and Mr Fillaudeau, in which part of Mr Fillaudeau's message is translated as 'we give holidays by the week so [Mr Bonifassi] has to take the week' (**translated text messages dated 21 December 2015**) (Exhibit A9), and not disputed in cross-examination by Fillaudeau's, leads me to find that Fillaudeau's had an unreasonable approach in relation to the taking of leave generally.

Reason for dismissal – personal hygiene and cleanliness of workspace

- 41 The termination letter mentions Mr Bonifassi's 'underperforming standard of hygiene and cleaning of [Mr Bonifassi's] work space' and 'lack of personal hygiene (cigarette smell)'. The letter states that on 1 December 2015, Mr Bonifassi was asked 'to take a mint after smoking' and on 27 January 2016 Mr Bonifassi's 'hygiene standard' was 'not as standard' and that he was asked 'to do something about the cigarette smell as well'.
- 42 The letter states that:
- a. on 1 December 2015 Mr Bonifassi was asked 'to maintain the hygiene standard at [his] post (the bar), which was very dirty, sticky and smelly';
 - b. on 27 January 2016 Mr Bonifassi left the restaurant and the bar 'without cleaning' and with 'broken glass everywhere behind the bar';
 - c. on 28 January 2016 the owners, Ms Maindok and Mr Fillaudeau, cleaned Mr Bonifassi's workspace, the bar, and 'found numerous mouse dropping[s], dirt and broken glasses'; and
 - d. on 31 January 2016, at closing time, Mr Bonifassi did not clean the bar, did not vacuum the floor and left broken glasses.

Mr Bonifassi's case

- 43 Mr Bonifassi says that he took mints or coffee beans to hide the smell of having smoked cigarettes. He says that he also used hand sanitiser.
- 44 Mr Bonifassi gave evidence that he cleaned the bar after his shift on Monday (25 January 2016) but because he did not return to work until the evening of Thursday 28 January 2016, he did not know what was discovered that morning.
- 45 On 31 January 2016 Mr Bonifassi was left alone at the restaurant in the evening, with no customers. He cleaned the coffee station, the bar area and the bench and left. He didn't vacuum the floor because a casual employee cleaned the floor earlier that evening.
- 46 Mr Corbion's evidence was that Mr Bonifassi's work space was the same as everyone else's and it was no cleaner or dirtier.

Fillaudeau's case

- 47 Mr Fillaudeau gave evidence that Mr Bonifassi would smell of cigarettes after he smoked and that Mr Bonifassi was asked to take mints or something to hide the smell of cigarettes.
- 48 Ms Maindok gave evidence that on about 28 January 2016, she cleaned the fridges and discovered mouse droppings behind wine bottles which looked like they had been there for a while. Mr Fillaudeau said that the restaurant had not had mouse droppings behind the bar in years.
- 49 Mr Fillaudeau said after Mr Bonifassi's shift on 28 January 2016, Mr Bonifassi did not clean the bar.
- 50 Mr Fillaudeau said Mr Bonifassi was left alone at the restaurant on Sunday 31 January 2016 to clean the bar and close the restaurant, because there were no customers. He said when he returned on Monday 1 February 2016, there were mouse droppings, broken glasses and stickiness behind the bar underneath the fridge.
- 51 Mr Fillaudeau said that the cleaning the area behind the bar and behind the coffee machine was Mr Bonifassi's job. Ms Maindok said that Mr Bonifassi, as the bar person, is responsible for state of the bar area.
- 52 Mr Fillaudeau said that Mr Bonifassi would only wipe down the benches, rather than clean the bar properly. Ms Maindok said every week, the bar should be cleaned with soap and water, and every evening the floors should be mopped and vacuumed. She said that because Mr Bonifassi was not cleaning the bar area, she would usually clean it herself and Mr Corbion would sometimes clean it. She said that while she was on maternity leave, Mr Corbion may not have checked whether Mr Bonifassi was cleaning the bar properly. She said she issued a verbal warning about the cleanliness of the bar when she returned from leave, though she did not say who she spoke to about the issue.

Consideration

- 53 I accept that Fillaudeau's asked Mr Bonifassi to hide the smell of having smoked cigarettes, and that Mr Bonifassi used mints, coffee beans and hand sanitiser to do so.
- 54 Mr Bonifassi was not cross-examined about his personal hygiene during work or the cleanliness of his workspace.
- 55 Given the evidence and lack of opportunity during cross-examination for Mr Bonifassi to respond to Fillaudeau's position that his workspace was unclean, I do not find that Mr Bonifassi's workspace was unclean. In any event, even if it had been, Fillaudeau's did not raise the issue with him and give him a chance to improve.
- 56 In the circumstances, Mr Bonifassi's personal hygiene and the condition of his workspace were not valid reasons to dismiss him.

Reason for dismissal – glad wrap

- 57 The termination letter refers to Mr Bonifassi's 'theft of gladwrap roll from [Fillaudeau's] kitchen' and states that on 20 December 2015 Mr Bonifassi stole a glad wrap roll and used it to wrap the chef's car.

Mr Bonifassi's case

- 58 Mr Bonifassi says that he glad wrapped the chef's car as a prank, because the chef had earlier put oil on the front window and door handle of Mr Bonifassi's car. He returned the leftover glad wrap to Fillaudeau's kitchen.
- 59 Mr Fillaudeau told him that Mr Fillaudeau had seen him do this on the security camera footage.

Fillaudeau's case

- 60 Mr Fillaudeau said that he discovered that Mr Bonifassi took the glad wrap from Fillaudeau's via a Facebook photo, which showed Mr Bonifassi carrying the glad wrap roll.
- 61 During the hearing, Fillaudeau's did not question Mr Bonifassi about the glad wrap incident and Fillaudeau's agent said Fillaudeau's was not relying on it.

Consideration

- 62 In my view, it was quite unreasonable for Fillaudeau's to characterise this incident as theft in its termination letter.
- 63 I find the use of glad wrap was a prank, a trivial matter and not a valid reason to dismiss Mr Bonifassi.

Reason for dismissal – behaviour to female staff and customers

- 64 The termination letter states that on 21 January 2016 Mr Bonifassi was told by the owner that he should 'watch [his] language and manners towards the female staff and guests' and was warned that the owners 'would not be able to carry on [his] contract with such attitude'.

Mr Bonifassi's case

- 65 Mr Bonifassi gave evidence that he had never been rude to the female staff and that he had never had a problem with the staff, so he did not know what the incident in the termination letter referred to.
- 66 In cross-examination, Mr Bonifassi denied that he had looked female customers up and down in an appreciative manner, or that he made any comments about them.
- 67 He said he had never been warned or told about any complaints in relation to this issue.

Fillaudeau's case

- 68 Ms Maindok gave evidence that on 21 January 2016 she saw Mr Bonifassi 'ogling' female customers as they walked into the restaurant and heard him make appreciative comments about them. She said she was called over by the female customer and was asked to not let Mr Bonifassi go to that table because the customer felt uncomfortable.
- 69 Ms Maindok asked Mr Bonifassi to 'keep it a bit more toned down', to which he replied 'oh, come on darling, don't be jealous' and walked away from her. Ms Maindok said because of the constant confrontation with Mr Bonifassi, she avoided the issue and continued working.
- 70 She said she did not warn to Mr Bonifassi about his behaviour, because they had previously been friends. She said she should have given him a warning.
- 71 In cross-examination, Ms Maindok said that she gave Mr Bonifassi a verbal warning, but not a written warning. She said she has never given Mr Bonifassi a written warning.

Consideration

- 72 I accept that Ms Maindok did not give Mr Bonifassi a written warning about his behaviour to female staff and customers. Her evidence of what she said to Mr Bonifassi would not amount to a verbal warning. It was also inconsistent with the termination letter.
- 73 Even if Ms Maindok gave Mr Bonifassi a verbal warning, I do not consider it likely the warning was to the effect that Mr Bonifassi's employment contract might be terminated if the behaviour continued, as stated in the termination letter.
- 74 The inconsistency between Ms Maindok's evidence on this issue and the termination letter leads me to make no finding about whether the conduct occurred. In any event, in the circumstances I do not consider that it would amount to a valid reason to dismiss Mr Bonifassi.

Reason for dismissal – attitude at work and refusal to carry out food and drinks

- 75 The termination letter refers to Mr Bonifassi's refusal to 'do what is asked to fulfil your contract', namely to carry out drinks and food to customers. It also mentions his 'lack of good attitude (smiling while at work, a basic requirement for [a] hospitality worker)'.

Mr Bonifassi's case

- 76 Mr Bonifassi tendered references from Bar Lafayette and Valentino's Café (Exhibit A6). The references commend Mr Bonifassi's 'strong communication and interpersonal skills' and notes his ability to deal with customers 'with a smile and cheerful demeanour'.
- 77 Mr Bonifassi gave evidence that he would smile at the front of the restaurant, but that he would not smile in the kitchen because he wasn't allowed to talk in the kitchen.
- 78 In cross-examination, Mr Bonifassi said that he did not refuse to carry out food and drinks, saying 'what the point [sic] to go in my black shirt, black pants with my...resign letter for notice and leaving'.
- 79 Mr Corbion gave evidence that Mr Bonifassi refused to fill up the water bottle for the kitchen 'a few times', but that 'bar-wise' he was a great worker. Mr Corbion said Mr Bonifassi had good communication with customers.

Fillaudeau's case

- 80 Mr Fillaudeau gave evidence that Mr Bonifassi was initially employed for three months as a waiter. He said there were no complaints about Mr Bonifassi in the first three months. After Mr Bonifassi signed his contract, he started showing up late to work, refused to carry out drinks and there were issues with mouse droppings and a sticky bar.
- 81 Mr Fillaudeau said that Mr Bonifassi was not willing to work out his notice period, because he refused to carry plates and drinks.
- 82 Ms Maindok gave evidence that Mr Bonifassi wouldn't take instructions from her and she had difficulty communicating with him. She would talk to him about his work ethic, but he would ignore her. She said 'I can just tell [Mr Bonifassi] nothing, pretty much. I'm – I don't have the experience or the expertise to, um, be able to give any advice or instructions to Nicholas Bonifassi'.
- 83 Ms Maindok said she expected staff to smile when they were in front of customers, but not otherwise.

Consideration

- 84 I accept that Ms Maindok found it difficult to communicate with Mr Bonifassi. However, as his employer, it is unreasonable for her to shy away from giving him a warning, to not give him a chance to respond or improve and then to dismiss him.
- 85 Given the evidence and lack of opportunity during cross-examination for Mr Bonifassi to respond to Fillaudeau's position that he lacked a 'good attitude', I do not find that Mr Bonifassi had a poor attitude at work.
- 86 I find that Mr Bonifassi did not refuse to carry out food and drinks to customers. I understood Mr Bonifassi's evidence during cross-examination to be that if he refused to carry out food and drinks, he would not have gone to the restaurant on 4 February 2016 in a black shirt and black pants with his resignation letter, giving Fillaudeau's one month's notice and stating that he would work out his notice period or would otherwise accept payment in lieu.
- 87 In any event, even if these issues were made out against Mr Bonifassi, and I do not find that they were, they would not be a valid reason for dismissal given the lack of warnings and opportunity for Mr Bonifassi to improve.

Reason for dismissal – speaking to other staff and aggressive behaviour

- 88 The termination letter mentions that Mr Bonifassi was aggressive toward and challenged the owners and management of Fillaudeau's and was also aggressive to 'plants and equipment when asked to do some work'. The letter states that on 1 December 2015 and 29 January 2016 Mr Bonifassi was asked not to talk to other staff in the kitchen and that after the second time, Mr Bonifassi 'shouted and walked in the restaurant and called the owner by a swear word in front of the other owner, waiting staff and customers at the till'.

Mr Bonifassi's case

- 89 Mr Bonifassi denied that he had ever been aggressive to the owners or management at any time.
- 90 Mr Corbion said Mr Bonifassi did not challenge him at work, and that Mr Corbion had never given Mr Bonifassi warnings at work.
- 91 Mr Bonifassi says that on 29 January 2016 Mr Fillaudeau told him to 'shut the fuck up' after Mr Bonifassi spoke to the chef. Mr Bonifassi replied 'putain, c'est le monde a l'inverse', which he said meant 'fuck, it's crazy, it's a world upside down'. Mr Bonifassi says he was in the kitchen at the time, not in the front of the restaurant.
- 92 In cross-examination, Mr Bonifassi denied that he was told to stop speaking to staff in the kitchen before 29 January 2016. He denied that he damaged equipment or anything else at the restaurant.

Fillaudeau's case

- 93 Mr Fillaudeau said on 29 January 2016 Mr Bonifassi was speaking to the chef about non-work-related issues. Mr Fillaudeau told Mr Bonifassi to go back to work. He saw Mr Bonifassi walk out to the front of the restaurant and, through the window in the door to the kitchen, shout something and flick the plants.
- 94 He denies having told Mr Bonifassi to 'shut the fuck up'. He says Mr Bonifassi called him 'the c-word in French', in front of staff and customers and Ms Maindok, although he concedes he did not hear this. He saw Mr Bonifassi flick the plants.
- 95 Mr Fillaudeau said that he did not give Mr Bonifassi a warning about his behaviour, because he decided to give Mr Bonifassi a 'first chance'. He told Mr Bonifassi not to call him names.
- 96 Ms Maindok gave evidence that she saw Mr Fillaudeau speak to Mr Bonifassi and heard Mr Fillaudeau say to Mr Bonifassi 'I've already told you once. Come on, we've got to move'. She did not hear Mr Fillaudeau say 'shut the fuck up'. After she left the kitchen, she saw Mr Bonifassi 'bursting out of the kitchen door and [he] went something... "ah, connasse" or something like this', which meant the c-word in French. In cross-examination, she said Mr Bonifassi 'definitely said that'. Mr Bonifassi then flicked a plant nearby in an 'immature fashion'. Ms Maindok said to Mr Bonifassi 'would you mind not to be like that, would you mind to tone it down a bit' and Mr Bonifassi walked off, muttering under his breath.

Consideration

- 97 Whether Mr Fillaudeau told Mr Bonifassi to 'shut the fuck up' or not, I accept he likely robustly told Mr Bonifassi to stop talking to staff in the kitchen, leading to Mr Bonifassi saying 'putain, c'est le monde a l'inverse'.
- 98 The reason I prefer Mr Bonifassi's evidence to Ms Maindok's evidence about this issue is because his was definite and consistent. Ms Maindok's evidence was not. Mr Fillaudeau did not hear what Mr Bonifassi said.

99 I accept that Mr Bonifassi flicked the plant. Given Mr Fillaudeau and Ms Maindok did not give Mr Bonifassi a warning about the incident, I find they did not consider it to be a particularly serious matter. Ms Maindok's evidence of what she said to Mr Bonifassi would not amount to a verbal warning. I find the behaviour did not warrant dismissal.

Reason for dismissal – the pousse-café

100 The termination letter states that on Saturday 30 January 2016 Mr Bonifassi served a pousse-café with 40 ml of alcohol instead of the legal requirement of 30 ml and that when the owner asked Mr Bonifassi about this, his answer was 'it is better that way'.

101 It was apparent from the termination letter and Fillaudeau's cross-examination of Mr Bonifassi and its submissions that Fillaudeau's considers this incident caused a serious and imminent risk to the health and safety of Fillaudeau's guests.

Mr Bonifassi's case

102 Mr Bonifassi gave evidence that on 30 January 2016 he received his first order for a pousse-café. He decided to make the coffee and pour the shot of cognac on the side. He said when Ms Maindok came to collect the drink, she said 'normally we put the cognac inside the coffee'. Mr Bonifassi replied he thought it looked more professional to serve the shot of cognac beside the coffee. Ms Maindok then took the drink and served it without measuring the cognac. They did not discuss the quantity of cognac being served.

103 In cross-examination, Mr Bonifassi said he could not remember if he free-poured or measured the cognac.

Fillaudeau's case

104 Ms Maindok gave evidence that none of the bottles at Fillaudeau's have pourers on them. She said Fillaudeau's provides jiggers which staff are supposed to use to measure alcohol quantity.

105 That day, she noticed Mr Bonifassi had free-poured the cognac. She questioned the presentation of the drink and also the amount of alcohol in the glass. In cross-examination, she said she told him she did not like him free-pouring and asked him to use the measures provided.

106 Ms Maindok said she did not think Mr Bonifassi poured too much or too little cognac, she just knew that he had free-poured. She did not check the quantity of cognac at the time, and she served the pousse-café to the customer.

107 She said that she checked the quantity of cognac served 'afterwards, when this case got brought up and all these things started coming up', by pouring water into a similar glass, up to the level she thought the cognac had been poured to. She and Mr Fillaudeau then measured the quantity of water, which was 40 ml.

108 Mr Fillaudeau said that Mr Bonifassi was asked numerous times not to free-pour alcohol although he did not provide further details about this.

Consideration

109 The letter of termination does not mention free-pouring, only that the quantity of cognac was 40 ml instead of the required 30 ml.

110 I accept that Mr Bonifassi free-poured the cognac. However, I find he did not serve too much cognac. I understand Ms Maindok's evidence to be that she measured the quantity with water after Mr Bonifassi made his claim of unfair dismissal. The termination letter notes that Mr Bonifassi served 40 ml. I find at the time it was written, Fillaudeau's had not measured the amount.

111 Ms Maindok's evidence that she did not think Mr Bonifassi poured too much is inconsistent with the termination letter and her evidence that she questioned him about the amount of alcohol.

112 Further, Ms Maindok can hardly rely on Mr Bonifassi's free-pouring to dismiss him, in circumstances where she chose to serve the drink. That Fillaudeau's characterises Mr Bonifassi's actions in making the pousse-café as 'engaging in theft and breaking liquor laws' as well as 'causing a serious and imminent risk to health and safety' is quite unreasonable.

113 I find that the incident with the pousse-café on 30 January 2016 was not a valid reason for dismissal.

Reason for dismissal – the Amex surcharge

114 The termination letter refers to 'the theft of the American express fee' and states that on Sunday 31 January 2016 a customer called Peter visited the restaurant and pointed at Mr Bonifassi, identifying Mr Bonifassi as the waiter who did not charge him an Amex surcharge in return for a 10% cash tip.

Mr Bonifassi's case

115 Mr Bonifassi gave evidence that the customer called Peter visited Fillaudeau's and suggested that instead of the customer paying an Amex surcharge, he would leave a 10% cash tip. Mr Bonifassi told Peter that he did not have authority to make that decision and called over the floor manager, Mr Corbion, to speak to Peter. Mr Bonifassi said on that occasion, Peter did not pay an Amex surcharge and left a tip in the tip jar. Mr Bonifassi said Peter visited the restaurant a second time and did the same thing.

116 Mr Bonifassi gave evidence that on Sunday 31 January, he saw Peter come to Fillaudeau's to buy a voucher. When Peter went to pay for the voucher, he asked for the Amex surcharge to be waived. Mr Bonifassi said the owners were 'pretty surprised', as they did not know the Amex surcharge had been waived for Peter in the past. Mr Bonifassi said he was setting up alfresco area outside at the time and, when Peter was asked by the owners who had waived the Amex surcharge in the past, Peter may have pointed at him. Mr Bonifassi said this may have been because Mr Corbion was on holiday at the time, so he was the only waiter Peter had spoken to previously about the Amex surcharge who was in the restaurant at the time.

- 117 When Peter left, Mr Fillaudeau approached Mr Bonifassi and asked him about Peter's request to waive the Amex surcharge. Mr Bonifassi explained what had happened the previous times Peter visited the restaurant, when Mr Corbion waived the Amex surcharge for Peter, who paid a tip instead of the Amex surcharge. Under cross-examination, Mr Bonifassi reiterated that this conversation occurred straight after the customer left the restaurant.
- 118 Under cross-examination, Mr Bonifassi said that Mr Corbion made the decision to waive the Amex surcharge and that Mr Bonifassi had never been authorised to, and did not, waive the Amex surcharge on any occasion. Mr Bonifassi said he never received tips directly from the customer.
- 119 Mr Corbion's evidence was that he alone made the decision to waive the Amex surcharge. He waived the Amex surcharge for Peter twice, but could not recall the exact occasions. He received a verbal warning from Ms Maindok on 4 February 2016, but no written warnings.

Fillaudeau's case

- 120 Ms Maindok gave evidence that on 31 January 2016, Peter asked her to waive the Amex surcharge. She said she asked Peter who had waived the Amex surcharge for him in the past and Peter indicated Mr Bonifassi, who was standing at the front door. Her evidence was that she thought Mr Bonifassi overheard the conversation and started moving and cleaning.
- 121 Mr Fillaudeau gave evidence that on 31 January 2016 the customer Peter pointed to Mr Bonifassi, who was working outside on the veranda. He said Mr Bonifassi saw Peter point at him and walked off. He gave evidence that Peter said 'that guy take [sic] off the surcharge but I usually leave a 10% tip in cash instead'.
- 122 Mr Fillaudeau denies that he spoke to Mr Bonifassi about the Amex surcharge on 31 January 2016.
- 123 Mr Fillaudeau gave evidence that on Monday 1 February 2016 he raised the waiving of the Amex surcharge with Mr Bonifassi. He said Mr Bonifassi did not apologise and said that it was 'good business' for Fillaudeau's because the customer came back. Mr Bonifassi did not offer to reimburse the restaurant. Mr Bonifassi did not say that it was not his fault, he said that it was a decision made by Mr Corbion.
- 124 Mr Fillaudeau gave evidence that on 4 February 2016, after he dismissed Mr Bonifassi, he spoke to Mr Corbion about the Amex incident. Mr Corbion said that he did waive the Amex surcharge but at no time did he authorise Mr Bonifassi to do so. Mr Fillaudeau said Mr Corbion showed remorse and was apologetic, so he only received a verbal warning.
- 125 Fillaudeau's referred to [19] to [22] of *BGC (Australia) Pty Ltd v Phippard* [2002] WASCA 191. In this case, the summary dismissal of an employee whose conduct was described as 'carelessness and minor dishonesty' was justified because the employee occupied senior managerial position, could reasonably be expected to set an impeccable example and his dishonest conduct 'was bound to undermine the relationship of trust that ought to exist between employer and employee'.

Consideration

- 126 I accept Mr Bonifassi's evidence that he was not authorised to and did not waive the Amex surcharge. Further, that he never received a tip in hand from the customer. Mr Bonifassi's evidence was definite and clear. It was also supported by Mr Corbion's evidence and Mr Bonifassi's letter to Fillaudeau's dated 4 February 2016 beginning 'As per our conversation' (**apology letter**) (Exhibit A3).
- 127 I accept Mr Bonifassi's evidence that the customer may have pointed to Mr Bonifassi because Mr Corbion was not present and Mr Bonifassi was the only waiter the customer had previously spoken to about waiving the Amex surcharge.
- 128 I find Mr Corbion decided to waive the Amex surcharge for the customer and did so on several occasions.
- 129 While I accept that Mr Fillaudeau and Ms Maindok suspected their staff may have conspired to increase tips by waiving the Amex surcharge, I do not find such a suspicion was based on reasonable grounds.
- 130 Mr Fillaudeau did not conduct a proper inquiry in response to the allegation. Given Mr Bonifassi's denial, Mr Fillaudeau should have spoken with Mr Corbion before concluding his staff were involved in a conspiracy. That would have been the fair and reasonable thing to do. Accordingly, I do not consider that Fillaudeau's has met its evidentiary onus.
- 131 I find the tips were shared in the usual way, between all the staff.
- 132 Mr Fillaudeau seemed to consider Mr Bonifassi's lack of remorse to be evidence of his guilt. Mr Bonifassi's version of events is entirely plausible and was supported by Mr Corbion's evidence and the apology letter. Mr Bonifassi was not apologetic because he did not engage in any misconduct.
- 133 I consider *Phippard* distinguishable from this case. In *Phippard*, the employee was found to have engaged in dishonest acts. In this matter, I do not find that Mr Bonifassi acted dishonestly and, importantly, he did not waive the Amex surcharge. As I have said, I do not find the glad wrap prank and service of the pousse-café to be theft or to involve dishonesty.

Date of termination

Mr Bonifassi's case

- 134 Mr Bonifassi said that on Monday 1 February 2016 at about 10:30 am, Mr Fillaudeau sat down with him and gave him an ultimatum – Mr Bonifassi could either resign straight away with no notice, or else Mr Fillaudeau would go to the police about the Amex incident. Mr Bonifassi did not understand why Mr Fillaudeau wanted to fire him and explained that the decision to waive the Amex surcharge was Mr Corbion's decision.

- 135 Mr Bonifassi said that Mr Fillaudeau gave him three days to think about his decision, because Mr Fillaudeau said he did not want to go to the police. After the meeting, Mr Fillaudeau asked Mr Bonifassi to take off his shirt and apron and leave them behind the bar. Mr Bonifassi did so and left the restaurant through the kitchen and walked to his car, shirtless.
- 136 For the security of his family, Mr Bonifassi decided to resign in order to get the benefit of this one month notice period under his employment contract.
- 137 On 3 February 2016 Mr Bonifassi requested a meeting via text message with Mr Fillaudeau to discuss their previous meeting. Mr Fillaudeau replied 'not sure what you want to discuss and it seems unnecessary to meet' and 'we sent you a letter as requested' (**text messages on 3 February 2016**) (Exhibit A4). Mr Bonifassi said he was not sure what the reference to the letter meant, as he had not received anything in writing confirming he should not return to work.
- 138 Mr Bonifassi wrote a letter to Fillaudeau's advising of his intention to resign and giving one month's notice (**resignation letter**) (Exhibit A2). He also wrote the apology letter, explaining that Mr Corbion made the decision in respect of any waived Amex surcharge and, to show his good faith, offered to pay Fillaudeau's \$30 to cover the Amex surcharge in return for Mr Fillaudeau not going to the police. These letters were both dated 4 February 2016.

Fillaudeau's case

- 139 Fillaudeau's notice of answer stated that on 1 February 2016:
- e. [Mr Fillaudeau] asked [Mr Bonifassi] in words to the effect 'you can give me one month's notice providing you do what you are asked to do.' [Mr Bonifassi] responded in words to the effect 'No, just pay me more.' [Mr Fillaudeau] replied in words to the effect 'OK I will go to the Police'.
 - f. [Mr Fillaudeau] then summarily terminated [Mr Bonifassi's] employment by saying words to the effect 'Ok you have no more work here' and 'Ok return your shirt and apron.' [Mr Bonifassi] forthwith ripped his shirt off, damaging it, and walked through the restaurant in front of customers and staff, through the kitchen and left the premises.
- 140 As set out at [123], Mr Fillaudeau gave evidence that on Monday 1 February 2016 he spoke to Mr Bonifassi about waiving the Amex surcharge. He said Mr Bonifassi did not apologise and said that it was 'good business' for Fillaudeau's because the customer came back. Mr Bonifassi did not offer to reimburse the restaurant. Mr Bonifassi did not say that it was not his fault, he said that it was a decision made by Mr Corbion.
- 141 Mr Fillaudeau said he told Mr Bonifassi that it was best they stopped working together because Mr Bonifassi was not apologetic about the Amex incident. He told Mr Bonifassi to either resign immediately or he would go to the police.
- 142 Mr Fillaudeau said that while Mr Bonifassi was collecting his personal items in the restaurant, he told Mr Bonifassi that he needed to return his uniform (shirt and apron) once they were cleaned. Mr Fillaudeau said both those items have the restaurant's logo and that he didn't want Mr Bonifassi to leave with them. He said Mr Bonifassi ripped off his shirt, started shouting and ran through the kitchen without a shirt.
- 143 Mr Fillaudeau denies that he gave Mr Bonifassi three days to think about things, or that he asked for a resignation letter. He said he fired Mr Bonifassi on 1 February 2016 and wrote the termination letter to Mr Bonifassi that evening.
- 144 Ms Maindok said she overheard the conversation between Mr Fillaudeau and Mr Bonifassi on 1 February 2016 and did not understand why Mr Bonifassi did not tell Fillaudeau's when the Amex surcharge was first waived. She said 'it was like it was kept secret so he could pocket the tips himself'.
- 145 She said she saw Mr Bonifassi rip open his shirt and say 'shove the job up your arse' and walked away shouting and yelling.

Consideration

- 146 There is conflicting evidence about what happened on 1 February 2016.
- 147 Both parties' evidence was that Mr Bonifassi met with Mr Fillaudeau, who gave Mr Bonifassi a choice to either resign, or Mr Fillaudeau would go to the police for alleged theft.
- 148 Mr Bonifassi's evidence was that Mr Fillaudeau asked him to take off his shirt and apron and leave them behind the bar. Mr Fillaudeau's evidence was that he asked Mr Bonifassi to return the shirt and apron after they were cleaned. That is inconsistent with his evidence that he did not want Mr Bonifassi to leave with the uniform. Fillaudeau's notice of answer does not mention Mr Fillaudeau asking Mr Bonifassi to clean the shirt and apron. Its wording suggests to me that Mr Fillaudeau expected Mr Bonifassi to return the shirt and apron immediately.
- 149 Both Mr Bonifassi's and Mr Fillaudeau's evidence was that Mr Bonifassi walked through the kitchen, and not, as stated in Fillaudeau's notice of answer, 'through the restaurant in front of customers and staff' after he returned his shirt and apron.
- 150 Mr Bonifassi says that Mr Fillaudeau gave him three days to decide whether to resign, or Mr Fillaudeau would go to the police.
- 151 Mr Fillaudeau says that did not happen. He says he dismissed Mr Bonifassi on that day. Mr Fillaudeau asked Mr Bonifassi to return his shirt and apron with Fillaudeau's logo, wrote the termination letter to Mr Bonifassi that evening and sent Mr Bonifassi a text message on 3 February 2016 in response to Mr Bonifassi's request for a meeting, which said 'not sure what you want to discuss and it seems unnecessary to meet' (Exhibit A4).
- 152 I accept that Mr Fillaudeau gave Mr Bonifassi an ultimatum, either that Mr Bonifassi resign immediately or be fired and Fillaudeau's would go to the police.
- 153 I accept that Mr Fillaudeau asked for the shirt and apron to be returned immediately, because Mr Fillaudeau wanted Mr Bonifassi to leave and not return to work. I find Mr Fillaudeau summarily dismissed Mr Bonifassi on 1 February 2016.

Meeting on 4 February 2016**Mr Bonifassi's case**

154 Mr Bonifassi gave evidence that on 4 February 2016 he went to Fillaudeau's to give Mr Fillaudeau his resignation letter and begin working out his notice period. When Mr Fillaudeau saw him, Mr Fillaudeau told him that Mr Fillaudeau didn't want to see him at the restaurant anymore and that he should go home. Mr Bonifassi asked for an email to confirm he was fired, so that he was entitled to one month's pay. Mr Bonifassi tried to hand Mr Fillaudeau the resignation letter and the apology letter and Mr Fillaudeau said to him 'it doesn't matter, I fired you two days ago'. Mr Bonifassi said that Mr Fillaudeau was not prepared to let him work out his notice period.

155 On 8 February 2016, the day before his wedding, Mr Bonifassi received the termination letter.

156 Mr Bonifassi said he was confused by the termination letter.

Fillaudeau's case

157 Mr Fillaudeau gave evidence that he posted the termination letter on Tuesday 2 February 2016. He said it was not a warning letter, but a dismissal letter.

158 Under cross-examination, Mr Fillaudeau agreed that he posted the termination letter on Wednesday 3 February 2016 and not Tuesday 2 February 2016.

159 Mr Fillaudeau gave evidence that on Thursday 4 February 2016 Mr Bonifassi, who Mr Fillaudeau considered was no longer working for Fillaudeau's, was waiting at the front of the restaurant, saying he wanted to work his month's notice and handing over the resignation letter and the apology letter. Mr Fillaudeau said to Mr Bonifassi, 'if you mean them sign them', so Mr Bonifassi signed the two letters (Exhibit R1 and Exhibit R2). Mr Fillaudeau offered to let Mr Bonifassi work out his notice period if Mr Bonifassi agreed to carry out food and drinks, but Mr Bonifassi refused and said 'no, just pay me more if you want me to do that'.

160 Ms Maindok said she eavesdropped on the meeting between Mr Fillaudeau and Mr Bonifassi on Thursday 4 February 2016. She recalls Mr Fillaudeau said 'if you want to continue here you need to carry out the food and drinks' and Mr Bonifassi replied 'you don't pay me enough for this'.

161 Mr Fillaudeau gave evidence that he went after Mr Bonifassi as he left and said 'you know, it's really silly, because I could go to the police. And, ah, put this, of course, to them. But, ah, I don't want to do it because you are on a visa and you have, ah, kids, you know. So I don't think it's correct'. Then he went back inside and raised the Amex surcharge issue with Mr Corbion.

Consideration

162 As I said in [126], I find Mr Bonifassi never waived the Amex surcharge. There was no conspiracy.

163 I find that Mr Bonifassi's offer to compensate Fillaudeau's was not evidence of his guilt but, as Mr Bonifassi says, was an act of good faith to prevent Mr Fillaudeau from going to the police.

164 I do not accept Mr Fillaudeau wanted Mr Bonifassi to work out a notice period, based on his own evidence and the termination letter which states three times that in the circumstances his continued employment during a notice period would be unreasonable. When Mr Bonifassi offered to work out his notice period, I find Mr Fillaudeau sent him home.

165 In all the circumstances, I find Fillaudeau's summarily dismissed Mr Bonifassi on 1 February 2016. It likely wanted him to resign immediately, under threat of police involvement. When Mr Bonifassi did not resign, Mr Fillaudeau told him to think about it. From the oral evidence, resignation letter and text messages on 3 February 2016, it is clear to me that Mr Bonifassi was willing to work out his notice period and Fillaudeau's would not let him.

166 I find it implausible that Mr Fillaudeau was prepared to let Mr Bonifassi work out his notice period, in circumstances where he believed Mr Bonifassi had conspired to steal from him. There were also inconsistencies with Fillaudeau's notice of answer as set out in [139] above, which stated that on 1 February 2016 Mr Fillaudeau offered to let Mr Bonifassi work out his one month's notice period and Mr Bonifassi refused.

167 At no time did Mr Fillaudeau's evidence suggest he was willing on 1 February 2016 for Mr Bonifassi to work out his notice period.

168 Mr Fillaudeau's evidence that on 4 February 2016 he was prepared to let Mr Bonifassi work out his notice period is inconsistent with Fillaudeau's argument that Mr Bonifassi's behaviour justified summary dismissal and Mr Fillaudeau's evidence that he again threatened Mr Bonifassi with going to the police.

Conclusion – unfair dismissal

169 I find that Mr Bonifassi's dismissal was harsh and unfair in the circumstances. He did not get 'a fair go all round'. Fillaudeau's exercised its legal right to dismiss so harshly and oppressively against Mr Bonifassi as to amount to an abuse of that right.

170 He was given no warnings and no real opportunity to explain or improve. Mr Bonifassi did not engage in theft. Fillaudeau's did not conduct a proper inquiry and did not have reasonable grounds to conclude Mr Bonifassi had engaged in theft. Mr Bonifassi's conduct did not warrant summary dismissal. Mr Fillaudeau threatened to call the police in an attempt to force Mr Bonifassi to resign.

The law – compensation for unfair dismissal

171 The Commission's powers in relation to unfair dismissal claims are set out in s 23A of the Act. The Commission can order an employer to pay an employee compensation for loss or injury caused by an unfair dismissal only if it considers reinstatement or re-employment impracticable: s 23A(6) of the Act. The amount of compensation cannot exceed 6 months' pay: s 23A(8) of the Act.

- 172 The principles which apply to assessing compensation for unfair dismissal are well-settled. Some of these principles are set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1999) 79 WAIG 8 by Sharkey P, with whom Coleman CC and Kenner C agreed, at 8-9.
- 173 First, the Commission must make a finding as to the loss and/or injury which Mr Bonifassi suffered by reason of the dismissal. If no loss or injury is established, there is nothing to compensate.
- 174 The Commission must then assess the proper amount of compensation for loss and/or injury, in light of all the relevant circumstances but disregarding the cap prescribed in s 23A of the Act. If the amount is in excess of the cap, the Commission reduces the amount to be awarded to an amount equal to the permissible maximum.
- 175 'Loss' is a broad concept that includes, but is not limited to 'actual loss of salary or wage, loss of benefits or other amounts which would have been earned, paid to or received by the dismissed employee but for the dismissal': *Capewell v Cadbury Schweppes Australia Ltd* (1997) 78 WAIG 299, 303.
- 176 'Injury' is also a broad concept, incorporating 'all manner of wrongs' and includes, for example, humiliation, injury to feelings and 'being treated with callousness': *Capewell* (303).
- 177 For compensation to be awarded for injury, the injury must 'fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal'. This requires evidence that the applicant has suffered 'loss of dignity, anxiety, humiliation, stress or nervous shock': *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849, 2862 (Coleman CC & Smith C). There will be an element of distress in most dismissal cases: *Lynam v Lataga Pty Ltd* [2001] WAIRC 02420; (2001) 81 WAIG 986 [56].
- 178 In deciding the amount of compensation, the Commission must consider the applicant's efforts to mitigate his loss as a result of the dismissal: s 23A(7) of the Act.
- 179 The employee has a duty to mitigate his loss or injury, but the onus of proof for failure to mitigate rests on the respondent: *Bogunovich* (1999) 79 WAIG 8, 8-9. Whether the employee mitigated his loss is relevant to determining whether the dismissal caused any loss: *Sealanes (1985) Pty Ltd v Foley* [2006] WAIRC 04110; (2006) 86 WAIG 1239 [99]-[105].
- 180 The purpose of compensation under s 23A is to compensate an unfairly dismissed employee for losses caused, not to punish the employer or to confer a windfall on the employee. This means compensation 'must be in respect of a lawful entitlement and/or as compensation for a demonstrated loss or injury caused by the harsh, oppressive or unfair dismissal': *Garbett* [85]. Compensation is not compensation if it does not, as much as possible, put the person who suffered the loss or injury back into the position which, but for the loss or injury, the person would have been in: *Bogunovich* (1999) 79 WAIG 8, 8.
- 181 In *Golding v PIHA Pty Ltd* [2004] WAIRC 12971; (2004) 84 WAIG 3639, Harrison C awarded \$500 for injury where the applicant was summarily dismissed without warning and supervised while she was required to pack up and leave the respondent's premises. Harrison C considered the respondent's treatment of the applicant callous, and accepted that the applicant was shocked, humiliated and upset by her termination.

Compensation for unfair dismissal

- 182 Mr Bonifassi does not want to be reinstated. He asks for two months' compensation and an apology letter from Mr Fillaudeau and Ms Maindok. I explained to Mr Bonifassi at the hearing that the Commission is not able to order Fillaudeau's to apologise to him.
- 183 Mr Bonifassi also asks for one month's payment in lieu of notice and 11.4 hours of annual leave. This will be dealt with in the denied contractual benefits matter below.

Mr Bonifassi's case

- 184 Mr Bonifassi gave evidence that, since he was dismissed from Fillaudeau's, he has been looking for work. Mr Bonifassi tendered a document which showed jobs he applied for on SEEK (Exhibit A10). The earliest date in Exhibit A10 was 22 February 2016. Under cross-examination, Mr Bonifassi said that he applied for jobs on SEEK before 22 February 2016, but that records were not kept before that date.
- 185 Mr Bonifassi began working at the Sentinel Bar and Grill (**Sentinel**) on 7 March 2016 or 10 March 2016. He worked there on a casual basis, earned about \$23 per hour and worked between 30 hours to 35 hours per week, Monday to Friday. He stopped working at the Sentinel on around 3 August 2016.
- 186 Mr Bonifassi's application states that his salary at Fillaudeau's was \$44,000 per year (before tax), and he worked 38 hours per week. His hourly rate as shown in his payslips from Fillaudeau's, with payment dates 27 January 2016 (**January payslip**) (Exhibit A7) and 9 February 2016 (**February payslip**) (Exhibit A8) was \$23.28 (to 2 decimal places). Mr Bonifassi said that he earned less at the Sentinel than he earned at Fillaudeau's. He said he used to earn about \$1,500 per fortnight at Fillaudeau's. At the Sentinel, he was earning about \$1,000 per fortnight, which was \$400 less per fortnight (after tax).
- 187 Mr Bonifassi gave evidence and submitted that his financial losses were about \$1,200 per fortnight and included:
- a. parking in the Perth CBD;
 - b. petrol;
 - c. childcare for his children; and
 - d. transport costs on buses, trains and his car.
- 188 Mr Bonifassi did not provide any evidence in support of those losses, such as receipts.

- 189 On around 3 August 2016, Mr Bonifassi started work as a senior waiter at a different restaurant. He works there on a casual basis, earning about \$24.50 per hour and working between 32 hours and 36 hours per week.
- 190 Mr Bonifassi tendered a Bankwest document showing transactions from 14 March 2016 to 5 July 2016 (Exhibit A11). He made transfers from his savings account in France on 26 April 2016, 9 May 2016, 4 July 2016 and 5 July 2016. He said that the Bankwest document was not a full record of his bank transactions.
- 191 Mr Bonifassi gave evidence that he transferred money from France in order to pay his bills in circumstances where he also had to cover the costs of his wedding, two children and mortgage. He submitted that a total of \$3,500 was transferred from France and that his family gave him a further €2,000 because Mr Bonifassi and his family could not live on Mrs Bonifassi's wage alone.
- 192 Mr Bonifassi submitted that after his dismissal, he did not work for a month and a half. He found work on 10 March 2016.
- 193 Mr Bonifassi did not give evidence about non-monetary loss, but submitted that he felt harassed, psychologically bullied and humiliated by Fillaudeau's. He was accused falsely without basis. His professionalism was belittled. His dismissal one week before his wedding, with two young children, a mortgage and lack of stability and a secure job caused him stress and he developed depression.

Fillaudeau's case

- 194 In cross-examination, Mr Bonifassi conceded he did not know how much he had earned since his employment ended. He said he did not think to print bank records as evidence about what he earned at the Sentinel.
- 195 Fillaudeau's submitted that Mr Bonifassi did not suffer any loss, or any loss suffered was 'miniscule'.

Consideration

- 196 I am satisfied that the working relationship between Mr Bonifassi and Fillaudeau's has broken down to such an extent that an order for reinstatement or reemployment would be impracticable.
- 197 I find Mr Bonifassi mitigated his loss.
- 198 I accept Mr Bonifassi's evidence that he was out of work for 6 weeks.
- 199 I find Mr Bonifassi's loss includes the 6 weeks during which he was out of work. Based on his evidence and his employment contract, that equates to \$5,307.84, being \$23.28 x 38 hours x 6 weeks.
- 200 I accept Mr Bonifassi was paid \$23.28 per hour at Fillaudeau's and '\$23 something' as a casual at the Sentinel.
- 201 Given Mr Bonifassi's evidence lacked detail and supporting documents it is difficult for me to make a finding about the reduction in Mr Bonifassi's salary, compared to his salary at Fillaudeau's, while he was employed at the Sentinel. As a casual, it is likely he did not get the benefit of annual leave or personal leave, but Mr Bonifassi did not give evidence or make submissions about that.
- 202 While I accept there may have been some loss of earnings between 10 March 2016 to about 3 August 2016, I am unable to make a finding about it.
- 203 I am not prepared to award compensation for the loss Mr Bonifassi says he suffered in relation to childcare, petrol, parking and transport. This is because I do not consider I can make a finding on the evidence about what those losses were.
- 204 For these reasons, I find Mr Bonifassi's loss to be \$5,307.84 being his loss of earnings during the 6 weeks he was out of work.
- 205 I accept that Mr Bonifassi was stressed and humiliated because of the way Fillaudeau's treated him. I find that Mr Bonifassi suffered injury as a result of his dismissal.
- 206 I consider that the circumstances of this case, which include Mr Bonifassi being required to return his uniform immediately and leave work partially unclothed, being accused of theft without Fillaudeau's having conducted a proper inquiry into the matter, being threatened with police being called and being summarily dismissed one week before his wedding, are such that it is appropriate for me to award Mr Bonifassi \$1,000 in respect of injury.

The law - denial of contractual benefits

- 207 The principles that apply to denial of contractual benefits claims are well settled. Mr Bonifassi must prove that his claim is an 'industrial matter', he was an 'employee' of Fillaudeau's, the benefits he claims are due to him under his contract of service, the benefits do not arise under an award or order of the Commission and that Fillaudeau's denied him the benefits: *Hotcopper Australia Ltd v Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704 [34].

Denial of contractual benefits

- 208 In this case, it is not disputed that the matter is an 'industrial matter', that Mr Bonifassi was an 'employee' of Fillaudeau's, and that the benefits he claims are due under his contract, which was a contract of service.
- 209 I must decide whether Mr Bonifassi was denied benefits that were due to him.
- 210 Mr Bonifassi says Fillaudeau's owes him one month's wages in lieu of notice and 11.4 hours of annual leave. Fillaudeau's says it does not owe Mr Bonifassi any contractual benefits.

Mr Bonifassi's case

- 211 Mr Bonifassi's employment contract relevantly states:

7. Leave entitlements

a) Annual leave

You are entitled to four weeks of annual leave after each twelve months of service with our Partnership. Annual leave is to be taken at the time agreed between you and the management.

10. Termination of employment

- a) In order to terminate your employment with Fillaudeau's you are required to give the company one month notice in writing.
 - b) In order for us to terminate your employment with the company is required to give you one month's notice of termination or pay one month's wage in lieu de notice. [sic]
- 212 Mr Bonifassi gave evidence that he is entitled to one month's notice, that he was not paid in lieu of notice and that neither the January payslip nor the February payslip show payment in lieu of the one month's notice.
- 213 Mr Bonifassi gave evidence that he is entitled to the 11.4 hours of annual leave shown on the February payslip, which he says he did not take. In his notice of application, Mr Bonifassi claims compensation for '17.5 hours gross'. At the hearing, Mr Bonifassi confirmed that this was a typographical error and it referred to the 11.4 hours of annual leave.
- 214 Mr Bonifassi referred to the translated text messages dated 21 December 2015 and gave evidence that Fillaudeau's only allowed annual leave to be taken by the week, not the day. He submitted that, given this policy, he could not have taken 11.4 hours of annual leave.
- 215 Mr Bonifassi agreed that he had been paid as though he took the 11.4 hours of annual leave, but gave evidence that he had never taken annual leave while employed at Fillaudeau's.
- 216 Mr Bonifassi submitted that he was missing payment of 11.4 hours of his normal base salary, because he never took that time as annual leave and was therefore missing an increased unused annual leave payment.

Fillaudeau's case

- 217 In cross-examination, Mr Fillaudeau gave evidence that he wanted Mr Bonifassi to work out his one month's notice, but that Mr Bonifassi refused to carry out drinks and food. When questioned whether he should pay the one month's wages in lieu of notice, he said 'if [Mr Bonifassi's] working I should, but if he refused to work I can't'.
- 218 Fillaudeau's submits that because Mr Bonifassi refused to perform work as required under his contract, he is not entitled to payment in lieu of notice because he hasn't satisfied an essential condition of his contract. It said Mr Bonifassi wasn't ready, willing and able to work that period of notice.
- 219 Mr Fillaudeau gave evidence that he did not know what the 11.4 hours on the February payslip meant. He asked Fillaudeau's accountant, who said she was not sure what it meant either and would fix it. The first time he heard of the annual leave issue was during these proceedings.
- 220 Fillaudeau's submitted that the 11.4 hours of annual leave have been paid, so there is no substance to Mr Bonifassi's argument. Fillaudeau's did not put on evidence that Mr Bonifassi had taken annual leave, nor did it cross-examine Mr Bonifassi about the issue.

Consideration

- 221 I find Mr Bonifassi had a contractual benefit to one month's notice or payment in lieu. As I state at [165], I accept that Mr Bonifassi was willing to work out his notice period but Fillaudeau's would not let him. I find Fillaudeau's did not pay Mr Bonifassi in lieu of notice.
- 222 I accept that Mr Bonifassi did not take the 11.4 hours of annual leave. I make that finding based on Mr Bonifassi's and Mr Fillaudeau's evidence, Mr Bonifassi's January payslip and February payslip and Mr Bonifassi's resignation letter which refers to 66.68 hours being owed. Therefore, Mr Bonifassi should have been paid for his ordinary hours in his last pay period and also for the untaken 11.4 hours of annual leave.
- 223 Accordingly, Mr Bonifassi's claim that he has been denied contractual benefits of one month's wages in lieu of notice and 11.4 hours of annual leave is made out.
- 224 To order Fillaudeau's to pay Mr Bonifassi one month's wages in lieu of notice and compensation for loss of 6 weeks' wages as set out at [204] would be double compensation, which should be avoided: *Matthews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 136 IR 156 [63].
- 225 I will therefore order Fillaudeau's to pay Mr Bonifassi one month's wages in lieu of notice and 11.4 hours of annual leave in respect of his denied contractual benefits claim.
- 226 The 11.4 hours of annual leave equates to \$265.40, being \$23.28 x 11.4 hours.
- 227 Taking into account that I will order Fillaudeau's to pay Mr Bonifassi one month's wages in lieu of notice, I will order Fillaudeau's to also pay Mr Bonifassi 2 weeks' wages and \$1,000 to compensate Mr Bonifassi for the loss and injury caused by his dismissal. In total, Fillaudeau's must pay Mr Bonifassi \$6,573.24 (gross).

Conclusion

- 228 Mr Bonifassi's dismissal was harsh and unfair and he was denied his contractual benefits of one month's notice and 11.4 hours of annual leave.
- 229 For these reasons, I order that E.J Fillaudeau and J.J Maindok trading as Fillaudeau's pay Mr Bonifassi the sum of \$6,573.24 (gross).
- 230 A declaration and order now issues.
-

2016 WAIRC 00820

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
NICOLAS BONIFASSI **APPLICANT**

-v-
E.J FILLAUDEAU AND J.J MAINDOK TRADING AS FILLAUDEAU'S **RESPONDENT**

CORAM COMMISSIONER T EMMANUEL
DATE WEDNESDAY, 12 OCTOBER 2016
FILE NO/S U 33 OF 2016, B 33 OF 2016
CITATION NO. 2016 WAIRC 00820

Result *Applications upheld*
Representation
Applicant Mrs S Bonifassi (as agent)
Respondent Mr G McCorry (as agent)

Declaration and order

HAVING heard Mrs S Bonifassi (as agent) on behalf of the applicant and Mr G McCorry (as agent) on behalf of the respondent;
AND HAVING given reasons for decision;
NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* (WA), hereby –

1. DECLARE that the applicant was denied benefits under his contract of employment.
2. DECLARE that the applicant was harshly and unfairly dismissed by the respondent.
3. ORDER that the respondent pay the applicant \$6,573.24 (gross), being the total of the denied contractual benefits and compensation for loss and injury caused by the dismissal, within 14 days of the date of this order.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2016 WAIRC 00852

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
KRISTOPHER DENNETT **APPLICANT**

-v-
EPSWW, C/O: COREY BROWN **RESPONDENT**

CORAM SENIOR COMMISSIONER S J KENNER
DATE MONDAY, 31 OCTOBER 2016
FILE NO/S B 54 OF 2015
CITATION NO. 2016 WAIRC 00852

Result Discontinued by leave
Representation
Applicant Mr G Upham as agent
Respondent No appearance required

Order

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2016 WAIRC 00803

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2016 WAIRC 00803
CORAM : COMMISSIONER D J MATTHEWS
HEARD : MONDAY, 1 AUGUST 2016, MONDAY, 12 SEPTEMBER 2016, MONDAY, 3 OCTOBER 2016
DELIVERED : MONDAY, 10 OCTOBER 2016
FILE NO. : U 91 OF 2016
BETWEEN : HELEN HUA
 Applicant
 AND
 RM & JM WILSON T/AS IMAGES EMBROIDERY
 Respondent

Catchwords : Industrial law (WA) - Termination of employment - Alleged harsh, oppressive and unfair dismissal - Termination due to poor performance of applicant - Applicant made aware and afforded time to improve performance - Applicant failed to improve performance - Some harshness attached to manner of dismissal - Compensation awarded
Legislation : *Industrial Relations Act 1979* (WA)
Result : Application allowed; compensation awarded
Representation:
Applicant : In person
Respondent : Mr R Wilson

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings and taken from the transcript as edited by the Commission)

- 1 The applicant was employed as a machine operator at the respondent business. The applicant was given notice of the termination of her employment with the respondent on 3 May 2016. Her employment ended on 13 May 2016.
- 2 The applicant lodged her unfair dismissal application in this jurisdiction on 25 May 2016. In her claim she alleged, and this was a position she maintained throughout the proceedings, that the business owners, Mr Robert and Mrs Judith Wilson, dismissed her because they noticed that she was having problems with her back and not for the reasons given.
- 3 On 20 June 2016, the respondents filed their Notice of Answer. At page 2 of the schedule to that document the respondents gave four reasons for the applicant's dismissal. None of those reasons related to a back problem and the respondents asserted, and maintained in these proceedings, that they only became aware of the applicant claiming she had a back problem after her employment ended.
- 4 The matter did not settle at conference and there was a three day hearing, spread over several weeks to accommodate Mondays being a convenient day for the respondents, at which the applicant, another worker at the business, Benjamin Sumbiri Banywesize, the business owners, Mr Wilson and Mrs Wilson, and their son, Marcus Wilson, gave evidence.
- 5 These proceedings need to determine in the first place whether the applicant's employment was terminated because she had a back problem or not. However, that is not the only matter that needs to be determined. I need to determine, if that was not the reason, what were the reasons for the dismissal, whether those reasons were good reasons, whether the process leading to dismissal was a fair one and whether the dismissal was for any other reason harsh.
- 6 I believe having heard three days of evidence and submission that I have before me sufficient material to answer those questions conclusively.
- 7 I note that the proceeding has not been an easy one due to English not being the applicant's first language and because of the inexperience of the parties with proceedings such as these.
- 8 I am confident, however, that with the applicant's working knowledge of English and the great assistance of Mr Interpreter that the applicant's language difficulties have not been a barrier to fairness in these proceedings. I am also confident that despite the inexperience of the parties that each has been able to get their point of view across with all the evidence being led that one could have reasonably expected. If there are feelings on the part of any party that in some way the proceedings have not been fair, that may be a reflection of their inexperience with the process rather than reality.
- 9 Turning then to the evidence, I say at the outset there is no evidence whatsoever that Mr and Mrs Wilson knew that there was anything wrong with the applicant's back before 3 May 2016 when the decision to dismiss her was communicated to her. What the applicant had to say about the matter was not evidence but rather speculation and Mr and Mrs Wilson denied the assertion emphatically and convincingly.

- 10 I find that any back problem that the applicant did have, and I do not need to find whether she had one or not, was not the reason for her dismissal.
- 11 The next question is whether the reasons in the Notice of Answer and about which Mr and Mrs Wilson gave evidence were the real reasons for the applicant's dismissal.
- 12 Those reasons were, one, that the applicant was late on that day, continuing a pattern of lateness. Two, that the applicant said the computer was broken when in fact she had left a disc in it the day before, a situation that had occurred before and which caused the business's computing network to freeze. Three, that the applicant made a basic error relating to the pulling of threads through a design which required garments to be shaved and, four, that the applicant had commenced sewing some garments in the wrong colour and to cover up the error had embroidered over the logo, a fact which was not discovered until later in the day and only then by chance.
- 13 The evidence in these proceedings put the above four reasons in a certain context. That is, each of the issues that arose on 3 May 2016 had a history concerning the applicant. The respondents' case was that that history showed that the issues on 3 May 2016 were, properly characterised, 'straws which broke the camel's back'.
- 14 Mr Wilson gave evidence that, over the previous months, he had spoken to the applicant about various issues including arriving on time, following instructions, keeping accurate records, correctly hooping material in the hoops, oversight with discs causing the freezing of the network, working too slowly and, in the event of errors being made, the applicant trying to fix them herself rather than bring it to the attention of the respondents.
- 15 On Mr Wilson's evidence, and the respondents' case, while not all of those errors had occurred on 3 May 2016, what did occur on 3 May 2016 corresponded to the discussions that had been had in that they were examples of lateness, making mistakes, not having learned from mistakes and not bringing errors to the attention of the respondents.
- 16 Mrs Wilson also gave evidence that she had in the months leading up to May 2016 spoken to the applicant about her work performance. She gave evidence that in February 2016 she brought to the attention of the applicant, in a meeting with her, a sheet which listed some of the weaknesses that had been identified in the work of the applicant going back many years which became Exhibit 6. Seven items were listed on that sheet and Mrs Wilson says that she pointed those weaknesses out to the applicant in the meeting in February and on several other occasions leading up to 3 May 2016.
- 17 The applicant denied ever having seen the document although it appears to have her mark at the bottom of it. I note that the matters listed on the sheet do not really correspond to the matters that the respondents say they were counselling the applicant about in 2016. The sheet mentions things like putting garments in a bag or box out on the bench, and seem to relate mostly to the filling in of job sheets which, while mentioned to the applicant in 2016, was not the focus of the respondents' concern with her performance. So I place little store in that document but I nonetheless accept that there were several discussions between Mrs Wilson and the applicant concerning her work performance.
- 18 Important in my findings is the evidence of Mr Banywesize, another machine operator, who said that Mr Wilson brought mistakes to the attention of all operators, usually in a joint meeting, and that he saw Mr Wilson engaging with the applicant in relation to work problems on several occasions. The applicant did not deny this and rather, by her evidence, was simply at pains to point out that Mr Wilson, at least, had adopted an aggressive attitude toward her in these discussions and had singled her out for unfavourable treatment in relation to her mistakes when everyone was making mistakes.
- 19 I will return to Mr Wilson's manner later but what it is important to note at this point in time is that I accept that there had been problems with the applicant's performance in the months leading up to 3 May 2016 and, against that background, I am satisfied that what Mr and Mrs Wilson told me about 3 May 2016 is the truth. That is, that the applicant was late and made mistakes on that day and that one of the mistakes, at least, was discovered by chance and that it indicated that the applicant had tried to cover up that mistake and that those matters were seen as the straws which broke the camel's back. This is an account that makes sense and has a clear ring of truth about it. The story that Mr and Mrs Wilson were aware of the applicant suffering back pain and invented what they say happened on 3 May 2016 or colluded to blow minor issues into issues warranting dismissal as mere pretext is not believable.
- 20 I find therefore that the applicant was dismissed for the reasons that the respondents gave, that is, for the reasons contained in the Notice of Answer about which both Mr and Mrs Wilson gave evidence.
- 21 The next question is whether those reasons were in all the circumstances, good reasons. That is, was it fair and reasonable that the applicant be dismissed for the reasons she was dismissed? Related to this is whether the process leading to Ms Hua's dismissal was a fair one. Where someone is dismissed, ultimately, for poor performance, that is for being inefficient or not an adequately efficient worker, the dismissal will only be fair and reasonable for that reason if there is a fair and reasonable history of events which lead to the decision.
- 22 In his closing statement I think Mr Wilson put it quite accurately. As he said, where someone is dismissed for poor performance, relevant matters have to be brought to the employee's attention, the employee has to be given instructions on how to improve, given time to improve, given warnings about the consequences of not improving, and an assessment must be made as to whether the person's performance has sufficiently improved.
- 23 In terms of those issues, there is a little bit to say about the background. The applicant had been employed by the respondents in at least two periods of employment, going back to the 1990s. The most recent period of employment, which I think was the second period of employment, commenced in 2007 and went through to the date of dismissal in 2016.
- 24 Relevant to my assessment of credibility and fairness the applicant says that if her performance was truly as bad as the respondents say, that if she made as many mistakes as the respondents say she made and failed to correct those mistakes after they were brought to her attention in the way the respondents describe, she would not have lasted nine years in that second period of employment.

- 25 There is some force in what the applicant says and the issue was tested with Mr and Mrs Wilson both by the applicant and by myself.
- 26 There are two relevant pieces of evidence in relation to it which, in my mind, satisfy the credibility issue, that is whether there was actually a process leading up to the applicant's dismissal, without considering whether the process was good enough to make the ultimate decision a fair one.
- 27 Firstly, there was the loss of most of the work of a big client which was communicated to the respondents in around September/October 2015 and, secondly, there was the move of the respondents' business from its old premises in Osborne Park to its new premises in Balcatta.
- 28 The loss of most of the work from that big client, described to me as "TARA", put Mr and Mrs Wilson in a situation where they focussed more closely on the efficiency of their business and the performance of their employees than might previously have been the case. In response it was common in these proceedings that the respondents' employees had agreed to work reduced hours and this only supports the conclusion I make that the pressure was on in relation to the business's performance and financial position.
- 29 The move to the Balcatta premises, which occurred in the months after the respondents' business received the news about TARA, led to a different configuration of workstations such that Mr and Mrs Wilson, but in particular Mr Wilson, were able to better observe how the applicant conducted herself during the work day. Mr Wilson gave evidence that from this new position he saw the applicant doing her work using inefficient methods that she had previously been counselled about and instructed on how to improve, including by the applicant being given handmade items that if used would assist her. His evidence was that he was able to observe, at Balcatta, that the applicant was not working efficiently and that ability to observe was different to Osborne Park.
- 30 Plans of the Osborne Park and Balcatta premises were tendered and I accept that Mr and Mrs Wilson would have been able to more easily observe the applicant at Balcatta and, again, their evidence on their observations of the applicant had a ring of truth about them.
- 31 Mr Wilson kept an eye on all employees and I find that he counselled all employees where mistakes were made but I also find that in circumstances where there was a need for good efficiency within the business and Mr Wilson saw the applicant, at Balcatta, employing inefficient methods to do her work, Mr and Mrs Wilson did focus on the applicant's performance in 2016. That is, I find that there were credible reasons for why issues came to light in 2016 that had perhaps not come to light, or come to light with such focus, previously.
- 32 I find that Mr and Mrs Wilson regularly brought performance matters to the applicant's attention in 2016. The evidence of Mr and Mrs Wilson is supported by that of Mr Banywesize and the applicant herself.
- 33 I also find that, despite the applicant's denials that this occurred, the applicant was warned by Mr Wilson that if her performance did not improve she may be terminated. Mr Banywesize said that Mr Wilson said this to all employees and that he was quite clear about it. The applicant submitted to me that Mr Banywesize gave this evidence only because he was still in the respondents' employ. I reject this totally. Firstly, the applicant never put this to Mr Banywesize, despite being invited to do so, and secondly because my assessment of Mr Banywesize is that he is an honest man.
- 34 The applicant says that when issues were raised with her by Mr Wilson they were raised by him in an angry and aggressive manner. It was not clear whether this was a general complaint or whether it was said by the applicant to have had the effect that she did not understand what was being said to her. Mr Wilson for his part admitted that at times he did become angry and Mrs Wilson confirmed this.
- 35 Without having to find exactly how often Mr Wilson became angry and what levels of anger were reached (although I specifically reject the applicant's assertion, which she attempted to put to Mr Wilson but about which she had not given evidence, that he clenched his fist at her) I find that the message that the applicant's performance had to improve, in the ways referred to, and that there would be consequences if it did not, was communicated to the applicant.
- 36 I also find that the applicant did not really respond to performance issues being brought to her attention, even though she was warned about the consequences. I find this based on the evidence of Mr and Mrs Wilson which had a ring of truth about it and also the evidence of Mr Banywesize to the effect that he saw Mr Wilson raising issues with the applicant several times at Balcatta and was present at several meetings at which her mistakes were discussed. However, I also found relevant the evidence of the applicant herself that, essentially, by 2016 she had become set in her ways. The applicant agreed that she did not correct her habits in accordance with instructions given by Mr and Mrs Wilson (see ts 64) and in re-examination she gave evidence, in effect, that she preferred to do things her way. (see ts 68-69)
- 37 I find the applicant had been doing her work in a certain way, her way, for over eight years and that by 2016 she had been, if I could perhaps use a phrase that might summarise what Mr and Mrs Wilson would say about her work performance, 'plodding along' in her work for those years going quite slowly, doing things her way, even if they were sometimes inefficient, making mistakes from time to time, fixing them, and producing an adequate but not brilliant work output.
- 38 And so by the time early 2016 came around, as I say, the applicant had become set in her ways and the close attention from Mr Wilson was real and warranted but also very unwelcome for the applicant. It was driven by the need for greater efficiency and the higher standards that demanded of the applicant and this was very difficult for her. I find that the applicant responded with some defensiveness and some blame shifting because the world had changed for her in a very dramatic way and she was struggling to cope. However, what was behind what was being said to her was reasonable and made sense in the circumstances and what was being demanded of her was reasonable and made sense in the circumstances. The applicant was either unwilling or unable to improve despite the demands being fair and reasonable ones of an experienced operator.

- 39 The process was not perfect, far from it. There was some emotion and anger involved on Mr Wilson's part. There was a lack of paperwork. However, I cannot expect that in a small business such as that being run by Mr and Mrs Wilson they would bring gold standard practice to bear in relation to bringing failings to the attention of an employee, developing programmes for improvement, with key performance markers and things of this nature.
- 40 I find that the respondents did enough in telling the applicant about problems with her performance, how she needed to improve, telling her of the consequences of not improving and giving her an opportunity to improve.
- 41 Insofar as Mr Wilson in his closing submissions told me accurately about the boxes that need to be ticked I think the boxes have been ticked. I add here that even if a perfect performance management process had been run I do not think it would have led to a different outcome for the applicant because she showed little willingness or ability to change her ways.
- 42 I also reject the applicant's assertion, really only developed during the course of the proceedings, that she was treated differently from the other employees as they all made similar mistakes and yet she was the only person whose employment was terminated. This echoes the applicant's argument that the reasons for her dismissal were mere pretext, which I have already rejected. In any event, I accept the evidence that the other employees did not make as many mistakes and that they showed a greater propensity to learn from them and not repeat them.
- 43 The decision to dismiss was fair and reasonable.
- 44 The final question is whether there was otherwise any harshness involved in the dismissal. I have already said that the process leading to dismissal was far from perfect. It is clear that Mr Wilson too often allowed emotion to get the better of him and spoke angrily to the applicant. I am not interested at this point of my decision in whether the applicant did anything in particular to provoke that anger. Mr Wilson was the boss and held the applicant's financial security in his hands to an extent and should have maintained professionalism at all times and this he clearly failed to do.
- 45 That does not mean that there was not a good reason for Ms Hua's employment to be terminated and I have found there was a good reason for her employment to be terminated being that the applicant had become set in her inefficient ways and, even if she did not like the way the message was being delivered, had ample opportunity to understand what was required of her and to address it and was simply unable to do so.
- 46 But it was not only the problems with the applicant's performance which came to a head on 3 May 2016, it was also the problems with the respondent's approach which came to a head. On 3 May 2016, on a day when both Mr and Mrs Wilson agree that Mr Wilson had been frustrated and angry, the applicant was told her employment was over without being given an opportunity to explain her side of the story in relation to all the matters that found their way into the Notice of Answer and without an opportunity to comment on whether those things ought result in her dismissal. The applicant was not given, for instance, 24 hours to think about her mistakes and to respond to the respondents on how they had been caused and whether they were her fault, nor an opportunity to address the respondents on whether those mistakes, if they had been made, ought result in her dismissal.
- 47 I know the respondents say there is a long history to the decision made on 3 May 2016 but the respondents had to remember on that day the applicant had been employed by them twice, on the last occasion for nine years, and that if she had been an inefficient employee they had tolerated that for many years and only really discovered it, and decided to do anything about it, after the move to Balcatta.
- 48 The respondents had to remember that on 3 May 2016 a long term employee who was inefficient, rather than "bad", should have been treated sensitively and effectively let down gently. Under the stress of running a small business, perhaps at the end of many months of working very hard to move premises, perhaps with the family issues in Queensland we were told about in the back of people's minds, and perhaps because of what I accept would have been the day to day difficulties in dealing with the applicant, given that I find she was acting defensively in relation to what was happening, there was too much emotion and not enough process in relation to what happened on 3 May 2016.
- 49 In that way, and in that way only, some harshness attached to the decision to terminate and I award Ms Hua \$1,500 by way of compensation in relation to it.

2016 WAIRC 00848

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HELEN HUA

APPLICANT

-v-

RM & JM WILSON T/AS IMAGES EMBROIDERY

RESPONDENT**CORAM**

COMMISSIONER D J MATTHEWS

DATE

THURSDAY, 27 OCTOBER 2016

FILE NO/S

U 91 OF 2016

CITATION NO.

2016 WAIRC 00848

Result Application allowed; compensation ordered

Representation

Applicant In person

Respondent Mr R Wilson

Declaration and Order

HAVING heard the applicant on her own behalf and Mr R Wilson for the respondent, on 1 August 2016, 12 September 2016 and 3 October 2016; and

HAVING given Reasons for Decision in which I determined the applicant was dismissed harshly and that compensation should be awarded; and

HAVING heard the applicant speak to the minute on 26 October 2016;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* make the following declaration and order:

(1) The dismissal of the applicant was harsh; and

(2) The respondent pay to the applicant the sum of \$1500.00 within 30 days of the date of this order.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2016 WAIRC 00828

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2016 WAIRC 00828

CORAM : COMMISSIONER D J MATTHEWS

HEARD : FRIDAY, 30 SEPTEMBER 2016

DELIVERED : MONDAY, 17 OCTOBER 2016

FILE NO. : B 123 OF 2016

BETWEEN : PETER KAY

Claimant

AND

CITY OF PERTH

Respondent

CatchWords : Industrial law (WA) - Contractual benefits claim - Claim for payment of amount equal to 100% of annual salary - Principles applied - Held contract terminated inside probationary period - Clause relied upon did not apply - Clause not breached - Claim dismissed

Legislation : *Industrial Relations Act 1979* (WA)

Result : Claim dismissed

Representation:

Counsel:

Claimant : Mr S Heathcote

Respondent : Mr S Kemp and with him Ms S Walker

Solicitors:

Claimant : Mr S Heathcote

Respondent : Jackson McDonald

Case(s) referred to in reasons:

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

Case(s) also cited:

Apache Oil Australia Pty Ltd v Santos Offshore Pty Ltd [2015] WASC 318

Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36

Australian Casualty Co Ltd v Federico [1986] HCA 32

Bryne & Frew v Australian Airlines (1995) 131 ALR 422
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7
Fitzgerald v Masters [1956] HCA 53
Gollin & Co Ltd v Karenlee Nominees Pty Ltd [1983] HCA 38
McCann v Switzerland Insurance Australia Ltd [2000] HCA 65
McGowan v Direct Mail and Marking Pty Ltd [2016] FCCA 2227
Pacific Carrier Ltd v BNP Paribas [2004] HCA 35
Sanders v Snell (1998) 157 ALR 491
Wilkie v Gordian Runoff Ltd [2005] HCA 17

Reasons for Decision

- 1 There was a written contract of employment between the claimant and the respondent executed on 14 December 2016.
- 2 Clause 5.1 provided:

The Employee's appointment is subject to the satisfactory completion of a qualifying period of six (6) months from the date of commencement. During this period either party may terminate employment by providing one (1) month's written notice to the other party.
- 3 Clause 17.5 provided:

Termination by the Employer: Any reason: If the Employer does so for any reason other than those specified in Clause 17.2, the Employer must pay to the Employee 100% of the annual salary then payable or the balance of remuneration then payable under this employment contract until its End Date, whichever is lesser. The payment specified in this clause includes any payment in lieu of notice which may otherwise be due to the Employee and discharges the Employer's maximum liability.
- 4 In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40] Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said:

The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.
- 5 The reasonable reader of the contract of employment having regard to the entire contract, the surrounding circumstances and the purpose and object of the contract would have understood it to provide as follows:
 - (1) The claimant's employment was subject to a probationary period of six months (clause 5.1);
 - (2) At any time during the probationary period of six months the respondent could terminate the employment of the claimant by giving him one month's written notice (clause 5.1);
 - (3) The claimant's employment would come to an end, pursuant to the notice given under clause 5.1, if such notice were given, one month from the date the notice was given; and
 - (4) The operation of clause 17.5 is subject to the successful completion of the probationary period, that is its provisions only take effect if notice has not been given within the six month probationary period provided for in clause 5.1.
- 6 The claimant contends that, if the notice under clause 5.1 is given to an employee less than a month before the expiry of the probationary period provided for in clause 5.1, the working of the period of notice has the effect that the employee works beyond the six month probationary period and enters territory where clause 17, and in particular clause 17.5, has operation. The argument continues that if an employee is working for the respondent, or would be but for a breach of the contract by the respondent, on a date more than six months after the employee is employed, because the notice under clause 5.1 was given less than a month before the end of the probationary period, termination by the employer may only be for cause under clause 17.2 or, if without cause, is subject to the provisions of clause 17.5.
- 7 The construction the claimant contends for is unreasonable.
- 8 The construction is unreasonable because it would mean that the six month probationary period provided for in clause 5.1 is not actually a six month probationary period at all, but a probationary period of five months and one day. After that time an employee would have the same contractual rights as an employee who is not on probation in relation to termination of employment.
- 9 A reasonable reader would reject a construction of an employment contract which clearly gives an employer six months to "make up their mind" about an employee that had the result that an employer did not have six months but rather only had five months and one day to do this. It would be clear to the reasonable reader that the contract provides that a new employee is, in relation to the question of termination of employment, in a different position to other employees and that the difference is effective and operative for a period of six months and not a lesser period.
- 10 A consideration of the text and the clear purpose and object of the transaction, that is to employ someone subject to the satisfactory completion of a probationary period of six months, admits only one result.

- 11 The reasonable person reading the contract would not have found that the respondent could pay the claimant a sum of money in lieu of the claimant serving the period of notice if notice were given under clause 5.1. There is no material within the contract that would allow the reasonable reader to come to such a conclusion.
- 12 The respondent breached the contract of employment by paying the claimant one month's salary as a lump sum rather than allowing him to work out the notice period. However, no harm has been done. Even if the claimant had been allowed to work the month, and had been at work pursuant to his contract of employment after the six month probationary period, this would not have, for the reasons given above, qualified him for a payment under clause 17.5.
- 13 The claimant has received, by a lump sum payment of a month's wages, a sum equating to the damage suffered by him.
- 14 In any event the Notice of Claim raised only a breach of clause 17.5 and not a breach of clause 5.1. Clause 17.5 did not apply, and would not have applied even if the claimant had been allowed to work out his notice period, and therefore was not breached.
- 15 An order will issue dismissing the claim.

2016 WAIRC 00830

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER KAY

CLAIMANT

-v-

CITY OF PERTH

RESPONDENT**CORAM**

COMMISSIONER D J MATTHEWS

DATE

MONDAY, 17 OCTOBER 2016

FILE NO/S

B 123 OF 2016

CITATION NO.

2016 WAIRC 00830

Result

Claim dismissed

Representation**Claimant**

Mr S Heathcote of counsel

Respondent

Mr S Kemp and Ms S Walker of counsel

Order

HAVING heard Mr S Heathcote, of counsel, for the claimant and Mr S Kemp and with him Ms S Walker, of counsel, for the respondent; and

HAVING given Reasons for Decision in which I determined to dismiss the claim;

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

The claimant's claim is dismissed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2016 WAIRC 00839

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KAYLENE KRAUSE

APPLICANT

-v-

WALKABOUT HOTEL MOTEL P/L

RESPONDENT**CORAM**

CHIEF COMMISSIONER P E SCOTT

DATE

FRIDAY, 21 OCTOBER 2016

FILE NO/S

B 176 OF 2015

CITATION NO.

2016 WAIRC 00839

Result Application dismissed

Order

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

WHEREAS by email dated 2 December 2015, the respondent's solicitors advised the applicant and the Commission that it has been put into external administration; and

WHEREAS by email dated 18 January 2016, the Commission informed the applicant that, under s 440D of the *Corporations Act 2001* (Cth), she must seek leave to proceed with the matter while the respondent is under external administration; and

WHEREAS by emails dated 20 October 2016, the applicant advised the Commission that the respondent is now in liquidation, and requested that the matter be dismissed.

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

THAT the application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2016 WAIRC 00833

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MIHALJ OLMAN	APPLICANT
	-v-	
	DEPARTMENT OF CORRECTIVE SERVICES	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 19 OCTOBER 2016	
FILE NO/S	U 165 OF 2016	
CITATION NO.	2016 WAIRC 00833	

Result Application dismissed

Order

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

WHEREAS the applicant concurrently filed several applications or appeals in respect of the same decision of the respondent; and

WHEREAS by letter dated 5 October 2016, the Commission noted the other matters and directed the applicant to elect which matter he would pursue; and

WHEREAS on 12 October 2016, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance* in respect of this matter.

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

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2016 WAIRC 00866

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2016 WAIRC 00866
CORAM	: COMMISSIONER T EMMANUEL
HEARD	: MONDAY, 12 SEPTEMBER 2016, TUESDAY, 13 SEPTEMBER 2016, WEDNESDAY, 14 SEPTEMBER 2016, FRIDAY, 23 SEPTEMBER 2016, WEDNESDAY, 12 OCTOBER 2016

DELIVERED : FRIDAY, 4 NOVEMBER 2016
FILE NO. : U 153 OF 2015
BETWEEN : ALISON PALMER
 Applicant
 AND
 FORREST PERSONNEL INC
 Respondent

CatchWords : Industrial Law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Principles applied – Redundancy – Whether the applicant was consulted – No consultation – Applicant harshly and unfairly dismissed – Compensation awarded – Application upheld – Declaration and order made

Legislation : *Industrial Relations Act 1979* (WA) s 23A, s 29(1)(b)(i)

Result : Application upheld

Representation:

Applicant : Mr K Trainer (as agent)

Respondent : Ms R Lee (of counsel)

Cases referred to in reasons:

AWI Administration Services Pty Ltd v Birnie (2001) 81 WAIG 2849
Begg v Clay & Mineral Sales Pty Ltd [1997] FCA 658
Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635
Bogunovich v Bayside Western Australia Pty Ltd (1999) 79 WAIG 8
Bonifassi v E.J Fillaudeau and J.J Maindok t/a Fillaudeau's [2016] WAIRC 00819
Capewell v Cadbury Schweppes Australia Ltd (1997) 78 WAIG 299
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd [2010] FCA 591; (2010) 198 IR 382
The Federated Clerks' Union of Australia v The Victorian Employers' Federation [1984] HCA 53; (1984) 154 CLR 472
Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893
Margio v Fremantle Arts Centre Press (1990) 70 WAIG 2559
Port Louis Corporation v Attorney-General of Mauritius [1965] AC 1111
Re Loty and Holloway v Australian Workers' Union (1971) AR (NSW) 95
Rollo v Minister of Town and Country Planning [1948] 1 All ER 13
Sealanes (1985) Pty Ltd v Foley [2006] WAIRC 04110; (2006) 86 WAIG 1239
Shire of Esperance v Mouritz (1991) 71 WAIG 891
Sinfield v London Transport Executive [1970] 1 Ch 550
TVW Enterprises Ltd v Duffy (No 2) (1985) 7 FCR 172
The Undercliffe Nursing Home v the Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Reasons for Decision

Background

- 1 Ms Palmer was employed as the Chief Operating Officer (COO) for Forrest Personnel Inc (Forrest Personnel) in March 2013. When the Chief Executive Officer (CEO) resigned in October 2014, Ms Palmer was asked to act as CEO. This acting arrangement was extended several times before Forrest Personnel began its recruitment process for the CEO position.
- 2 Ms Palmer was not successful in her application and Mr Sullivan was appointed CEO of the organisation. Three weeks later, Mr Sullivan restructured Forrest Personnel and made Ms Palmer's COO position redundant.
- 3 Ms Palmer's claim is made under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (Act). She says that she was unfairly dismissed and her position was not made redundant. Instead her position was renamed General Manager Services and its salary was reduced. Ms Palmer says Forrest Personnel did not consult her and it did not offer her any alternative positions. She says she would have accepted an alternative position.
- 4 Forrest Personnel says it did not unfairly dismiss Ms Palmer. It made Ms Palmer's COO position redundant after consulting with her and Ms Palmer was not interested in any alternative positions.

- 5 Ms Palmer seeks the full amount of compensation that the Commission can award, being six months' remuneration. Forrest Personnel says no compensation should be awarded to Ms Palmer.

Question to be decided

- 6 I must decide whether or not Forrest Personnel unfairly dismissed Ms Palmer.

The law

- 7 The test in a claim of harsh, oppressive or unfair dismissal is whether the employer has exercised its legal right to dismiss so harshly or oppressively against the employee as to amount to an abuse of that right: *The Undercliffe Nursing Home v the Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385, 386 (Brinsden J). It involves considering whether the employee got a fair go all round: *Re Loty and Holloway v Australian Workers' Union* (1971) AR (NSW) 95, 99 (Sheldon J). The test is objective and the onus of proof is on the employee.
- 8 A failure to have a fair process can lead to a finding that the dismissal was harsh, oppressive or unfair: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 but a lack of procedural fairness may not always have this result: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891, 899 (Nicholson J). In *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36; (2003) 83 WAIG 893 EM Heenan J notes that the distinction between substantive and procedural issues can be useful but the 'decision for the Commission, or a court in any particular case, is simply whether the individual termination of employment was harsh, oppressive or unfair and that test must always be applied without any gloss' [72].
- 9 The Full Bench in *Margio v Fremantle Arts Centre Press* (1990) 70 WAIG 2559 held that '[a]n employee should, so far as is practicable, not be dismissed without warning as to the possibility of dismissal' (2561).

Summary of timeline

- 10 Ms Palmer was told on Monday 20 July 2015 that she had not been selected to be Forrest Personnel's CEO and the new CEO would start the next day.
- 11 Ms Palmer met Mr Sullivan just before a meeting of the Board of Directors of Forrest Personnel (**Board**) on Tuesday 21 July 2015. They did not meet or speak again face-to-face until Friday 24 July 2015, although they exchanged emails on the night of Wednesday 22 July 2015.
- 12 Ms Palmer and Mr Sullivan met on Monday 27 July 2015.
- 13 Ms Palmer and Mr Sullivan met again on Thursday 30 July 2015, and later that night Mr Sullivan sent Ms Palmer an email.
- 14 The parties present very different versions about what was discussed during their meetings.
- 15 Ms Palmer and Mr Sullivan had no contact from Friday 31 July until Friday 7 August 2015, when Ms Palmer sent Mr Sullivan an email asking if they could meet to discuss the work she had been doing.
- 16 They met on Monday morning, 10 August 2015. Ms Palmer's employment was terminated at this meeting (**termination meeting**).

Credibility

- 17 Ms Palmer and Forrest Personnel present very different versions of several important aspects of this case, including what occurred at their meetings. I make various findings about witness credibility which resolve this conflict.

Mr Rawet

- 18 Mr Rawet is Ms Palmer's partner. His evidence was measured, frank and forthcoming. I find Mr Rawet to be a credible witness.

Ms Crittall

- 19 Ms Crittall was employed at Forrest Personnel at the time Ms Palmer was recruited and dismissed. She has held several positions with Forrest Personnel, including Human Resources Manager and General Manager People and Resources.
- 20 Generally, Ms Crittall presented as a credible witness. She equivocated in relation to one aspect of her evidence and I will say more about that later.

Ms Palmer

- 21 Ms Palmer gave evidence for a day and a half. Her evidence was thoughtfully given, clear, forthcoming and consistent. Ms Palmer answered the questions put to her without hesitation. Her evidence was measured, calm, precise and nuanced. It rang true to me.
- 22 Ms Palmer impressed me as a truthful person to whom professionalism and integrity is very important. I find Ms Palmer to be a credible witness.
- 23 Forrest Personnel says I should reject Ms Palmer's evidence because she put the previous CEO's electronic signature to a letter that she drafted for the first version of the organisation's Annual Report 2013/2014 (**annual report**). I disagree.
- 24 I accept the evidence of Ms Palmer and Ms Crittall about the circumstances that led to this incident. I find Ms Palmer added the previous CEO's signature to a letter she drafted because it related to a period during which he had been CEO. He had left the organisation in unhappy circumstances and he had not prepared the annual report, leaving Ms Crittall and Ms Palmer with just a few days to prepare and finalise the annual report. All copies of that first version of Forrest Personnel's annual report, which included the letter drafted by Ms Palmer, were recalled and destroyed.

- 25 I find Ms Palmer's actions understandable in the circumstances. I am not troubled by this incident and it does not affect my view of Ms Palmer's credibility.
- 26 Forrest Personnel says I should doubt Ms Palmer's credibility because she indicated in an email that she intended to sign a deed when she did not intend to sign it. It says Ms Palmer's actions are, at best, manipulative because she did not sign the deed but accepted payment beyond what she was entitled to in accordance with the terms of the deed. Further, Forrest Personnel says Ms Palmer's offer to settle for \$25,000 in exchange for signing the deed affects her credibility.
- 27 As I discuss from [318] to [338], I find Ms Palmer's termination package was never subject to a deed. She accepted payment in accordance with what she was offered at the termination meeting. It was reasonable for Ms Palmer to want to see the sums involved in her termination package.
- 28 It was open to Ms Palmer to offer to forego bringing a claim in exchange for signing the deed. Her actions do not affect my view of her credibility.
- 29 Forrest Personnel says Ms Palmer's reliance on and reference to the previous CEO's promise that she would be his successor, in circumstances where Ms Palmer knows the previous CEO had no authority to appoint Ms Palmer to the CEO position, shows Ms Palmer's poor judgment and affects her credibility.
- 30 I consider that the promise made to Ms Palmer by the previous CEO is relevant to Ms Palmer's disappointment about the way Forrest Personnel treated her. Any reliance on or reference to the promise by Ms Palmer does not affect my view of her credibility.

Mr Sullivan

- 31 Mr Sullivan was an unimpressive witness.
- 32 Mr Sullivan frequently did not answer questions put to him. At times he was evasive. Mr Sullivan repeatedly interrupted Ms Palmer's representative.
- 33 Some of Mr Sullivan's evidence was implausible in all the circumstances.
- 34 On occasion, the evidence Mr Sullivan gave in cross-examination or re-examination was inconsistent with his earlier testimony. It may be that the passage of time has affected Mr Sullivan's recollection of events.
- 35 For these reasons, I find Mr Sullivan's evidence to be unreliable.
- 36 Further, I am concerned by a number of statements in Forrest Personnel's pleadings which I consider to be misleading.
- 37 Mr Sullivan gave evidence that he approved Forrest Personnel's pleadings.
- 38 Forrest Personnel's Response to the Notice to Admit states that Forrest Personnel's Notice of Answer and Amended Particulars of Claim were filed with the approval and on the instruction of Mr Sullivan.
- 39 Forrest Personnel's Notice of Answer and Counter-Proposal states that Ms Palmer resigned. When it was put to Mr Sullivan in cross-examination that Ms Palmer did not resign, first he said 'No. The applicant accepted a, um, package', then he said 'Yes. She did.' Asked again whether Ms Palmer resigned, Mr Sullivan replied 'Yes.' He appeared to characterise a resignation as 'a willingness to depart, which is a resignation.' Mr Sullivan stated:
- Was it voluntary in terms of was it made enticing enough that the person was prepared to do it voluntarily, or was the person – was it made – was it made in circumstances where the person was very upset and was saying they're going to take us to court? Um, so my definition – so if – just to clarify my definition of a resignation, a resignation is where both party [sic], or where one party has said, 'I am prepared to terminate my employment agreement with you, um, with no further claim.' That's different to a termination.
- 40 I find Mr Sullivan tailored his evidence to suit Forrest Personnel's case. He refused to make concessions he thought would damage Forrest Personnel's case even where it was obvious the concessions needed to be made.
- 41 Forrest Personnel's Amended Particulars states that Mr Langton, the previous CEO, denied that he had 'made a verbal promise [to Ms Palmer] that she would have the role of CEO when he ceased his employment with [Forrest Personnel]' (at [2.2]). However, Mr Sullivan gave evidence that he believed Mr Langton probably did make the offer to Ms Palmer that she would succeed into the CEO position. Mr Sullivan said he believed that because Ms Crittall told him that on his second day at Forrest Personnel. That suggests to me that Forrest Personnel sought to rely on the denial in circumstances where its CEO, Mr Sullivan, having approved the pleadings to the contrary (see [37] and [38]), believed that the offer probably had been made. I find that misleading. It adversely affects my view of Mr Sullivan's truthfulness and credibility.
- 42 Forrest Personnel's Amended Particulars states that the previous CEO 'was the subject of a complaint by the Applicant of harassment which resulted in his resignation'. Mr Lewis, who was Forrest Personnel's former Chief Financial Officer, and Ms Palmer gave evidence that Ms Palmer did not complain about the previous CEO. Mr Sullivan conceded in cross-examination that a complaint by someone other than Ms Palmer about the previous CEO led to the former CEO's resignation.
- 43 Forrest Personnel's Amended Particulars states Ms Palmer was given advice about consultation mechanisms and had continued access to her work email account throughout the change process. Mr Sullivan gave evidence that Forrest Personnel communicated with staff about the change process via their email accounts and Ms Palmer may have had no access to her work email account from Friday 14 August 2015, which was well before the end of the change process.
- 44 I consider Forrest Personnel's pleadings to be misleading. In circumstances where Mr Sullivan approved the content of those pleadings, this adversely affects my view of Mr Sullivan's credibility.
- 45 Because of the unreliability of Mr Sullivan's evidence, I have approached his evidence with considerable caution.
- 46 To the extent that Ms Palmer's evidence conflicts with Mr Sullivan's evidence, I prefer Ms Palmer's evidence.

47 I set out below a summary of what the parties say occurred and my findings.

Ms Palmer's recruitment to the COO position

- 48 Ms Palmer gave evidence that she has a bachelor's degree in social sciences and a master's degree in social sciences, specifically in human services management. For the past 25 years she has held senior positions in a number of different organisations, either as Operations Manager, Executive Level Manager or CEO.
- 49 Ms Palmer gave evidence that when she was recruited to the COO position, she was told by the CEO, Mr Langton, that she would be his successor. He said he would not be in the position for the long term and she would take over from him.
- 50 As stated above, Forrest Personnel says that Mr Langton denied making that promise.
- 51 I accept the evidence of Ms Palmer, Ms Crittall and Mr Lewis on this issue, all of whom were present at the meeting where they say the statement was made.
- 52 I find that at the time that she was recruited to the COO position at Forrest Personnel, Ms Palmer was told by the CEO that she would be his successor.

Ms Palmer acting in the CEO position

- 53 In October 2014, Ms Palmer was seconded to act as CEO after Mr Langton resigned from the position. This acting arrangement was extended twice, and continued on an open-ended basis until the CEO recruitment was finalised on Monday 21 July 2015.
- 54 In an email to all staff on 21 July 2015, the Chair of the Board (**Chair**) thanked Ms Palmer for 'continuing to deliver services of excellence'. In an email to all staff the same day, Mr Sullivan refers to the Board paying tribute to Ms Palmer and notes that she richly deserved the vote of thanks the Board gave her.
- 55 Ms Crittall gave evidence that she had worked with Ms Palmer in the past at another organisation. Ms Crittall said Ms Palmer's skills, abilities and commitment to work were exceptional.
- 56 Forrest Personnel did not dispute that Ms Palmer's performance was excellent. However, it suggested that she exercised poor judgment in attaching Mr Langton's electronic signature to letter from the CEO that she authored for the annual report. As I state at [25], I consider this event to be understandable in the circumstances. It does not adversely affect my view of Ms Palmer's performance or her credibility.
- 57 I accept that Ms Palmer's performance as COO and acting CEO was excellent. I accept that she was awarded a bonus of \$10,000 for the 2013/2014 year and that under her leadership, the organisation's performance, star ratings and revenue all increased.

The recruitment process for the CEO position

- 58 Ms Palmer gave evidence that she was very disappointed when she was told at a Board meeting in January 2015 that if the CEO position were to be advertised the next day, she would not be appointed. She was disappointed not to be given the permanent position at that time, and also that the Board denied knowing about the verbal agreement that she would become the CEO. Ms Palmer said she knew she could not do anything about it because she had nothing in writing, so she just had to accept it, carry on and do the best possible job she could.
- 59 When Forrest Personnel advertised for the permanent CEO position, Ms Palmer almost did not apply. She was under the impression that the Chair, Mr Ian Peterson, and other interview panel members, who were Board members, may be biased against her because of an incident that had occurred around April 2014. The Chair had accused Ms Palmer of a breach of confidentiality in an email he sent to her which was copied to the Board. The Chair later agreed he had been mistaken and agreed that he would apologise to Ms Palmer. Ms Palmer was concerned her integrity and character had been questioned and that it may have tainted the Board's image of her, unfairly influencing the recruitment process for the CEO position.
- 60 Ms Palmer gave evidence that the Chair treated her differently to how he would usually treat a CEO. They had infrequent meetings outside of Board meetings, she felt he undermined her position by deferring reports she had written and he gave her no feedback. She gave evidence that all indications from the Chair were that he did not want Ms Palmer to be CEO.
- 61 Ms Palmer was interviewed on 6 July 2015 for the CEO position.
- 62 Ms Palmer and Ms Crittall gave evidence that Ms Crittall's husband, Mr Ian Wilks, was told on 8 July 2015 that he was unsuccessful for the position. Ms Palmer gave evidence that after that she thought perhaps she was in with a chance because she was not told then that she was unsuccessful.
- 63 On the afternoon of Monday 20 July 2015, the recruitment company contacted Ms Palmer to tell her that she was unsuccessful. Ms Palmer gave evidence that about 20 minutes later, the Chair called her and said, 'Oh, good, then you know...that you haven't been successful' and launched into telling her all about Mr Sullivan. Ms Palmer was disappointed by the conversation and thought the Chair handled things poorly and insensitively. She was told at that point that Mr Sullivan would start as CEO the next day. When she pointed out to the Chair that her contract required two weeks' notice, the Chair agreed that she would act as CEO while Mr Sullivan did orientation for the two weeks.
- 64 I accept Ms Palmer's evidence.

Tuesday 21 July 2015

- 65 Ms Palmer's and Mr Sullivan's accounts of what happened on Tuesday 21 July 2015 differ in a number of important respects. It is not in dispute that they met for the first time in the afternoon before the Board meeting. At the Board meeting, there was discussion about Ms Palmer acting as CEO for three weeks to enable Mr Sullivan to do an orientation during that period. This is reflected in Mr Sullivan's orientation plan (**Tab 10**).

Ms Palmer's evidence

- 66 Ms Palmer gave evidence that the first words she said to Mr Sullivan were, 'Welcome to Forrest Personnel. Congratulations on your appointment.' She met him just before 2:00 pm, and they had a brief discussion during which he asked whether she would act for an extra week so that he could do a thorough orientation and see different sites. She agreed to act as CEO for the three weeks. They did not discuss any specifics about how she should conduct the work. She interpreted it to mean that she should continue with business as usual, which would free him up to get a true understanding of the organisation, and she would be carrying on the role of CEO in that period.

Mr Rawet's evidence

- 67 Mr Rawet gave evidence that Ms Palmer told him that when she met with Mr Sullivan, she congratulated him on winning the appointment. Mr Rawet said he clearly remembered her saying to him 'Well, you know, I'm disappointed but it's got nothing to do with him...he won the position, I didn't'. Mr Rawet said 'she deliberately made an effort not to appear to be sour grapes and I believe she wouldn't have cos that's just not her nature'.

Mr Sullivan's evidence

- 68 Mr Sullivan gave evidence that he expected staff to have cleared their diaries for him, despite the short notice of his appointment and arrival, because it is not a normal event for a new CEO to arrive. He says that at the Board meeting, he corrected Ms Palmer's statement that she was going to act as CEO because there was a requirement under her contract to continue acting in that role for two weeks. He gave evidence that he said that the Board had just accepted a delegations manual which states it is the CEO's role to appoint the acting CEO. Ms Palmer's representative objected to Mr Sullivan's evidence on the basis that this was not put to Ms Palmer in cross-examination.

Consideration

- 69 I accept Ms Palmer's evidence, which was consistent with what Mr Rawet said Ms Palmer told him at the time, that she welcomed Mr Sullivan to Forrest Personnel and congratulated him on his appointment. I find Mr Sullivan and Ms Palmer agreed that Ms Palmer would act as CEO for three weeks, rather than two weeks, to enable Mr Sullivan to do his orientation.

Wednesday 22 July 2015**Ms Palmer's evidence**

- 70 Ms Palmer gave evidence that on Wednesday 22 July 2015 she had meetings in Perth. At 4.43 pm she received the following email from Mr Sullivan (**Tab 14**):

Hello Alison,

I regret that we could not meet today and I understand you will be in Perth tomorrow as well.

Please organise a time to meet me by no later than 12:00pm on Friday of this week to address the issues identified in my Orientation Plan.

Additionally, please send me a brief update on a daily basis at 4:30pm which will include your:-

- Activities for that day.
- Your planned activities for the forthcoming day.
- Any meetings you plan to attend for the forthcoming week with a calendar invitation to attend any business or planning meetings.

Thankyou very much.

Regards,

Mark Sullivan

Chief Executive

- 71 She gave evidence that she found his email strange and it almost felt like he was micromanaging her. They had had no contact since the Board meeting the night before and she thought it was strange Mr Sullivan had not contacted her to discuss matters in his email. Ms Palmer was not sure it was necessarily appropriate to invite Mr Sullivan to some of her meetings, for example one of them was for Board members only. She replied to him at 6.25 pm with the following email (**Tab 14**):

Hi Mark

I hope your first couple of days with Forrest have gone well.

I can meet with you on Friday in Bunbury at 10:30am. The afternoon would have suited me better, but I can change my plans because I am aware you will commence your road trip next week.

As discussed, I am happy to continue in my A/CEO role until the 10/8 - has this been approved by the Board?

Look forward to catching up on Friday

Cheers

Ali

- 72 Mr Sullivan wrote back to her at 8.05 pm the same evening (**Tab 14**):

Hello Alison,

You are confusing two different industrial issues.

I have an obligation to pay you a higher duties allowance for 2 weeks. I have no obligation to allow you to perform those duties.

The Board has delegated me authority to appoint an acting CEO and I decided to allow you to continue during my orientation.

I believe that there is a difficulty in communication between us perhaps due to your busy workload and I am reconsidering my decision.

Please note my request below and attend to it first thing tomorrow.

I will make my decision after that.

Mark Sullivan

Chief Executive

- 73 Ms Palmer gave evidence that she was really disturbed by Mr Sullivan's response. The subject line indicated a chain of emails with the Chair about Ms Palmer. She found the email quite aggressive, almost bordering on threatening and said it rang warning bells. She was confused about why he would think they had a difficulty in communication in circumstances where they had had no other communication since the Board meeting the night before. She was also confused about his statement that he had an obligation to pay her a higher duties allowance for the two weeks, but no obligation to allow her to perform those duties because she had thought her contract was with the Board and she was just acting in the position while he did orientation. Ms Palmer gave evidence that because there had been no other emails between them or any other communication, she had been left to understand that she was carrying on as per normal.
- 74 Ms Palmer gave evidence that she felt disturbed and upset by Mr Sullivan's emails. She was not able to sleep that night as she tried to figure out what was going on.

Mr Rawet's evidence

- 75 Mr Rawet gave evidence that Ms Palmer told him that evening that Mr Sullivan's emails concerned her. She was quite disturbed and upset by Mr Sullivan's tone, and his wording took her aback.

Mr Sullivan's evidence

- 76 Mr Sullivan gave evidence that he came to work at 9.00 am on Wednesday 22 July 2015 and he expected that he would meet with Ms Palmer at that time. He said it was a very important meeting to have and he was surprised when he was told that Ms Palmer was in Perth because the night before, after the Board meeting, he had asked if she would catch up with him that night and she explained she was exhausted and he had said, 'Okay, we'll catch up tomorrow'. He did not recall whether she said, 'Yes' or 'No', but he expected they would catch up at 9.00 am. Mr Sullivan did not explain why it was that he thought they would meet at 9.00 am.
- 77 Mr Sullivan gave evidence that he sent the emails to Ms Palmer on Wednesday 22 July 2015 because he wanted to be clear with her that if he did not meet with her on Friday 24 July 2015 and feel comfortable with her continuing in the acting CEO position, he could not keep her in that position. If her busy workload was such that she could not communicate with him on the one day he had free, he would have to reconsider his decision. I understood from his evidence that he meant his decision to have Ms Palmer acting in the CEO position.
- 78 In cross-examination, Mr Sullivan agreed that his response to Ms Palmer on Wednesday 22 July 2015, which was his first full day on the job, was an attempt to establish his authority. He said it was very respectful to say 'I'll make the decision about whether you continue in the position or not'.
- 79 In re-examination, Mr Sullivan said that he was very surprised by Ms Palmer's email response to him asking whether the Board had approved her acting position until 10 August 2015. The reason he was surprised is because at the Board meeting on Tuesday 21 July 2015 he had clarified that the appointment of the acting CEO was the responsibility of the CEO in consultation with the Chair, rather than the Board's responsibility. Mr Sullivan gave evidence that he took Ms Palmer's question, 'Has the Board approved my acting as CEO', to mean that she was saying, 'I'm now the Acting CEO, I'm going to keep doing the role, that I'm not answerable to you'. He gave evidence that he was concerned she was saying, 'The Board has approved this so, I am the Acting CEO and you can't overrule it. I want to make it crystal clear'. Given that Mr Sullivan was about to leave for his site visits on the Friday afternoon, he considered that if he had not met with Ms Palmer about her plans as acting CEO, it would have been 'a very dangerous situation'.

Consideration

- 80 I find it unreasonable that Mr Sullivan would expect to meet with Ms Palmer at 9.00 am on Wednesday in circumstances where they had not agreed to do so.
- 81 I accept that Ms Palmer was confused, disturbed and upset by the content and tone of Mr Sullivan's emails.
- 82 In my view, Mr Sullivan's emails were ill-considered, unreasonable and sent in an attempt to establish his authority as incoming CEO. I find Ms Palmer had done nothing to warrant Mr Sullivan's approach.
- 83 I accept that Ms Palmer felt micromanaged and undermined by Mr Sullivan's emails. In the circumstances, I find it unsurprising she would feel that way.

Thursday 23 July 2015**Ms Palmer's evidence**

- 84 Ms Palmer gave evidence that having not slept on the night of Wednesday 22 July 2015, she thought it was best not to attend the meeting she had planned to attend. Even though it was only for a half day, Ms Palmer went to an afterhours surgery to get a medical certificate.
- 85 Ms Palmer emailed Mr Sullivan on Thursday 23 July 2015 and explained she was not feeling well due to the events of the week and that she was taking the rest of the day off. She also explained that she had shared her calendar with him and invited him to meetings.
- 86 Ms Palmer gave evidence that she thought 'I'm going to start making really detailed notes of every meeting and just about everything I say to [Mr Sullivan]'. She did not want him to have cause to think she was not doing the right thing.
- 87 Ms Palmer shared her calendar with Mr Sullivan and invited him to attend all of her scheduled meetings. Ms Palmer gave evidence that she kept her diary up to date and accurate, adjusting it regularly after the fact for accuracy so that it was an accurate reflection of her work and could be used for reporting purposes. She shared her diary with Mr Sullivan around 9.00 am on Thursday 23 July 2015.

Mr Rawet's evidence

- 88 Mr Rawet gave evidence that he spoke to Ms Palmer on Thursday 23 July 2015. She told him that she was concerned enough about Mr Sullivan's email the night before that she could not sleep. Ms Palmer was quite disturbed by Mr Sullivan's email and upset by his tone. She took a sick day on Thursday and got a medical certificate.
- 89 Mr Rawet said Ms Palmer said to him 'Don't worry about it, everything will be fine tomorrow' and she went in to work on the Friday.

Mr Sullivan's evidence

- 90 Mr Sullivan said he did not realise that Ms Palmer took leave that Thursday afternoon until much later. He did not dispute having received her email and he confirmed in cross-examination that he was in the office with access to email. He agreed that he had access to Ms Palmer's diary from Thursday 23 July 2015, although he said in cross-examination that he did not believe he could log onto her emails from his iPad while he was travelling. There was no suggestion in his evidence that this concerned him or that he raised the issue with Ms Palmer.

Consideration

- 91 I accept that Ms Palmer was disturbed by the tone and content of Mr Sullivan's emails and that this led to her being unable to sleep on the night of Wednesday 22 July 2015.
- 92 I find that by sharing her electronic diary with Mr Sullivan and inviting him to her meetings, Ms Palmer complied with Mr Sullivan's request to update him about her activities and meetings.

Friday 24 July 2015**Ms Palmer's evidence**

- 93 Ms Palmer gave evidence that she came into work as usual on Friday 24 July 2015 expecting to meet with Mr Sullivan at 10.30 am as agreed by email. Mr Sullivan eventually arrived at work at around 1.00 pm.
- 94 Ms Palmer gave evidence that when she met with Mr Sullivan at around 1.30 pm he told her that he was angry with her. She explained her understanding of the acting CEO role and he did not refute or say anything against her continuing to act as CEO. She said he then seemed to soften a bit in his approach towards her, and the initial frustration and anger she had displayed dissipated.
- 95 Ms Palmer gave evidence that she explained to Mr Sullivan at the meeting that she thought it was business as usual, that she was acting as CEO and for that reason had kept her appointments on Wednesday. Because of the way the events had unfolded that week, in that she was notified late on Monday that she was unsuccessful for the position and Mr Sullivan started on Tuesday, and then his emails on Wednesday evening, everything had:
- ...kind of, um, escalated for me and that's why I had taken Thursday off. But that I had thought about it, I was okay to come in, I, um, I - I know myself and I just wanted to come back and get on with the job. Um, I was saying this to kind of alleviate any ideas that he might have that I was still unwell or that I couldn't work or - or whatever.
- 96 Ms Palmer gave evidence that Mr Sullivan seemed to accept her explanation, although he seemed angry that she had not cancelled all of her appointments and made herself available to him.
- 97 Ms Palmer gave evidence that Mr Sullivan went on to say that he knew Ms Palmer was ready to take on the role of the CEO, that he thought she had outgrown Forrest Personnel and to assist her he would arrange for her to meet with a career coach. He expected that she would have found alternative employment in the next three to six months, preferably three months. Ms Palmer said that she remembered this so well because she thought it was a really odd thing for him to say, to presume that he knew what she wanted or what she was ready for.
- 98 Ms Palmer said that Mr Sullivan told her seeing a career coach would help her to work out what she wanted to do so that she could move on and he spoke about how she was ready to be a CEO.
- 99 Ms Palmer said she was a bit perplexed by that opening conversation with Mr Sullivan and it immediately made her feel like he wanted her to be removed from Forrest Personnel, that he wanted her to move on. Because of this, she was a bit more direct with him and she specifically said something along the lines of, 'It sounds like or it seems like I'm not wanted', and although he seemed initially taken aback by that, Mr Sullivan said, 'No, I know that you're ambitious', and 'you would benefit from the career coach'.

- 100 Ms Palmer gave evidence that this made her think perhaps she should explain her situation to Mr Sullivan and what she was feeling in case he had formulated the wrong impression and thought that she would not be happy because she wanted to move on or because she had not been made CEO. She tried to reassure him that she really enjoyed the COO position, that she really enjoyed working for Forrest Personnel, that it met some key criteria she had for employment (which was that she believed in the organisation she worked for), that she was still gaining satisfaction and learning new things from the job, that she was really not looking to move into another position and that it would actually be quite difficult for her to do so because there were not many opportunities for someone at her level in Bunbury in organisations like Forrest Personnel. Generally, those sorts of organisations have their head office interstate and she explained that relocation was not her preferred option, explaining that her partner had been working for his employer in Bunbury for the past 27 years. Ms Palmer gave evidence that she tried to give Mr Sullivan the impression she was feeling quite stable and satisfied with working at Forrest Personnel. She said that conversation lasted until close to 5:00 pm and later that night at around 11:00 pm she received an email from Mr Sullivan thanking her for the meeting and saying that he thought it was a constructive meeting.
- 101 In cross-examination, Ms Palmer said she absolutely did not say to Mr Sullivan that she felt it had been unfair that he had taken the CEO job from her. She did not talk about the promise that she would have the CEO position, about being owed a big bonus and she did not ask him if he had been head hunted. She did not indicate that she was paid too much as a COO and that the organisation was going to have to retrench her.
- 102 In cross-examination, Ms Palmer gave evidence that Mr Sullivan did not raise with her that she should use the Employment Assistance Program service. He only suggested seeing a career coach because he said she had outgrown Forrest Personnel, it was clear that she needed to move on and he expected her to find alternative employment within three to six months' time, preferably three. In cross-examination, Ms Palmer gave evidence that she did not say at that meeting that she was not willing to accept any reduction in salary or demotion. She absolutely did not say that she was not even sure she would stay. Ms Palmer denied that she said, 'You're going to retrench me. I've told the Board we can't have both a COO and a CEO, and that the Chief Executive Officer position is not in the budget'. She also did not say that the COO position was not in the budget.
- 103 It was not put to Ms Palmer in cross-examination that perhaps they could review what people were paid and that Mr Sullivan could see there was a need for a restructure sooner rather than later.

Ms Crittall's evidence

- 104 Ms Crittall gave evidence that Ms Palmer phoned her after her meeting with Mr Sullivan on Friday 24 July 2015. Ms Crittall said Ms Palmer told her that she thought it was almost as if Mr Sullivan was trying to push Ms Palmer out of her position and out of Forrest Personnel, and to suggest that there was no position that would be suitable for her. Rather, Ms Palmer would be better off moving on because there were no challenges left for her at Forrest Personnel and Mr Sullivan suggested career counselling, someone to help with her resume.

Mr Rawet's evidence

- 105 Mr Rawet gave evidence that Ms Palmer told him that at the meeting on Friday 24 July 2015 Mr Sullivan said to her that he did not think she would be happy being COO and she denied that. Mr Sullivan said he expected Ms Palmer to find a new position within six months, and preferably three.

Mr Sullivan's evidence

- 106 Mr Sullivan gave evidence that at the meeting on Friday 24 July 2015 their discussion began with him running through a standard outline about his background and his commitment to quality. He said Ms Palmer's first words to him were that she regretted that they had not met until that day. He agreed it was regrettable and that he needed to be confident that there would be good communication between the two of them because he would be away from Monday.
- 107 Mr Sullivan said he then asked Ms Palmer to talk him through the organisational chart and to tell him about her responsibilities as COO. She explained that she was responsible for corporate services, human resources, direct services, quality assurance and accreditation. When he commented that that did not leave a lot of scope for what the CEO would do, he said Ms Palmer became distressed and said she had told the Board that her position will be redundant. She said the COO position was not in the budget and Mr Sullivan told Ms Palmer he had reviewed the staffing profile and the COO position was clearly in the budget. Mr Sullivan gave evidence that Ms Palmer said he would probably retrench her and he replied that he had literally just walked in the door and had no intention of retrenching anyone.
- 108 Mr Sullivan said that Ms Palmer said she was paid too much and that Forrest Personnel could not afford the COO position. He said he replied that may be the case but perhaps they could review what people were paid and that he could see there was a need for a restructure which was probably on the cards for him sooner rather than later.
- 109 Mr Sullivan gave evidence that they discussed bonuses and he explained that he had already removed the \$30,000 from the budget that had been earmarked for his own bonus. He said Ms Palmer told him she should be paid a bonus of \$20,000 or \$40,000.
- 110 Mr Sullivan said Ms Palmer became quite distressed. He said she was sad and as the meeting went on she became teary. He said Ms Palmer 'was clearly very, very disappointed' that she had not been appointed CEO.
- 111 Mr Sullivan gave evidence that Ms Palmer said she wanted a performance review and he explained that under the delegation manual as CEO if there were to be a performance review he would do one. He told her not to directly contact the Board about that. He said Ms Palmer became very tearful and said 'You've taken my job', 'With your background you could get any job', and 'Why have you taken mine?'.

- 112 Mr Sullivan gave evidence that he considered this to be quite an extraordinary discussion. He said he was deeply disturbed and described it as not normal. Mr Sullivan said he got Ms Palmer some tissues and he wanted her to settle a bit. He was trying to contain the situation. He gave evidence that he was deeply disturbed because this would be his last contact with Ms Palmer before he was out of the organisation for two weeks. He suggested that Ms Palmer needed to be cautious and not damage her work or standing. He asked if she had help and support for the weekend and she said she did.
- 113 In cross-examination, Mr Sullivan agreed that Ms Palmer had told him at the meeting that it had been a difficult week, that she was trying to adjust to the changes, including not getting the CEO position, and that she needed an amount of time to assimilate all of that.
- 114 Mr Sullivan said that as he drove home from work on Friday 24 July 2015 the Chair phoned him to say that Ms Palmer had called him to ask for a performance review. That led Mr Sullivan to contact Ms Crittall and ask that she contact Ms Palmer because he was concerned about Ms Palmer.
- 115 In re-examination, Mr Sullivan said it would have been impossible for Ms Palmer to interpret his comments during that meeting to mean that she was to move on. When she said that he would have to retrench her because there was no budget of allocation, he had already said that this was not the case, that the position was in the budget and that he had checked the finances.
- 116 In re-examination, Mr Sullivan said that Ms Palmer was 'very, very distraught that she did not have the role of CEO. She was distraught to a point that was not normal' and he had 'moved at a point in the meeting to simply trying to calm her down'. He said in trying to calm her down he assured her that she could transition to a CEO position with another organisation and in six months she could have what she wanted, she did not need to be that distressed. He said it was not a constructive meeting, that he was 'desperately worried about her - her health' and that he 'was really worried about her, [he] was really worried'.
- 117 In cross-examination, Mr Sullivan said that the meeting ended because she was distraught and he believed it was very unconstructive. He went on to describe it as highly unconstructive. Mr Sullivan went on to give evidence that it would not be reasonable for a person who had just been told that they missed out on a CEO job on a Monday and had received emails of the kind he sent on the Wednesday, to be struggling at the end of the week. He stated 'The behaviour on Friday was a complete shock to me.' He agreed that he followed that meeting up with an email thanking Ms Palmer for the meeting and saying he thought it was constructive. Unprompted, Mr Sullivan then gave evidence 'I – I would also have to say that, um, in-in true honesty, I knew that statement was incorrect'. Mr Sullivan did not give evidence about why he described the meeting as constructive in his email.
- 118 In cross-examination, Mr Sullivan denied he said words to the effect that he expected Ms Palmer to be gone within six months. He said that he told Ms Palmer that on the information she had given him about her performance, with the right mentoring she could be a CEO of another organisation within six months.

Consideration

- 119 To the extent that Ms Palmer's and Mr Sullivan's evidence conflict in relation to this meeting, I accept Ms Palmer's evidence.
- 120 Mr Sullivan's evidence that the meeting was highly unconstructive is at odds with the email he sent Ms Palmer that night thanking her for the meeting and describing it as constructive. I do not accept his later version of events.
- 121 If Mr Sullivan was so concerned about Ms Palmer's mental health or if Ms Palmer had said to him that she expected or wanted to be made redundant, I do not accept that he would have sent her an email saying the meeting was constructive.
- 122 I find Mr Sullivan's evidence implausible. It is clear to me that Mr Sullivan had no problem sending very direct emails so it cannot be that he was just being polite. There was no credible evidence before me to suggest that Mr Sullivan said the meeting was constructive for any reason other than because it was.
- 123 Ms Palmer's evidence on this issue was clear and consistent. Mr Sullivan's evidence was not. As I state at [69], I accept Ms Palmer's evidence, supported by Mr Rawet's evidence, that she had welcomed Mr Sullivan to the organisation. I accept that although Ms Palmer may have been disappointed that she did not receive the CEO position, she recognised that Mr Sullivan was not responsible for that. It is entirely implausible to me that she would make comments to him to the effect that he had taken her job. I do not accept that Ms Palmer was distraught during the meeting.
- 124 At all times, Ms Palmer's evidence was measured, considered and plausible. I find the measured tone of her emails and communication generally was consistent with the way she presented as a witness. In contrast, Mr Sullivan used emotive language and hyperbole to describe the situation and Ms Palmer. That approach was also consistent with the tone of his emails and written communication.
- 125 I find Ms Palmer did not tell Mr Sullivan that he would have to make her redundant and that she would not accept a demotion.
- 126 I find Ms Palmer told Mr Sullivan that she enjoyed her COO position and working at Forrest Personnel, she believed in the organisation and was not looking to move. I find Ms Palmer explained to Mr Sullivan that it would be hard to move because there were not many opportunities in Bunbury at her level and relocation was not her preferred option, given that her partner's particular working arrangements.
- 127 I find Mr Sullivan told Ms Palmer that she had outgrown Forrest Personnel and that he expected her to move into a CEO position elsewhere within three to six months.

The weekend of 25 July and 26 July 2015

Mr Sullivan's evidence

- 128 Mr Sullivan gave evidence that over the weekend of 25 and 26 July 2015, he spoke to a friend who is a psychologist. His friend told him that he could not make an assessment of Ms Palmer because he not seen her, but based on Mr Sullivan's

description of the conversation they had had during the meeting of Friday 24 July 2015, Ms Palmer had 'clearly engaged in a conversation with [Mr Sullivan] that was detrimental to her professional interests ... and it was contrary to what [he] had expected and that had left [him] quite disturbed.'

- 129 Mr Sullivan said that his psychologist friend was concerned that if Ms Palmer were to be left alone in the organisation for two weeks and was as distressed as Mr Sullivan had described, having started in a very professional mood and ended up where they had ended:

there was a possibility she could self-harm, and he meant that in – and he said 'I mean that in both terms' that in fact she could self-harm by damaging her career, um, and possibly the organisation at the same time, also she could self-harm, period, um, that I shouldn't take it lightly.

- 130 In cross-examination, Mr Sullivan said that he meant professional self-harm of a person who 'will lose the plot' in a meeting with their boss, and he gave the example of Ms Palmer contacting the Board after he told her not to. Mr Sullivan said that he asked Ms Crittall to contact Ms Palmer over that weekend, and Ms Crittall had told him that Ms Palmer was very upset but was tracking okay.

- 131 On Sunday night, Mr Sullivan sent Ms Palmer a text message saying that he had been worried about her all weekend (**Tab 15**).

- 132 Mr Sullivan conceded he was not qualified to make judgments about Ms Palmer's mental health.

Consideration

- 133 It was clear to me from Mr Sullivan's examination-in-chief that he intended to describe the possibility of Ms Palmer self-harming in a professional and personal sense. He appeared in cross-examination to back away from that statement and framed it more in terms of professional self-harm. In any event, I find Mr Sullivan's evidence about this issue to be odd and implausible.

- 134 I find Mr Sullivan's evidence that he concluded Ms Palmer would do damage to herself if she remained in the workplace is not credible. Even if he believed, and I do not accept that he did, I find it an unreasonable conclusion for him to reach.

Monday 27 July 2015

- 135 Ms Palmer and Mr Sullivan agree that they met outside of the office on the morning of Monday 27 July 2015. After that meeting, they returned to the office and later that day, they went out for a drink. They give different accounts of what occurred during those meetings.

Ms Palmer's evidence

- 136 Ms Palmer gave evidence that on the evening of Sunday 26 July 2015, Mr Sullivan had texted her saying that he had been worried about her all weekend and asking her to give him a call. She called him on Monday morning as soon as she saw his text.

- 137 Ms Palmer told Mr Sullivan that there was no need to worry and that she was fine. She gave evidence that she was a bit confused about why Mr Sullivan would be worried about her because they had had a relatively productive meeting on Friday and discussed a lot of work, so his concern came out of the blue. She tried to set his mind at rest and said 'There's no need for you to be worried, I'm absolutely fine' and 'I'll see you in the office.' But Mr Sullivan was quite insistent he wanted to meet outside the office to have a coffee, and so they met at a coffee shop at 9.00 am.

- 138 At the coffee shop, Mr Sullivan expressed concern about Ms Palmer's mental health. Ms Palmer thought that was because she had taken part of Thursday off work, so she again said she was fine, that she had good insight into her own wellbeing and that she had come to work and that everything was good on Friday, so there was no cause for him to have any concern.

- 139 Ms Palmer gave evidence that Mr Sullivan kept saying he had issues and concerns around her mental health, and he again mentioned her going to see the career coach, and said he would forward those details as soon as he could. Ms Palmer gave evidence that she was concerned about Mr Sullivan talking about her mental health in a public place, and also that she could not understand what he based his concerns on. She said eventually Mr Sullivan started discussing work aspects, including clinical governance, and he said that there would be a role for Ms Palmer in his clinical governance agenda.

- 140 Ms Palmer gave evidence that at that meeting, Mr Sullivan suggested she would be involved in writing up a report about clinical governance and total quality management (**total quality management report**). He said she could work from home so as not to be distracted when preparing the report, but he did not give her any instruction about when she should start the project or what she should do in respect of her other functions as acting CEO.

- 141 Ms Palmer said that she had originally objected to Mr Sullivan when he suggested that she work from home because she explained she did not have a printer and she did not like looking at large documents on the computer. He immediately said to her 'just buy a printer on your way home'. She explained to him she did not have internet access and had to rely on hotspots, but he did not want to know about that.

- 142 In cross-examination, Ms Palmer denied that Mr Sullivan said he wanted to ensure she was not seen by others in the organisation as being stood down, so he suggested they both work in the office that day. She said she was not stood down and there was no suggestion she was being stood down.

- 143 Ms Palmer gave evidence that when she got back to the office, she updated her diary, blocking out two days in one week and two days the following week to work on the total quality management report, which she would probably, but not necessarily, do from home. As Mr Sullivan had access to her diary, she thought he would be able to see that she had followed his instruction.

- 144 Ms Palmer gave evidence that on that afternoon, Mr Sullivan told her that Ms Jade Cowle, People and Culture Manager, had been stood down by the Board. He told Ms Palmer she would be industrially at risk if Ms Palmer remained in the organisation.

Ms Palmer asked him to explain what he meant because she did not really understand. Ms Palmer did not think that she was involved. She gave evidence that Mr Sullivan 'got quite annoyed and angry and belittling' with her, and he said that he would expect 'someone at [her] level' would understand. She felt belittled in response to that, and a bit fearful, so she sought legal advice to clarify whether or not she was industrially at risk.

145 Ms Palmer gave evidence that later that day, Mr Sullivan asked her to go for a drink with him. She did not really want to go, but she did not want any other misinterpretations of her actions or behaviours because of the emails Mr Sullivan had sent to her on Wednesday and the initial frustration and anger that he had shown on Friday. Although things seemed to have improved, she just did not want to leave any kind of door open to suggest that she was not being cooperative or friendly, so she agreed.

Mr Rawet's evidence

146 Mr Rawet gave evidence about what Ms Palmer told him at the time about the meeting on Monday 27 July 2015. His evidence was broadly consistent with Ms Palmer's. He said Mr Sullivan told Ms Palmer to meet with him outside the office that morning and that Mr Sullivan discussed Ms Palmer's mental state at the meeting. Mr Rawet gave evidence that Ms Palmer had told him she was really quite taken aback that Mr Sullivan, who had met her briefly, was making judgments about her mental state. He also gave evidence that Ms Palmer was asked by Mr Sullivan that day to work on clinical governance and total quality management, and that she blocked out some time to do that while she continued to act as CEO. Further, Mr Rawet gave evidence that Mr Sullivan told Ms Palmer that she could work from home.

147 Mr Rawet gave evidence that Ms Palmer told him that Mr Sullivan asked her to seek guidance counselling. She thought that was totally inappropriate and uncalled for. It annoyed her that someone who did not know her could presume to understand her mental state, someone who was not qualified to make those judgments, and then to suggest that she needed psychological counselling.

148 Mr Rawet gave evidence that everything was fine at home. Nothing in that weekend or around that time made him believe that Ms Palmer was suffering any sort of stress disorder. Mr Rawet is familiar with that through his work with firefighting, and the suggestion that Ms Palmer needed counselling was totally at odds with Mr Rawet's observations of her.

Ms Crittall's evidence

149 Ms Crittall gave evidence that Ms Palmer is a very calm, rational, logical and analytical person. She has known Ms Palmer for 18 years. In all that time she has never seen Ms Palmer hysterical, heard her raise her voice or get overly emotional. Ms Crittall said that Ms Palmer was upset but that her state of mind was just normal. She was 'how she always is' during that period.

Mr Sullivan's evidence

150 Mr Sullivan gave evidence that he met with Ms Palmer at the coffee shop and the meeting started very professionally. He said Ms Palmer said she had reflected about things over the weekend and she was now 100% on board and very confident about what she was doing. He said Ms Palmer had a very professional demeanour.

151 Mr Sullivan said that he had reflected on what Ms Palmer had said about wanting to be a CEO, she clearly had the skills to be a CEO, she needed to think about and reflect on her commitment professionally and what she wanted to do with her career plans moving forward. Mr Sullivan said that he suggested an organisational psychologist could help with that. He said he did not feel comfortable with her remaining in the workplace because of her change in demeanour in the meeting on Friday and the things she had said to an incoming CEO which were not helpful to her.

152 Mr Sullivan gave evidence that he thought Ms Palmer would do herself damage if she continued in the workplace. He said he made that assessment based on her change in demeanour during the meeting on Friday, saying unhelpful things to an incoming CEO and contacting the Board after he told her not to. Mr Sullivan said to Ms Palmer:

We will work the day together on Monday, all day...We will say to staff that you are working – it's very common at Forrest for people to work at home...I will say to people that you're going to work on the quality agenda...that way I don't have to say to people you're not the acting CEO during the period. Um, but that – that is what you're to concentrate on and to work from home.

153 He gave evidence that Ms Palmer said she did not have a printer and he told her to buy one.

154 In cross-examination, Mr Sullivan described the meeting of Monday 27 July 2015 as a coherent, professional meeting. He also said that he was of the view that Ms Palmer 'was of a state of stress where she could be a danger to herself'.

155 In cross-examination, Mr Sullivan disputed that his instructions to Ms Palmer on Monday 27 July 2015 were not clear. He said he had not in some way relieved Ms Palmer of all the acting CEO duties, but that he had asked her not to work in the office and not to approach Board members, so he had certainly put strict limits around it. He said he instructed Ms Palmer to keep him acquainted with what she was doing, but he did not contact her directly.

156 In cross-examination, Mr Sullivan conceded that Ms Palmer may have come to grips with the changes that had occurred around her by Monday 27 July 2015, but that he did not believe that.

157 Mr Sullivan gave evidence that he and Ms Palmer went out that evening and had a glass of wine together, and talked about his personal reasons for being there.

Consideration

158 I prefer Ms Palmer's evidence to that of Mr Sullivan.

159 Even based on Mr Sullivan's evidence, he did not expressly say to Ms Palmer that she was no longer acting CEO or that she was being directed to work only from home. Nowhere in his evidence did he say that she must remain solely at home and work from home. In cross-examination, he said 'I made that instruction crystal clear to her verbally', but he did not put it to her in writing. If that were the case, I would have expected him to give evidence of it when he was being examined by his counsel.

- 160 I accept that Mr Sullivan's instructions to Ms Palmer were not clear, and I accept Ms Palmer's evidence that no one instructed her to cancel all of her appointments, rather her only instruction was to continue to act as CEO for the period of Mr Sullivan's orientation. I find Mr Sullivan told Ms Palmer that she could (rather than she must) work from home.
- 161 I find Mr Sullivan's evidence implausible and inconsistent.
- 162 He conceded under cross-examination that he was not an expert in assessing a person's mental health. But in any event, I found his evidence about this issue to be inconsistent. He seemed to characterise Ms Palmer as being a danger to herself and in a state of stress which, on his own evidence, was based on her being teary, upset and saying things that he thought were unhelpful, for example, that he had taken her job from her. As I have stated earlier, I do not accept that Ms Palmer would have said something of that sort to Mr Sullivan on Friday 24 July 2015.
- 163 Ms Palmer's version of events is plausible to me. It is consistent with the text messages that she sent, the email that Mr Sullivan sent to her following the meeting on the Friday, and the fact that Mr Sullivan and Ms Palmer went out for a drink on the Monday evening. In my view, it is not plausible that Mr Sullivan and Ms Palmer would have gone out for a drink and discussed his personal reasons for being there in circumstances where Mr Sullivan considered that Ms Palmer was in a state of stress where she could be a danger to herself. I also do not consider that going out for a drink is consistent with Mr Sullivan being so concerned about Ms Palmer's conduct that he would effectively stand her down and order her to work from home.
- 164 If Ms Palmer was stressed or distressed about what was occurring, that stress was caused by Mr Sullivan's actions and approach. I accept the evidence of Mr Rawet and Ms Crittall in relation to Ms Palmer's state at this time. I find that Ms Palmer's mental health was not affected in the ways described by Mr Sullivan.

Tuesday 28 July and Wednesday 29 July 2015

- 165 Ms Palmer gave evidence that on the afternoon of Tuesday 28 July 2015 she emailed Mr Sullivan, mainly because she wanted to confirm with him that she had made an appointment with Mark Greenwood, who was the career coach that Mr Sullivan had suggested. She included a reference to their having had a drink together on the Monday night, in order to be polite and cordial, to try to create a good working relationship with him (**Tab 16**):

Hello Mark

Thank you for the drink last night, it was good getting out of the office, relaxing and getting to know you a little better. I hope your Site visits have been productive and you are enjoying meeting with the staff.

I just thought I'd let you know that I have arranged a meeting with People Solutions (Mark Greenwood) for Wednesday afternoon next week.

Cheers

Ali

- 166 On Wednesday 29 July 2015 she attended an operational meeting which had been pre-arranged.

Consideration

- 167 The tone of Ms Palmer's email to Mr Sullivan is not that of a person who was struggling or being unprofessional. I find she was being cooperative, friendly and trying to do as Mr Sullivan had directed.

Thursday 30 July 2015

Ms Palmer's evidence

- 168 On Thursday 30 July 2015, Ms Palmer came into the office because she had meetings scheduled. She gave evidence that when Mr Sullivan came into the office and saw her, he asked her to come into his office. He was very angry with her. He said he had not expected to see her in the office and that he expected her to work from home as instructed. Ms Palmer gave evidence that when she explained to him that she did not realise that she was meant to drop everything else, including the acting CEO position that she was still doing, and just purely concentrate on the total quality management report. She said Mr Sullivan told her she was potentially industrially at risk, that she needed to look after her mental health and she should have been working from home.
- 169 Because Mr Sullivan had been talking about her mental health so much, Ms Palmer thought she should let Mr Sullivan know some of the things she actually did find a bit stressful, which included cancelling appointments at the last minute and not being able to follow through on commitments. Ms Palmer gave evidence that she was trying to paint a picture for Mr Sullivan of why she had scheduled in various commitments and that cancelling those things would put her reputation at risk because she had a good reputation of meeting her commitments. She gave evidence that Mr Sullivan was not concerned with that and the impression she got from him was that she was to leave the office straight away.
- 170 Ms Palmer gave evidence that Mr Sullivan told her he wanted her to come back an expert on total quality management. At first she thought he was saying it in a sort of jovial way. She said to him 'well, I don't – don't think I'll come back an expert in – in a week, but I will certainly do my best' and have something prepared for him to look at. He looked her in the eye and really seriously said 'no, I want you to come back a subject matter expert'. Ms Palmer gave evidence that she felt this was another strategy to set her up to fail.
- 171 Ms Palmer gave evidence that on Thursday evening, she received an email from Mr Sullivan (**Tab 17**):

Hello Alison

On Monday I instructed you to work from home - looking after your good health, researching the strategic TQM agenda I outlined and considering how you could align with your future career aspirations. I have sourced Mark

Greenwood, an experienced organisational psychologist, to support you with this. These are important duties relevant to your role. You agreed with this and thanked me for my support.

So I was surprised to find you conducting normal operational meetings in the workplace today. I did not find your statements that you felt you lacked a printer at home or that you felt less stressed "at the office" acceptable explanations.

Since I gave that instruction, you are aware the Board has commenced a process concerning Jade Cowl's [sic] respect for the Board's authority. That may relate to the CEO appointment process. In that environment, your decision not to respect my authority is a serious error of judgement. It bewilders me.

A charitable interpretation [is] that you are experiencing stress. A less charitable interpretation is that you are testing my authority. I will seek advice and consider my response further.

You are aware of your responsibility in the workplace to follow direction. Ensure this behaviour is not repeated. To be explicit, you are to:

- Care for your good health and avail yourself of the supports in the EAP and the additional support I have sourced with Mark Greenwood.
- Prepare a written handover to me of all outstanding issues relevant to my role.
- Research TQM and Clinical Governance Processes and prepare a report on how these can be applied [sic] in Forrest Inc.

Regards

Mark Sullivan

172 Ms Palmer gave evidence that she was really quite taken aback by the email, because again Mr Sullivan was suggesting she was experiencing stress which she was not, but also that she was testing his authority, which she would never do. Ms Palmer gave evidence that she thought she had complied with his request and that he could see it in her diary. She found his statement, 'I will seek advice and consider my response further' threatening, and she remembered the previous email he had sent her on the Wednesday evening that also said he was reconsidering his position.

173 By this time, Ms Palmer said that she feared there was some sort of agenda to remove her. Between the emails, instructing her to go to the career coach, expecting her to have found alternative employment, and now being isolated from staff and having to work from home, she thought 'I can't afford to do or say anything where he will interpret it as being confrontational, or argumentative, or not following instructions...I just have to do whatever he wants me to do, and I have to continue to be as professional, and as polite, and as cordial as I can possibly be.'

174 The next day, Friday 31 July 2015, she worked from home.

Mr Rawet's evidence

175 Mr Rawet gave evidence that Ms Palmer had told him at the time that Mr Sullivan was angry when he discovered her in the office. Ms Palmer told Mr Rawet that she was confused because she was still acting CEO, she had other duties including as the COO, and she had acceded to Mr Sullivan's request to work from home because she had blocked out time to do so. Mr Rawet gave evidence that Ms Palmer told him that Mr Sullivan had said to her she must do clinical governance work only, buy a printer on her way home, and instructed her not to be in the office.

Mr Sullivan's evidence

176 Mr Sullivan gave evidence that he was surprised when he learned on Thursday 30 July 2015 that Ms Palmer had attended a meeting the day before.

177 He said that the purpose of the email he sent to Ms Palmer on the evening of Thursday 30 July 2015 was to say to her that he was very willing to listen to the fact that she was stressed and that that was changing. He was seeing her behaviour to date in light of that. He was giving her the benefit of the doubt but they had had a clear discussion about her not being in the workplace and he had made that decision based on her professional safety and possibly also her emotional safety. Mr Sullivan gave evidence that he found her behaviour in coming to work and having a meeting that he was unaware of 'quite bemusing...it ran contrary to what I'd asked her a week earlier which was that I wanted daily reports of what was occurring'. Mr Sullivan said 'I'll be honest, I was a bit annoyed when I sent [that] email.'

178 In cross-examination, Mr Sullivan said that he told Ms Palmer on Monday 27 July 2015 that she was not to conduct normal meetings from that date. He made that very clear.

179 In cross-examination, Mr Sullivan denied that the operations meeting Ms Palmer conducted on Wednesday 29 July 2015 (which he learned of on Thursday 30 July 2015) would have been a meeting ordinarily conducted by a person who was managing the events of the business on a day-to-day basis. Mr Sullivan said, 'it was not a day-to-day meeting, it was an all-day meeting'. He went on to say it was not an operational meeting because it should not have taken that long and it covered a very broad range of topics.

180 In cross-examination, Mr Sullivan seemed to accept that Ms Palmer blocking out at least a day and a half to work from home on the total quality management report showed that she was at least seeking to comply with his instructions to some extent.

Consideration

181 I accept Mr Sullivan's evidence that he was angry that he thought Ms Palmer had not complied with his instructions. Based on his evidence, I do not agree with Mr Sullivan's assertion that his instructions to Ms Palmer were clear. I find that he did not tell Ms Palmer on Monday 27 July 2015 that she was no longer acting CEO and he did not instruct her that she was only to work from home on the total quality management report. I find he did not instruct her not to conduct meetings.

- 182 Having characterised the meetings Ms Palmer attended on Wednesday 29 July 2015 as ‘normal operational meetings in the workplace’ in his email (**Tab 17**), I do not accept his evidence that such a meeting was not one ordinarily conducted by a person responsible for the day-to-day management of the organisation because it was too long and because it covered a very broad range of topics.
- 183 I accept Ms Palmer’s evidence that on Monday 27 July 2015 Mr Sullivan told her she could work from home on those projects and I accept that she blocked out time to do so. I find that Ms Palmer complied with Mr Sullivan’s direction as best she could.
- 184 I do not accept that Mr Sullivan was motivated by concern for Ms Palmer’s health. I find the tone of his email to be aggressive and ill-considered. I find that Mr Sullivan was annoyed by Ms Palmer continuing to act as CEO and continuing to work in the office. That is clear to me from the content and tone of his email (**Tab 17**), as well as his and Ms Palmer’s evidence.
- 185 In my view, Mr Sullivan isolated Ms Palmer from the workplace by directing her on Thursday 30 July 2015 to work only from home. Further, it is clear to me from his email (**Tab 17**), which refers to his instruction that she ‘[consider] how [she] could align with [her] future career aspirations’ and the fact that he sourced Mark Greenwood to support her with this, that he intended to remove Ms Palmer from the workplace.
- 186 I find Mr Sullivan’s actions and approach to be high-handed, unreasonable and, unsurprisingly, caused Ms Palmer to feel concerned.

Between Friday 31 July and Friday 7 August 2015

Ms Palmer’s evidence

- 187 Ms Palmer gave evidence that after she received Mr Sullivan’s email on the evening of Thursday 30 July 2015, she had no contact with Mr Sullivan until she emailed him on Friday 7 August 2015. She gave evidence that she wrote him the following email, to make sure that she was on track with what he wanted and was meeting his expectations (**Tab 24**):

Good afternoon Mark

I was wondering if we can catch-up early next week so that I can discuss with you, the progress to date in regards to the report brief on developing and implementing a quality management system for Forrest. I would like to check that I am on the right track and meeting your expectations.

In addition, I have a meeting scheduled at the Bunbury office at 11:00am on Tuesday with Andries Pretorius the Manager of Partners in Recovery (PIR) which is a programme with Community First International (CFI). PIR was originally with Medicare Local, but all the Medicare Locals have since closed down and the programme has been transferred to CFI. As the new Lead Agent, CFI have had to prepare new agreements with host providers – of which we are one. Andries would like to meet to discuss and sign-off on the new Host Agency Agreement. Are you happy for me to come in and do this, or would you prefer to meet and sign the Agreement yourself? We don’t want to postpone this process as payment to us will be expedited upon signage of the agreement.

Regards

Alison

- 188 In response to Ms Palmer’s email requesting that they catch up to discuss her progress with the total quality management report, Mr Sullivan sent Ms Palmer an email on Sunday 9 August 2015 suggesting they meet up at 11.00 am on Monday 10 August 2015 at WorkWise Advisory Services (**WorkWise**) (the organisation that Forrest Personnel used for employment-related advice) so that they could talk privately.
- 189 Ms Palmer gave evidence that she replied to Mr Sullivan to check whether it was okay for her to come in earlier or whether he would prefer that she did not arrive until 11.00 am. He responded by email to say ‘yes, that was exactly what I was intending. Please can we meet at 11 am on Monday, 10 August’. Ms Palmer gave evidence that the reason she was checking with Mr Sullivan was because by that time she was almost fearful of doing the wrong thing or coming into the office when he had not been expecting her. She did not want to leave any doubt at all. She was trying to be absolutely certain about things.
- 190 Ms Palmer gave evidence that on Wednesday 5 August 2015, she went to Perth to meet with the career coach, as Mr Sullivan had instructed her to do. Other than that, she worked for the entire period on the total quality management report.

Mr Sullivan’s evidence

- 191 I understood from Mr Sullivan’s evidence that during this period, he did not contact Ms Palmer until he responded on Sunday 9 August 2015 to the email she sent him on Friday 7 August 2015.

Termination meeting on Monday 10 August 2015

Ms Palmer’s evidence

- 192 Ms Palmer gave evidence that Mr Sullivan was about 40 minutes late for their meeting on Monday 10 August 2015. She waited at the WorkWise office until he arrived.
- 193 Ms Palmer had brought her total quality management report to the meeting because that is what she thought the meeting was about.
- 194 Ms Palmer gave evidence that the first thing Mr Sullivan did at the meeting was sit down and to hand her a termination letter, which was stapled to a document entitled ‘Forrest Personnel Organisational Restructure’ dated 6 August 2015 (**Tab 20**) (**restructure document**). Mr Sullivan said, ‘I’m sorry’ as he handed her the letter and the stapled restructure document. Ms Palmer read the letter and she understood that she was being dismissed immediately. The termination letter states (**Tab 25**):

Dear Alison,

Re: Organisational restructure

I wish to advise that in consultation with the Board I have decided to restructure Forrest Personnel's management structure.

I previously discussed with you the need to embed quality systems at all levels of the organisation. During my tour of Forrest's sites, a number of staff have identified inappropriate referrals which in some cases may stipulate a case plan that is contrary to the duty of care we have to our client's [sic] good health and welfare.

This is deeply concerning. I have decided that the senior quality role we discussed will require appropriate clinical qualifications. Regrettably this change requires the streamlining of management functions and makes your current role of Chief Operating Officer redundant.

Having made a firm decision to implement change, the attached Organisational Restructure Plan is open for consultation to all affected staff until Thursday 14 August at 5:00pm. Notwithstanding, it is unlikely that the decision regarding your role will be changed and your last day will be Friday 15 August. You are now on leave with full pay, and your payment in lieu of notice & redundancy will be calculated from that date.

This decision relates solely to the operational needs of the organisation and is not a reflection on your contribution to the organisation as a senior staff member. You are encouraged to make use of Forrest's EAP program and additionally to seek other appropriate supports as previously discussed.

Regards

Mark Sullivan
CEO

- 195 Ms Palmer said she was very surprised by the second and third paragraphs of the letter because Mr Sullivan had discussed with her embedding quality systems, but he had not spoken to her about his findings on his trips to other sites or speaking with other staff.
- 196 Ms Palmer gave evidence that she felt it was really quite incorrect because he was so new and lacked understanding about the operations of the organisation. Having not spoken to Ms Palmer, Mr Sullivan had formed an incorrect view about the organisation and how it did things. She could not understand how streamlining would make the COO position redundant, so it did not really make sense to her. What was very clear to her was that she was being made redundant and that the decision was made. It had been typed and signed in a letter, and provided to her.
- 197 She had no idea that the meeting on Monday 10 August 2015 would turn into a termination meeting. Had she known what the meeting was really about, she would have requested a support person as a witness and would have been better prepared about what questions to ask. Ms Palmer gave evidence that it was a total shock to her and she had not seen it coming. She had had fears and concerns and she had thought Mr Sullivan might be trying to make her working life uncomfortable. He had certainly made it clear to her that he did not want her remaining at Forrest Personnel. But in such a short period of time and with so few meetings with her, she could not believe that her position would be made redundant and that there would be no other positions she could do within the organisation.
- 198 Ms Palmer gave evidence that she and Mr Sullivan sat side by side at the meeting. She read the introduction of the restructure document, and she was shocked by how inaccurate it was. It seemed to her almost deliberately misleading, and then she realised that it was 'all a fait accompli, this has already been decided and approved'. Ms Palmer gave evidence that she looked at the new organisational chart at the back of the restructure document and noticed that new positions had been created at the executive level, but no job descriptions were attached. All the salaries had been blacked out. She asked Mr Sullivan, 'would there be other positions I could do?' and he said to her, which she scribbled down on a piece of paper in the car afterwards 'there's no suitable positions for you at Forrest' and 'you are to go and that decision's been made and is final'. Ms Palmer gave evidence that it was very clear to her that there were no other positions for her and the decision had already been made.
- 199 Ms Palmer said the senior executive positions all had names assigned to them except for General Manager Clinical Governance. Mr Sullivan mentioned very briefly that he specifically wanted someone with a Level 5 Registered Nurse qualification for that position and the salary would not be less than \$125,000. Ms Palmer did not ask anything more about that position because she was excluded from it, not being a registered nurse. Ms Palmer gave evidence that Mr Sullivan did not speak about any other positions at all.
- 200 Ms Palmer gave evidence that she had never discussed her COO position in any way with Mr Sullivan, either at that meeting on Monday 10 August 2015 or any previous meeting. She never understood at any time during this meeting that there was any negotiation around what was happening or around remaining in the organisation. Mr Sullivan said very clearly that the decision had been made and it was final.
- 201 Ms Palmer gave evidence that the meeting was not adjourned. She and Mr Sullivan did not leave the room until she was walking out of the door to leave. They did not take a break while she read the document. Mr Sullivan sat the whole time beside her, looking at her. They did not discuss an exit meeting or a bonus. Ms Palmer stated:
That was the last thing on my mind, I was not thinking exit interview. That was never ever discussed. Um, and I never stated, um, or talked about in any way, shape or form a bonus...There was absolutely no discussion, reference or anything in relation to a bonus whatsoever.
- 202 Ms Palmer gave evidence Mr Sullivan said she could use the car or have an allowance throughout the redundancy period and could keep any IT equipment she had at home. She could also keep her work phone and printer. Mr Sullivan said Ms Palmer could continue to see the career coach to a value of \$2,000 and that he would arrange for the Chair to give Ms Palmer a reference. They did not discuss the number of weeks or amount of money that she would be paid. Mr Sullivan told her that her entitlements would be calculated at the acting CEO rate.

- 203 Ms Palmer gave evidence that the first time she saw any details about the terms of her termination package were in the email Ms Crittall sent to her on Sunday 16 August 2015 (**Tab 29**).
- 204 In cross-examination, Ms Palmer gave evidence that Mr Sullivan did not mention that the General Manager People Culture and General Manager Services positions would both be remunerated at \$110,000. She said he never mentioned wages assigned to positions other than the General Manager Clinical Governance position.
- 205 In cross-examination, Ms Palmer denied that Mr Sullivan told her the positions in the document were different from her current position, but that the General Manager Services position was hers if she wanted it.
- 206 Ms Palmer gave evidence that she had never had a discussion with Forrest Personnel about notice in the event that she was made redundant. She was definitely not of the belief that she had until early November to express an interest in continuing in the position. As far as she was concerned, when she walked out of the termination meeting on Monday 10 August 2015, her employment was over, albeit that the calculations for payment would be made up until Friday 14 August 2015. There was no suggestion she could make an application for any of the General Manager positions and she was cut off from email on Monday 17 August 2015, so she had no knowledge of the job descriptions, what was going on, or what the process was.
- 207 In re-examination, Ms Palmer confirmed that Mr Sullivan never discussed anything with her about what others may have been saying in terms of her commentary about her future with Forrest Personnel. She gave evidence that Mr Sullivan never indicated to her that anything had been said to him by others.
- 208 In cross-examination, Ms Palmer denied that she had a break during the meeting. She said Mr Sullivan sat beside her for the whole meeting. Ms Palmer denied she was given the opportunity to get independent legal advice. She said Mr Sullivan made it clear that the decision was final and that she was finished with the organisation, and the termination letter said so as well. Ms Palmer denied that she had told Mr Sullivan that she was not interested in any of the new positions, given the drop in salary. She said that did not happen and she did not know what the salary was. The only question she had asked him was whether there were any other positions she could do, and he said there were 'no suitable positions...available to you' and 'the decision for you to go has been made and is final'. Ms Palmer gave evidence that Mr Sullivan was very clear in his tone, and his demeanour was shutting the door on any further conversation around that.
- 209 Ms Palmer denied that she was given the opportunity to consider her position carefully. It was clear to her the decision was made and it was final. She stated 'when I walked out of – of WorkWise, it was with the knowledge that I was no longer working for Forrest Personnel. That's what I genuinely believed, and nothing that he had said had led me to believe otherwise or led me to think that there was any other avenues [sic] that I could pursue.'

Mr Rawet's evidence

- 210 Mr Rawet gave evidence that Ms Palmer had told him that she thought the meeting on Monday 10 August 2015 was to discuss her work on the total quality management report. Instead, when she went into the meeting, Mr Sullivan handed her a document in which she was advised that she was being dismissed. There was a new structure and no place for her in it. The only available position was a clinical governance position, for which she was not qualified. Mr Rawet gave evidence that Ms Palmer was bordering between shock and disbelief, she felt ambushed and her termination was a bolt out of the blue.

Mr Sullivan's evidence

- 211 Mr Sullivan gave evidence that these sort of meetings are formulaic. At the meeting he started by saying he had some bad news but as she had indicated it may not be a surprise to her, given their previous conversations and what he was hearing around the traps.
- 212 Mr Sullivan gave evidence that he raised the possibility of Ms Palmer doing the General Manager Services position, but that it would involve a significant reduction in pay. He was proceeding on the basis of what she had said in the past, that she was not interested in a reduction in pay and that there was a general perception amongst staff that Ms Palmer wanted to leave in any case.
- 213 Mr Sullivan gave evidence that he had not wanted to offend Ms Palmer by putting her name in the restructure document, given she had said she would not entertain a reduction in salary.
- 214 Mr Sullivan gave evidence that he explained to Ms Palmer that the General Manager Clinical Governance position would be paid at \$135,000 and required a Level 5 Registered Nurse qualification which she did not have.
- 215 Mr Sullivan gave evidence that if Ms Palmer had said in the meeting 'actually, I am interested in that much lower pay – lower grade of position, I am interested in getting paid, um, \$50,000 less', that would certainly have changed the restructure document immediately and he would have put her name into the General Manager Services position.
- 216 Mr Sullivan agreed that the restructure document that was given to Ms Palmer during the meeting had all of the wages blacked out in it.
- 217 Mr Sullivan went on to say that after he explained the structure to Ms Palmer, she said she was not surprised. He then suggested a 15-minute break, and left her in the meeting room while she read through the document. When he came back into the room, he followed the formula and said 'there's no requirement for you to comment at this point'. He offered her an opportunity to seek independent advice and said she had the opportunity to go away and reflect on it, and think about her future and what she wanted to do. Mr Sullivan gave evidence that Ms Palmer said 'I don't need to do that'. He said Ms Palmer pointed out Mr Sullivan had made an error in putting a particular employee's name in a manager's position, and asked why he had done that. He explained it was because she was paid more highly than other Area Managers and Ms Palmer pointed out to him that it was because the employee had a vision impairment and did not receive a car, so she received a payment in lieu of the motor vehicle. Mr Sullivan said he then said to Ms Palmer, 'well, that's what, um, the initial draft is for, it's to consult on and what ends up happening may be quite different'. He gave evidence that they then moved straight onto discussing her termination package.

- 218 Mr Sullivan gave evidence that he handed Ms Palmer the termination letter after he had talked through the process with her. He said he handed her the documents and said 'based on the discussion we've had, here are the documents and your feedback can happen now or you can go and reflect on it and you can give feedback later'. He said that when he came back 15 minutes later, Ms Palmer said she knew how these processes worked and they went straight into discussing her termination package.
- 219 In re-examination, Mr Sullivan said that he handed the documents to Ms Palmer and discussed the content of the termination letter and the restructure document with her. He indicated the documents were facing him, not her. He said she did not read the letter. Mr Sullivan went through the dot points from his file note of the meeting (**Tab 26**) and when they had a break, Mr Sullivan turned the document around to Ms Palmer so that she could see it. This was Ms Palmer's first opportunity to read the letter.
- 220 Mr Sullivan gave evidence that if Ms Palmer had come back the next day and told him she would take a reduction in pay and the General Manager Services position, he would have said clearly she had the ability. He stated 'Um, I would have, ah, that wouldn't have changed anything. Also I had said to Alison, "I want to see that you have a career plan with that, that you are actually committed to this role, you commit to the organisation" ... clearly she was the most qualified person for that role if she was prepared to do it. We would have been lucky to get her.'
- 221 Mr Sullivan gave evidence that they then moved straight into discussing Ms Palmer's termination package and broadly they agreed on what that would comprise, being severance, entitlements, keeping the work car for a period, the printer and phone. Mr Sullivan said he told Ms Palmer she was not entitled to a bonus but he was prepared to pay her at the CEO rate.
- 222 Mr Sullivan said straight after the meeting on Monday 10 August 2015, he handwrote notes in the car which he typed up later that day (**Tab 26**):

Meeting commenced at 11:30am:

- Handed copy of attached letter and Version 1 of Restructure to Alison.
- Stated that the role of COO was no longer required and was to be made redundant.
- Stated that the new role of GM Clinical Gove required a Clinical Qualification (Nursing, Social Work, OT, Psychology or Physiotherapy) and Alison did not meet key criteria.
- Stated that the new role of "GM People and Culture" and "GM Services" would both be remunerated at \$110K (excl. vehicle) which was a very substantial decrease from Alison's current remuneration of approximately \$155K.
- Stated that these roles were both very different from her current role and it would be unreasonable for me to expect her to apply for a role that represented a significant demotion. However I was open to her opinion in the matter.
- Suggested that the meeting should be recessed for 10 mins while Alison had the opportunity to review the documents I had given her.
- Meeting recessed at 11:40am.

Meeting reconvened at 11:55pm:

- Alison agreed that she was not interested in any of the new roles given the drop in salary.
- Alison stated she was aware of how the redundancy would be negotiated but wanted an "Exit Interview" with the Board for the purpose of calculating a bonus she felt was due to her.
- Stated that I did not agree there was a bonus due to her and it is not provided for in her contract

In discussion it was agreed that:

- I recognised that she felt she was due a bonus so as a compromise I was prepared to pay her at the rate of Acting CEO for the redundancy. Her termination payment (leave accruals, redundancy and payment in lieu) will also be calculated at the Acting CEO rate.
- She can elect to either retain use of her vehicle throughout the redundancy period or will be paid an additional allowance in lieu of same.
- She will retain her computer, phone and printer for personal use.
- Her last day will be Friday 14th August. We will co-operate with all reasonable efforts to minimise Alison's tax liability such as allowing her to salary package taxable entitlements.
- Agreed that while I did not know the circumstances of her relationship with the Board over the last 12 months it had clearly been a stressed on both sides. Subject to a "clean" separation and signing of a "Deed of Release" I will use my best endeavours to ensure the Board will provide an appropriate reference for Alison and undertake to provide a positive verbal reference in the future. Penny will assist Ian Peterson by drafting an appropriately worded written reference.

Alison stated that she felt this was a very fair offer in the circumstances and thanked me for taking a generous approach. Told her that she should get her own advice and get back to me if there was anything I missed. Told her that Penny would contact her regarding the "Deed of Release" and the reference.

Meeting closed at 12:10pm

- 223 Mr Sullivan agreed that the series of dot points in his file note reflects the sequence of the termination meeting.

- 224 In cross-examination, Mr Sullivan gave evidence that at the meeting he had discussed with Ms Palmer the decision to make her redundant, and gave her a chance to respond prior to handing her the termination letter telling her that her position was redundant and she was to leave the organisation.
- 225 In cross-examination, having agreed that the first thing he did was hand Ms Palmer the termination letter with the restructure document attached, Mr Sullivan then gave evidence that he placed those two documents on the table between them. He said Ms Palmer did not have an opportunity to read them. He worked through with her that there was to be a restructure, that he did not expect this to surprise her based on her previous comments to him, comments he had heard from others and the agendas of the Board meetings (although he said he could not recall if he had raised the last point with Ms Palmer). He gave evidence that Ms Palmer did not have a chance to read those documents until he said to her:
- Now is the opportunity. Now that I have explained that to you and now I have heard from you that in fact it is not a surprise and that you are expecting it, I'm now going to give you these two documents to read but you do not need to respond to them at this stage. Alison elected to respond.
- 226 Mr Sullivan would not concede that his verbal evidence and his file note were inconsistent. He insisted 'I am saying both are right'. He interrupted Ms Palmer's representative a number of times and he had to be reminded several times to answer the question.

Consideration

- 227 I prefer Ms Palmer's evidence to that of Mr Sullivan. His evidence was inconsistent between examination-in-chief, cross-examination and re-examination.
- 228 Based on Ms Palmer's evidence of the meeting and Mr Sullivan's evidence that his file note accurately reflected the sequence of the meeting, I accept that he handed Ms Palmer the termination letter and the restructure document at the start of the meeting. I find Ms Palmer read the termination letter at the start of the meeting.
- 229 Ms Palmer's evidence, Mr Sullivan's approach leading up to the meeting, that the restructure document had names against the senior executive positions other than the General Manager Clinical Governance position, that the salaries were blacked out other than for the General Manager Clinical Governance position, and Ms Palmer's evidence that she would have accepted an alternative position because of her personal circumstances (which I will outline later) lead me to find that Mr Sullivan intended to dismiss Ms Palmer on Monday 10 August 2015. The fact that Mr Sullivan handed her a termination letter during the meeting is, to me, at odds with the idea that there was a possibility that her employment would not have been terminated at that meeting.
- 230 Further, it is clear to me from both their evidence that Ms Palmer had no warning about the true nature of the meeting.
- 231 I accept that she expected that they would be discussing her work on the total quality management report. Ms Palmer was not offered the opportunity to have a support person or any advanced warning about what the meeting would entail, and that leads me to accept her version of events rather than Mr Sullivan's.
- 232 I found Mr Sullivan's evidence about what occurred at the meeting on Monday 10 August 2015 to be inconsistent, whereas Ms Palmer's evidence was clear and consistent. I did not agree with Mr Sullivan's contention that both his verbal evidence and his file note could be accurate in circumstances where he placed the termination letter and restructure document on the table, not allowing Ms Palmer to read it until the break. That, to me, is implausible and inconsistent with his own file note and his evidence in re-examination that he handed Ms Palmer the termination letter.
- 233 I deal with the issue of consultation from [238] – [279].
- 234 I find Mr Sullivan told Ms Palmer that the General Manager Clinical Governance position required a registered nurse qualification. I find that Mr Sullivan did not put the salaries of other positions to Ms Palmer.
- 235 I find Ms Palmer asked which other positions might be available for her. Mr Sullivan informed her there were no suitable positions and she was to leave Forrest Personnel.
- 236 To the extent of any inconsistency, I accept Ms Palmer's evidence about this meeting.

Was Ms Palmer unfairly dismissed?

- 237 In deciding whether Ms Palmer was unfairly dismissed, I turn first to the question of whether Forrest Personnel consulted with Ms Palmer.

Did Forrest Personnel consult with Ms Palmer?

Ms Palmer's evidence

- 238 Ms Palmer gave evidence that prior to the meeting on Monday 10 August 2015 Mr Sullivan had never asked her anything about the COO position, its functions, duties and tasks. The only thing he had said to her was that there would be a role for Ms Palmer in the quality agenda, but he had not explained what that might be. Ms Palmer gave evidence that the Chair sent all staff an email on 13 February 2015 saying that the Board had met and decided it wanted to have an organisational review of systems, structure, procedures and policies. That email stated 'the current executives will remain in place until 30 June'. Ms Palmer was on leave at the time the email was sent and asked the Chair several times what it was about and for the terms of reference. Even as acting CEO she was not privy to or involved in any of those conversations.
- 239 Ms Palmer also gave evidence about two documents she prepared for the Board which were tendered at the April 2015 Board meeting. She wrote an Organisational Review Document (**Tab 5**) which included some options for the Board to consider. Ms Palmer gave evidence that the Board never discussed it at the meeting or provided her with any feedback. Ms Palmer also prepared a Corporate and Leadership Structure document (**Tab 6**). That document contained information for newer Board members about the operating structure at the time and it included a range of future options. Ms Palmer gave evidence that those scenarios were not discussed or approved at the Board meeting.

240 In cross-examination, Ms Palmer gave evidence that she did not say at any time that the COO position should be made redundant, she was only suggesting that the CEO and COO positions could be joined if she were continuing in the position because she had the operational management experience to do both.

241 Ms Palmer gave evidence about the Board minutes from May 2015 (**Tab 7**) which refer in the second last dot point on the first page to:

Budget concerns if there was both a high level CEO and COO. The proposition from the Acting CEO to make the COO position redundant was put forward however, never ratified to join the two positions.

242 Ms Palmer said that this was minuted in the context of the existing organisational structure remaining in place and the complementary skills of staff. She gave evidence that if a CEO did not have the operational experience, it would be very hard for him or her to do the combined position, and there would be a requirement to reinstate a COO or something very similar.

243 In cross-examination, Ms Palmer denied that when the Chair told her on Monday 20 July 2015 that she would not be the CEO of Forrest Personnel, she said to him 'you'll have to make me redundant.' Ms Palmer said in evidence:

No, because in the time that I had been Acting CEO, I took the organisation from a \$400,000 deficit to – the last figures that I had seen was close to \$100,000 in the positive. So there'd been nearly a half a million dollar turnaround and things were heading in the right direction. And I absolutely refute that I said in any way, shape or form, or implied or inferred that the COO position should be made redundant. That's not – not correct at all.

244 It was put to Ms Palmer in cross-examination that in his email dated Sunday 2 August 2015 (**Tab 19**) Mr Sullivan states:

I am still finding my way, and I have not finished the process or determined what I will recommend to the Board. Importantly, I have not had the opportunity of a detailed discussion with the Board and Management Team.

Mr Rawet's evidence

245 Mr Rawet gave evidence that Ms Palmer had said to him that her proposal to the Board in May 2015 to merge the COO and CEO positions was in the context of the same person doing both. It was not sustainable but it could be done for a period of time.

Ms Crittall's evidence

246 Ms Crittall gave evidence that Forrest Personnel's redundancy process checklist (**Exhibit A13**) was part of the standard procedure. The checklist includes consideration about whether the redundancy is genuine, whether the person could be redeployed, a consultation process and the opportunity to have a support person. Ms Crittall said none of the procedures were followed by Forrest Personnel in Ms Palmer's case.

Mr Sullivan's evidence

247 Mr Sullivan gave evidence that by Thursday 6 August 2015 he had finished the process of what he would recommend to the Board, having read almost through the night every Board minute, every strategic plan for a year and going through all the position descriptions and budgets. He created the restructure document (**Tab 20**) and he circulated it to the Board on Thursday 6 August 2015.

248 In cross-examination, Mr Sullivan agreed that having made the decision on Wednesday 5 August 2015 to terminate Ms Palmer's services, he did not consult with Ms Palmer between that date and the termination meeting. Mr Sullivan said he had already consulted with Ms Palmer.

249 In examination-in-chief, Mr Sullivan gave evidence that Ms Palmer had said to him she expected there would be a redundancy, on two occasions she had put a report to the Board saying the COO position should be made redundant and she had made it clear she was not interested in a pay decrease. On that basis, he did not put her name in the restructure document.

250 Mr Sullivan also gave evidence that he did not include Ms Palmer's name in the restructure document because he had read through the Board minutes, read through all emails to and from Ms Palmer and spoken to staff. He said all staff were of the opinion that Ms Palmer was going to leave. He said either Ms Palmer had told them or emailed them to that effect. Mr Sullivan did not give evidence that he had spoken directly to Ms Palmer when he was working on the restructure document and it was also not put to Ms Palmer that 'all staff were of the opinion that she would leave'.

251 In cross-examination, Mr Sullivan agreed that the Chair told him on the morning of Saturday 18 July 2015 that Ms Palmer was seeking to take leave 'potentially for good' and that was the first time he heard it.

252 Mr Sullivan agreed in cross-examination that he did not put to Ms Palmer at the meeting on Friday 24 July 2015 that the Chair or other staff had told him she was going to move on.

253 In cross-examination, Mr Sullivan gave evidence that he searched Ms Palmer's emails on the weekend of Saturday 1 August and Sunday 2 August 2015. Mr Sullivan agreed in cross-examination that he did not discuss those emails or the comments made by staff about Ms Palmer intending to leave Forrest Personnel with Ms Palmer before the termination meeting.

254 Mr Sullivan gave evidence that Ms Nankiville (a Regional Manager at Forrest Personnel) told him that Ms Palmer was going to leave and that she was just waiting on whether she could get a redundancy package. Mr Sullivan checked the email system and found an email where Ms Palmer said she was going to leave and that she was hoping to get a redundancy package.

255 In cross-examination, Mr Sullivan gave evidence that he wrote the termination letter after he had looked through a large number of emails where the staff and Ms Palmer had told the Board on two occasions that she wanted to be made redundant. He said she also told him at their first meeting she wanted to be made redundant and he confirmed that in the termination meeting. He said had Ms Palmer corrected that impression he would have immediately amended it into his plans.

- 256 Mr Sullivan agreed in cross-examination that he did not raise the issue of the emails or staff commentary with Ms Palmer before the termination meeting. When it was put to him in cross-examination that he should have put the view he had formed on the basis of those emails and the conversations to others to Ms Palmer if he had carried out consultation, Mr Sullivan replied, 'Um, I did put them to the applicant at that meeting'.
- 257 In cross-examination, Mr Sullivan agreed that he had not discussed the alternative position of General Manager Services with Ms Palmer prior to the termination meeting.
- 258 Mr Sullivan gave evidence in cross-examination that the restructure document changed substantially between its four drafts and said that every comment from staff was noted. He described it as a document that was consulted on and changed. When asked why the same level of consultation was not applied to Ms Palmer, Mr Sullivan insisted 'there was that level of consultation'. I understand that he was referring to the meeting on Friday 24 July and Monday 27 July 2015 and also the restructure document itself. He said the restructure document 'clearly laid out how people could input to the process...and people actively and vigorously did that'. Mr Sullivan agreed that on his evidence of Ms Palmer's state on Friday 24 July and Monday 27 July 2015 she could hardly be in a position to make decisions about her future. Mr Sullivan then said 'can I put the context of self-harm as being more self-professional-harm, um, but certainly yes, I did not think that she was in a position to make firm decisions'. He then denied that he now relies on that as consultation, having just given evidence that it formed part of his consultation.
- 259 Mr Sullivan gave evidence that he gave Ms Palmer an opportunity to feed back to the process and that was consultation. He said the restructure document dated 24 August 2015 was distributed by email. It was put to Mr Sullivan that Ms Palmer had been cut off email by that date. Mr Sullivan gave evidence that she could have participated in the review because she had received the first draft. She could still have emailed restructure@fpi.org.au. Ms Palmer's emails were still active for another two weeks, 'or they may have been cut off on Friday [14 August 2015]. I'm not sure'.
- 260 Mr Sullivan agreed that he did not make Ms Crittall redundant and then offer her the General Manager People and Culture position. He simply rang her and offered her the position. However, he would not agree that he used a different process for Ms Palmer. He said 'um, I didn't. Um, Ms Palmer had the opportunity of a position, that with a significantly reduced role'.
- 261 In cross-examination, Mr Sullivan agreed that Forrest Personnel invited internal applicants to apply for the General Manager Services position after 16 August 2015, at a time when Ms Palmer no longer had access to work email.

Consideration

- 262 I accept Ms Palmer's evidence and I find that she was not consulted.
- 263 Mr Sullivan gave evidence that all staff were of the opinion that Ms Palmer would leave. However, Forrest Personnel did not lead any evidence from other Forrest Personnel staff to that effect and it was not put to Ms Palmer that all staff thought she would leave.
- 264 I do not agree with Mr Sullivan's characterisation of Ms Palmer's statements in her emails to other staff. She does not state that she is going to leave nor that she is hoping to be made redundant.
- 265 I do not accept Mr Sullivan's evidence that if Ms Palmer corrected his view that she wanted to be made redundant, he would have immediately amended his plans. I do not accept that she had ever told him she wanted or was going to be made redundant. Further, I accept Ms Palmer's evidence that Mr Sullivan did not confirm with her at the termination meeting that she wanted to be made redundant.
- 266 I do not accept that Mr Sullivan would have amended his plans. I find that Ms Palmer asked whether there were any other positions she could do and Mr Sullivan made it clear to her that there were not. Further, having handed Ms Palmer the termination letter saying her position was made redundant, that her last day was Friday 15 August [sic] and that that was very unlikely to change, I do not accept Mr Sullivan's suggestion that there was consultation.
- 267 Mr Sullivan's evidence that he did not use a different process for Ms Palmer to the one he used with Ms Crittall is simply incorrect. It was clear from his evidence that he used a different process.
- 268 I do not accept that Ms Palmer could have participated in the review or in applying for the General Manager Services position because her work emails were cut off after 16 August 2015.
- 269 I do not accept Mr Sullivan's evidence that if Ms Palmer had said to him the day after her termination that she would accept the General Manager Services position, Forrest Personnel would have been lucky to have her. That evidence is not credible in light of the termination letter and Mr Sullivan's approach in isolating Ms Palmer more generally.
- 270 Consultation has long been recognised as an integral part of fairness in the employment relationship where an employer seeks to restructure or introduce other workplace change. In *The Federated Clerks' Union of Australia v The Victorian Employers' Federation* [1984] HCA 53; (1984) 154 CLR 472, Wilson J said 'Consultation between employers and employees, preceded by the distribution of adequate information is not only sensible but essential if commerce and industry are to meet the challenge of progress in a spirit of harmony and with some regard for human dignity' (502).
- 271 In *TVW Enterprises Ltd v Duffy (No 2)* (1985) 7 FCR 172, Toohey J said:

Consultation is no empty term. "The requirement of consultation is never to be treated perfunctorily or as a mere formality" *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111 at 1124. That decision and others, for example, *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13 at 17 and *Sinfield v London Transport Executive* [1970] 1 Ch 550 at 558, make it clear that a responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they may be taken into account (178-179).

- 272 I agree with the submissions made by Ms Palmer's representative that consultation is not perfunctory advice about what is about to happen. It must involve providing a person with a genuine opportunity to influence the outcome of the proposal to be implemented: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd* [2010] FCA 591; (2010) 198 IR 382 [148] (Logan J).
- 273 In that case, his Honour makes it clear that it is not sufficient to inform an employee about what is to occur. He states '[t]here is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, "this is what is going to be done" and saying to that person "I'm thinking of doing this; what have you got to say about that?'. Only in the latter case is there consultation' [45].
- 274 Mr Sullivan seemed to think that consultation involved considering statements made by Ms Palmer prior to a decision being made to restructure her position (which I do not accept that Ms Palmer made, in any event), proposals to the Board which were not discussed or considered by the Board, comments made by other staff members about Ms Palmer's intentions and reading through Ms Palmer's emails to see whether she had said anything to others about the subject. Mr Sullivan says that he put the conclusion he had arrived at to Ms Palmer at the termination meeting and she could have responded and told him that his view was incorrect but she did not.
- 275 As I have stated, I do not accept Mr Sullivan's version of events. Even if I did, I would not consider that Mr Sullivan consulted with Ms Palmer.
- 276 Consultation would have to involve giving Ms Palmer an opportunity, before a final decision was made, to consider a proposal to make her position redundant and to provide feedback to Forrest Personnel.
- 277 Putting the matter to Ms Palmer at a meeting with no warning and providing her with a termination letter and a restructure document that included the names of other employees against all of the management positions, except the one for which he indicated she was not qualified, does not constitute, and is not consistent with, consultation.
- 278 Ms Palmer had no opportunity to be heard or to influence the outcome of the restructure. Mr Sullivan simply informed her that her position was redundant and there was no alternative position for her at Forrest Personnel.
- 279 I have no difficulty finding Forrest Personnel did not consult with Ms Palmer.

Would Ms Palmer have accepted an alternative position?

Ms Palmer's evidence

- 280 Ms Palmer gave evidence that she did not want to be unemployed for a number of reasons. First, for financial reasons because she and her partner were in the process of building a new house and they had major progress payments to make. She had always been the major breadwinner in the family and she had worked continuously for most of her life, for over 30 years. Ms Palmer gave evidence that all of her friends are local and her networks are very important to her because she does not have family.
- 281 Ms Palmer gave evidence that because of her experience in the employment industry and intense knowledge of the labour market, she knew it would be very difficult to find alternative employment. Her partner of 16 years is based in Bunbury. His working situation meant that even if Ms Palmer were successful getting a job elsewhere, he had a very restrictive job and it would have been very difficult for him to find work elsewhere. Ms Palmer's partner has a secure, specialised government job that he has had for 27 years. Ms Palmer gave evidence that it is rare in Bunbury and its surrounds to find any positions remunerated even up to \$90,000. So all of these factors together meant that Ms Palmer would never have preferred to have been unemployed to working.
- 282 Ms Palmer was cross-examined about the email she sent to Ms Acarregui on 10 June 2015 (Exhibit A10) in which she stated 'So, I could be looking for work in the not too distant future...I can walk away with some level of happiness'. Ms Palmer gave evidence that she meant she could have walked away if she had another job to go to, knowing in her mind the organisation was being well handled and her statement about looking for work in the not too distant future meant that she could be looking for work at any point in time. It did not mean that she was going to resign or voluntarily leave without finding other employment.
- 283 In cross-examination, Ms Palmer said she did not believe that there would have been discussions within the organisation about whether she might be leaving. She does not think that people thought she would be voluntarily leaving and she did not enter into those discussions. Ms Palmer gave evidence that it did not bother her to step back into the position of COO. In fact, she had been a CEO in the past and resigned to go on to other positions that were not at the CEO level. She had never said to Mr Sullivan or to anybody else that she only wanted to be a CEO.
- 284 Ms Palmer gave evidence that in her email to Ms Acarregui she described her disappointment when the Board decided to advertise the CEO position, explaining that she was quite devastated and that it felt like a slap in the face. Ms Palmer said that she did not feel very optimistic because she had previously been told if it were advertised she would not get it so she could be looking for work in the not too distant future. Her email states (**Exhibit A10**):
- If things go belly-up for me, it's likely David and I will move interstate as there's not a lot for me in Bunbury and if we had to move, I would rather go interstate than to Perth. At the end of the day, I really want for FP to get a really good CEO and if I am not it – then as long as the Board make a really good decision, I can walk away with some level of happiness (at least for everyone else!).
- 285 She goes on to say in that email she does not think she will be retiring for a very long time to come.

286 On 7 July 2015, Ms Palmer sent an email to Ms Nankiville (**Exhibit A12**):

Hi Paula

There has been suspicious silence in regards to the business-wide review that Ian flagged back in Feb. I suspect nothing has progressed and now it will all be determined by the new CEO. I am sure that if the new CEO doesn't know anything at all about DES, government contracts, Star Ratings, PIR, IPS, My Way and other things – then they would want a COO to remain, at least until they were up to speed. I don't want to end up doing all the work like I did before for Mike and have a new person purely concentrating on acquiring new non-government funding, which is what I think the Board are looking for.

If they do want the COO to remain, that person won't be me as I couldn't face staying after everything that's happened and what the Board has put me through these past 9 months and more. Another alternative is that the COO position is made redundant (at least I'd get a few extra weeks pay!). In saying all of that, I would be absolutely devastated to leave FP. I have invested so much of myself and believe in everyone and what this organisation could be (and what it is already growing into) – but this whole experience has been too shattering and perhaps because of it, I would no longer even be the best COO and it's time for one of the other Managers to be given the opportunity.

I don't exactly know what I 'would' do. Strong likelihood that I would look interstate for work. Anyway, will cross that bridge when I come to it and sit in blissful ignorance for the next couple of days.

Ali

287 Ms Palmer explained that she had sent that email the day after she was interviewed for the CEO position and she was expressing her concerns in the email but she was trying to explain that if everything were to stay as it had been before, that she really would not be very happy, but she definitely would not be unemployed as a preference. No doubt, if she was not very happy, she would have looked for other work, but she would have been devastated to leave Forrest Personnel and she would have remained employed until she had found other work.

288 Ms Palmer was cross-examined in relation to this email (**Exhibit A12**). Ms Palmer said that her statement that if they do want the COO to remain, that person would not be her meant that she was expressing the feelings she felt on that particular day in that she had not been happy with the changes made to the interview panel the day before and she had real concerns about the outcome of the recruitment process. Ms Palmer gave evidence that she would never voluntarily put herself and her partner in a position where she was not working, which is not to say that she would not have at some point started looking for a job, but she would not resign unless she had another job to go to.

289 Ms Palmer gave evidence that there is very little difference between her COO position and General Manager Services position (**Tab 21; Exhibit A6**). She said there is nothing in the General Manager Services position that she could not do and had not been doing previously.

290 Ms Palmer gave evidence that she could have carried out the General Manager People and Resources position as well (**Tab 22**).

291 Ms Palmer gave evidence that she is 100% certain she could perform everything in the General Manager Clinical Governance position and she had been doing so. She said that although Mr Sullivan had told her at the termination meeting very specifically that he wanted someone with a Level 5 Registered Nurse qualification in the position, in fact the job description does not call for any requirement for any allied health professional or any specific professional qualification at all (**Tab 23**).

292 Ms Palmer gave evidence that she could absolutely perform the position of General Manager Service Innovation. She said there was nothing in the job description that she had not extensively done before (**Tab 41**).

293 At [3.10] of Forrest Personnel's Amended Particulars, Forrest Personnel states that Ms Palmer had previously stated to Mr Sullivan that she was not interested in continuing in a new position that entailed a reduction in responsibility and salary. Ms Palmer gave evidence that this is totally incorrect. There had never been a discussion about any of the new positions, or even touching on any of the positions that might become available, or any reduction in salary or otherwise. She knew nothing about the restructure or new positions that were being proposed or the salary of those positions. Before the termination meeting on Monday 10 August 2015, Ms Palmer had not had any discussions with Mr Sullivan about continuing in a position with a reduced salary or in a position with reduced responsibilities.

294 Ms Palmer gave evidence in examination-in-chief that her personal circumstances were that she did not want to be unemployed. She had been working in the industry for decades so she knew how difficult it would be to secure other employment, particularly at or even close to the level she had been working at so she went home in disbelief after the termination meeting.

295 Ms Palmer gave evidence that up until Sunday 9 August 2015 there had been no discussions between her and her partner about the possibility that she might lose her job. She would have accepted an alternative position due to her financial circumstances.

Mr Rawet's evidence

296 Mr Rawet gave evidence that there were very limited positions that he could do given the nature of his work. He described himself as not particularly mobile at all. Mr Rawet gave evidence that if Ms Palmer was out of work there was virtually no likelihood that she could find alternatives in Bunbury which may mean that they would have to move interstate. He said each time over the years when they had discussed the issue they had concluded they were far better off remaining in their positions in Bunbury.

297 Mr Rawet gave evidence that Ms Palmer had had reservations about applying for the CEO position and that she was not surprised when she was not appointed. He gave evidence that Ms Palmer loved working for Forrest Personnel and really enjoyed the people there.

298 Mr Rawet gave evidence that Ms Palmer told him that if she were working for a good CEO at Forrest Personnel she would find it a good situation and a learning opportunity. If she did not get the CEO position, she expected that she would return to her substantive COO position.

299 Mr Rawet said that he and Ms Palmer had not discussed her accepting a lower rate of pay because that was not something that was under consideration. It was not even a consideration that she would leave employment. Mr Rawet explained there was no lower salary position on offer. If there had been, in the \$120,000 vicinity, he would certainly have said 'well we need to take it'. Mr Rawet explained that they had not anticipated Ms Palmer being out of work. He had made investment decisions on the basis of her continued employment and they had made the first of two out of five or six payments on their investment property at the time. Mr Rawet said Ms Palmer had never spoken with him about the COO position being too expensive or that she would have to be made redundant. Mr Rawet said that Ms Palmer had said to him the CEO position was overpriced.

300 In cross-examination, Mr Rawet gave evidence that Ms Palmer had never said to him that she would not be willing to accept any reduction in salary or any demotion.

Ms Crittall's evidence

301 Ms Crittall gave evidence that when she saw the restructure document, she noticed that there were two positions that Ms Palmer would have been perfect for. The first one was the General Manager Clinical Governance position. She gave evidence that she told Mr Sullivan, 'this is exactly what Alison is passionate about', and said that Ms Palmer would be perfect for the position. Mr Sullivan replied 'no', that he needed need someone with a medical qualification like 'a Level 5 nurse'. Ms Crittall said to him that it would difficult to find someone with high level business acumen and a nursing degree. She suggested they could give the position to Ms Palmer and just contract in the medical experience.

302 Ms Crittall gave evidence that the General Manager Clinical Governance position (**Tab 23**) in the end did not require an allied health qualification. She said the position was not advertised but rather given to Ms Graham who has a social work background and is not a clinical nurse.

303 Ms Crittall gave evidence that the General Manager Services position (**Exhibit A6**) was circulated internally shortly after 16 August 2015. Only two managers were interested in applying for that position, Ms Bagshaw and Ms Lynch. Ms Crittall explained to Mr Sullivan that both Ms Bagshaw and Ms Lynch wanted the position and that whoever missed out would feel very disgruntled. Ms Crittall gave evidence that Mr Sullivan suggested to her that what they would do would be to make another General Manager position called General Manager Service Innovation. Ms Bagshaw was given the General Manager Services position and Ms Lynch was given the General Manager Service Innovation position. For that reason, the General Manager Service Innovation position was not in the restructure document (**Tab 20**).

304 Ms Crittall gave evidence that there is no difference between the General Manager Services and COO position. She said they are the same position. When she spoke to Mr Sullivan about Ms Palmer being perfect for the General Manager Clinical Governance position she also said to him that the General Manager Services position is exactly the same as the COO position. Ms Crittall gave evidence that Mr Sullivan did not respond to that. They had this conversation in the afternoon of the day Ms Palmer was made redundant.

305 Ms Crittall denied that the position of COO was split between General Manager Services and General Manager Clinical Governance and that the tasks a COO would do would be split between those two positions. Ms Crittall said, 'No, it was General Manager Services'. Ms Crittall also denied in cross-examination that the General Manager Services and General Manager Service Innovation positions were split. Ms Crittall said the General Manager Services position was not split, another position was created. Ms Crittall said that the person who took on the General Manager Service Innovation position was the Regional Manager for Busselton and Margaret River, who would be still running her sites and doing her normal job, but would have some additional responsibility of sourcing tenders and grants. The position was not divided into two.

Mr Sullivan's evidence

306 Mr Sullivan gave evidence in cross-examination that Ms Palmer was capable of doing the General Manager Services position. He said the COO position is a different position altogether to the General Manager Services position.

307 In cross-examination, Mr Sullivan gave evidence that when the General Manager Clinical Governance position was advertised it did not require a clinical nurse qualification. He said that was clearly an oversight. He then agreed that the person in the position was not a clinical nurse but a social worker. He said a clinical governance position required a clinical qualification, even though that was not in the job description. Mr Sullivan gave evidence that he could not recall Ms Crittall telling him Ms Palmer was capable of doing that job. He said he was not aware that Ms Palmer is one unit short of a social work qualification.

308 In cross-examination, Mr Sullivan gave evidence that he did not recall speaking with Ms Crittall about the prospect of Ms Lynch leaving if she was not the successful candidate for the General Manager Services position. He did recall a conversation about the two potential applicants for the position.

309 Mr Sullivan gave evidence that the COO position covered all four positions of General Manager Services, General Manager People & Resources, General Manager Clinical Governance and General Manager Service Innovation.

Consideration

310 I accept Ms Palmer's evidence that she would have accepted a lower salary in an alternative position to ensure that she had a job, at least while she looked for other employment. Ms Palmer's evidence was plausible, clear, consistent and definite. Her evidence was also supported by Mr Rawet's evidence.

311 I accept that Ms Palmer thought it would be difficult to find a suitable position at her senior level in Bunbury. Indeed, it has been. Ms Palmer has not been able to secure a position since her dismissal.

- 312 I find Ms Palmer's explanation of the statements made in her emails to Ms Acarregui and Ms Nankiville plausible. At their highest, they were statements about how she felt at that particular time. In my view, they do not establish that Ms Palmer anticipated or wanted to be made redundant or would not have accepted an alternative position.
- 313 I prefer Ms Crittall's evidence to that of Mr Sullivan's in relation to their discussion about the creation of the General Manager Service Innovation position. This is because Mr Sullivan gave vague, verbose responses to these questions. Ms Crittall's evidence was plausible, definite and clear.
- 314 I accept that the primary functions of the COO position continue to be performed by the General Manager Services and some aspects of the position were incorporated into other positions. Given the reduced status and pay of the General Manager Services position, I find the COO position was made redundant.
- 315 Whether or not the COO position was made redundant, it is clear to me that Ms Palmer was capable of performing the General Manager Services, General Manager Clinical Governance and General Manager Service Innovation positions.
- 316 On the evidence, I have no difficulty finding that Ms Palmer was not offered an alternative position.
- 317 Further, I find that if Forrest Personnel had consulted Ms Palmer and offered her one of these alternative positions, she would have accepted any of these alternative positions rather than be unemployed.

Deed

- 318 At the hearing, the parties gave evidence about a deed of settlement (deed).
- 319 During the course of the four-day hearing, Forrest Personnel placed considerable emphasis on the issue of the deed. I prefer Ms Palmer's version of events and find that the deed was not part of the discussion at the termination meeting on Monday 10 August 2015. Having made Ms Palmer redundant, Forrest Personnel agreed to pay her a termination package.

Ms Palmer's evidence

- 320 Ms Palmer gave evidence that her termination package was never contingent on her signing anything. She and Mr Sullivan never spoke about a deed of release or a deed of settlement at the termination meeting on Monday 10 August 2015. It was subsequently raised by Ms Crittall and that was in the context of obtaining a reference for Ms Palmer by the Chair. Ms Palmer explained that she wanted to see the deed because at that point, she had yet to see any dollar amounts and was not aware of what Forrest Personnel would be paying her in respect of her severance payment. When the deed was sent to her on Sunday 16 August 2015, the figures did not look quite right to her. When Ms Palmer queried them, Forrest Personnel realised it had short changed her two weeks on her notice period.
- 321 Ms Palmer gave evidence that she expressed to Ms Crittall that she wanted to keep open the option of taking legal action, if that was a course she wanted to go down, and that she was not prepared to sign a deed. Ms Crittall indicated to Ms Palmer that signing the deed was to obtain a signed reference from the Chair, and that a signed copy of the reference was being withheld from Ms Palmer until she signed the deed. Ms Palmer did not sign the deed and she did not receive a signed copy of the reference.
- 322 In re-examination, Ms Palmer confirmed that the first time she saw the amounts and the numbers of weeks which made up her termination package was when Ms Crittall sent an email to Ms Palmer's work email address on Sunday 16 August 2015 (**Tab 29**), which attached the draft deed. Ms Crittall forwarded that email to Ms Palmer's personal email address on Monday 17 August 2015.
- 323 In cross-examination, Ms Palmer denied that she negotiated changes to the terms of the deed with Ms Crittall. She said she merely pointed out that there were errors in the minimum number of weeks owed in lieu of notice. In relation to the email Ms Palmer sent to Ms Crittall on Monday 24 August 2015 (**Tab 35**), Ms Palmer said that her statement, 'both seem good now', was in relation to the number of weeks' wages she was entitled to being correct because earlier there had been errors made. She went on to explain that she had had numerous conversations with Ms Crittall to confirm that she had no intention of signing the deed because Ms Palmer wanted to leave her options open to take legal advice or legal action.
- 324 Ms Palmer denied that she intended to sign the deed when she wrote another email to Ms Crittall on 24 August 2015 (**Tab 34**), saying 'The rest is fine. It would be good to have a signed copies (sic) of both documents before I go on leave on Friday'. Ms Palmer said she was not intending to sign it, she just wanted to have everything sorted and available to her, in case she decided not to take legal action. Ms Palmer denied that Ms Crittall had told her that she needed a copy of the deed before payroll could be run. Ms Palmer gave evidence that the only conversations with Ms Crittall in relation to signing the deed were about whether Ms Palmer wanted a signed copy of the reference given to her.

Ms Crittall's evidence

- 325 Ms Crittall gave evidence that she suggested to Mr Sullivan that Forrest Personnel should get Ms Palmer to sign a deed if she were agreeable to it, and Mr Sullivan said he thought that was a good idea. Ms Crittall said Mr Sullivan then made Ms Palmer receiving a signed reference from the Chair contingent upon Ms Palmer signing a deed.
- 326 Ms Crittall gave evidence that she had made a mistake in calculating the number of weeks' notice that Ms Palmer should be paid. The initial calculation was two weeks short of what Ms Palmer was entitled to under her contract of employment and in accordance with the statutory entitlement because Ms Palmer was over 45 years old.
- 327 Ms Crittall gave evidence that Ms Palmer's main concern about the deed was to see exactly how much money she would be receiving. Ms Crittall said that Ms Palmer was never actually going to sign the deed because Ms Palmer believed she had been unfairly treated and wanted to leave the option open to take legal action.

328 In cross-examination, Ms Crittall confirmed that Ms Palmer 'never actually committed to signing the deed of settlement'. It was put to Ms Crittall that she had said, in an email to Forrest Personnel's payroll officer which was copied to Mr Sullivan, 'I am expecting the deed back in the next couple of days...however we will only send out her reference once we get the Deed back' (Tab 40). Ms Crittall gave evidence that she was thinking the deed may come back, but she knew from conversations with Ms Palmer that Ms Palmer was not going to send the deed back. Ms Crittall also said that she told Mr Sullivan, 'I don't think Alison's going to sign the deed'. When asked whether she lied when she said she was expecting the deed back, Ms Crittall said, 'well, um, I guess it was a difference between my role as HR and my conversations that I'd had with Alison outside.' She agreed that there was possibly a conflict between her being in HR and a friend of Ms Palmer. Ms Crittall went on to say that she was expecting the deed back, but she did not say it would come back.

Mr Sullivan's evidence

329 Mr Sullivan gave evidence that he could not recall whether he and Ms Palmer discussed a deed at the termination meeting on Monday 10 August 2015. He said that they were discussing a separation package, 'a separation package will always include a deed of release...if I'm negotiating a separation package with a senior staff member, I assume they know that what - that's what that means'.

330 In cross-examination, Mr Sullivan seemed to suggest that figures were discussed with Ms Palmer at the termination meeting and that he put the amounts of money that were involved to Ms Palmer, but that he did not tell her the exact amounts. He agreed that the exact amounts were unknown. He also agreed that it was reasonable for Ms Palmer to look at the amounts when Ms Crittall provided them in the deed. His file note of the termination meeting does not mention that figures were discussed at the meeting. In cross-examination, Mr Sullivan disagreed that paying Ms Palmer at the CEO rate was a compromise between what she thought she might be entitled to and his own belief that nothing should be paid. When his file note of the termination meeting was put to him, which states 'I recognised that she felt she was due a bonus so as a compromise I was prepared to pay her at the rate of Acting CEO', Mr Sullivan then contradicted his earlier evidence.

331 In cross-examination, Mr Sullivan agreed that as discussions unfolded, it became a position that if Ms Palmer did not sign the deed, she would not get a signed reference.

332 Mr Sullivan insisted that Ms Palmer resigned. He said that the deed was sent to her and it said 'I am going to terminate my employment in return for this consideration'. Ms Palmer replied by email 'both documents are fine now'. Mr Sullivan said 'my definition is that is a resignation'. When Mr Sullivan was asked to read the one-page deed (Tab 33), he did so and gave the following evidence 'Okay. It says, um: 'I will hereby have taken, accepted and agreed to accept in good faith this and that in return for that the employment is terminated''. When Ms Palmer's representative asked him where in the deed it said that, Mr Sullivan was unable to point to it.

Consideration

333 I prefer the evidence of Ms Palmer to that of Mr Sullivan. Mr Sullivan's evidence was implausible, inconsistent and in some respects misleading. Ms Palmer's evidence was plausible, clear and consistent.

334 I consider Ms Crittall, as a friend of Ms Palmer, was in awkward position while Ms Palmer's termination payment was being finalised. I accept that Ms Palmer had told Ms Crittall that she did not intend to sign the deed.

335 While I do not find Ms Crittall was actually expecting Ms Palmer to sign the deed, and therefore Ms Crittall's statement about expecting the deed back in the next couple of days was not accurate, it is clear to me from the evidence and Ms Crittall's email, which is copied to Mr Sullivan, that Mr Sullivan approved payment being made to Ms Palmer without requiring Ms Palmer to first return a signed deed. I also accept that Ms Crittall told Mr Sullivan that she did not think Ms Palmer would sign the deed.

336 In addition to Mr Sullivan's evidence being inconsistent, I found Mr Sullivan's evidence in relation to a termination package always including a deed to be implausible. While it may be a common practice for a termination package to include a deed of release, it is by no means an implied part of such an arrangement. Mr Sullivan's evidence that it is leads me to conclude that his experience in these matters is questionable and it affects his credibility as a witness on this issue.

337 In any event, even on Mr Sullivan's evidence, I find that Ms Palmer's termination package was not contingent upon her signing a deed. I accept that Ms Crittall suggested that Forrest Personnel should get Ms Palmer to sign a deed because it was on Ms Crittall's checklist. Ms Palmer was entitled to see what her termination package comprised. I find that is what Ms Palmer mean when she said 'both docs look good now.'

338 I find Forrest Personnel dismissed Ms Palmer and agreed to pay her entitlements at her acting CEO rate. Ms Palmer did not agree to take no action against Forrest Personnel. She was entitled to bring the claim that she brought.

Conclusion – unfair dismissal

339 In order to be plausible and persuasive, Mr Sullivan's evidence relies upon Ms Palmer having given him cause to think she had mental health issues. I find she did not. I make that finding based on the evidence of Ms Palmer, Ms Crittall and Mr Rawet, as well as Ms Palmer's emails and text messages. I find that at most Ms Palmer was understandably upset about the way she had been treated by the Board and about having missed out on the CEO position.

340 I find Ms Palmer behaved in an appropriate and professional manner. Mr Sullivan had no valid reason to direct Ms Palmer to work from home or to relieve her of her acting CEO duties.

341 I find Mr Sullivan's treatment of Ms Palmer was harsh and unfair from his second day of employment and continued until Ms Palmer was dismissed.

342 I find Ms Palmer was left with the impression that her termination was a *fait accompli*. Mr Sullivan held the termination meeting off site. Mr Sullivan directed Ms Palmer not to attend work before the termination meeting. He did not let Ms Palmer know in advance what was the true nature of the meeting on Monday 10 August 2015. He did not put to Ms Palmer the possibility of her doing the General Manager Services position before the meeting.

- 343 I find Ms Palmer was not consulted about her position being made redundant.
- 344 Forrest Personnel did not comply with its obligations under the General Order on Termination Change and Redundancy.
- 345 I am not satisfied that Forrest Personnel had a valid reason for terminating Ms Palmer's employment on the ground of redundancy because it failed to consult with her about her impending redundancy: *Begg v Clay & Mineral Sales Pty Ltd* [1997] FCA 658 (Marshall J).
- 346 Clearly Ms Palmer did not get a fair go all round.
- 347 Forrest Personnel handled the transition to a new CEO insensitively and treated Ms Palmer very poorly indeed.
- 348 Mr Sullivan treated Ms Palmer dreadfully. He sent her aggressive, authoritarian emails in circumstances where Ms Palmer had followed all of his instructions and was attempting to do her job. Mr Sullivan questioned Ms Palmer's professionalism and mental health without any reasonable basis to do so and isolated her from the workplace before unfairly dismissing her, all notwithstanding her period of faithful service as a high performing senior employee.
- 349 There was no reasonable ground for Mr Sullivan's 'concern' about Ms Palmer's mental health. I am inclined to think it provided Mr Sullivan with an excuse to isolate Ms Palmer from the workplace and require her to work from home. There was no evidence that Mr Sullivan was familiar with Ms Palmer's workspace from home or that he made any inquiry about whether Ms Palmer's home was a suitable place to work. After sending Ms Palmer away from the workplace, Mr Sullivan did not contact Ms Palmer to check on her wellbeing. That leads me to conclude that he was not genuinely concerned about Ms Palmer's mental health.
- 350 I find Mr Sullivan expected Ms Palmer to leave Forrest Personnel. For that reason, he directed her to see a career coach and told her he expected her to be a CEO elsewhere within three to six months.
- 351 It is not at all clear to me on Mr Sullivan's evidence that he conducted a fair, objective or comprehensive review of Forrest Personnel, leading to him selecting Ms Palmer for redundancy.
- 352 I find Mr Sullivan made the decision to terminate Ms Palmer's employment before Forrest Personnel consulted with staff about its restructure. Mr Sullivan treated Ms Palmer differently to other employees at Forrest Personnel, for example Ms Crittall and Ms Graham.
- 353 On Mr Sullivan's evidence, Ms Palmer was not given notice of the nature of the meeting on Monday 10 August 2015, nor was she given the opportunity to have a support person.
- 354 Even if her position was made redundant, there was no meaningful discussion about the termination and no exploration of alternatives before Ms Palmer was dismissed, which may have removed the need for dismissal.
- 355 Plainly, Forrest Personnel did not consult Ms Palmer. Her dismissal was procedurally and substantively unfair.
- 356 If her position were to be made redundant, there were clearly alternative positions that she could do. They were never put to her and I find she would have accepted one of them.
- 357 There is nothing before me to suggest that, if Forrest Personnel had offered Ms Palmer an alternative position, she would not have continued working for Forrest Personnel for some time.
- 358 Forrest Personnel exercised its legal right to dismiss so harshly and unfairly against Ms Palmer as to amount to an abuse of that right.
- 359 Mr Sullivan was aware that notwithstanding Ms Palmer's experience and qualifications, her prospects of other suitable employment were low because of her particular personal circumstances.
- 360 Forrest Personnel's very harsh and unfair treatment of a committed, high performing employee caused her significant loss.

Compensation

- 361 Having found that Forrest Personnel unfairly dismissed Ms Palmer, I turn to the issue of her remedy.
- 362 Ms Palmer does not want to be reinstated. She seeks compensation for her loss and injury.
- 363 I understand from Forrest Personnel's evidence and submissions that there is no suitable position into which Ms Palmer could be reinstated.
- 364 I find that the relationship between Ms Palmer and Forrest Personnel has broken down to such an extent that reinstatement would be impracticable.

The law – compensation for unfair dismissal

- 365 As I state in *Bonifassi v E.J Fillaudeau and J.J Maindok t/a Fillaudeau's* [2016] WAIRC 00819, the Commission's powers in relation to unfair dismissal are set out in s 23A of the Act.
- 366 The Commission can order an employer to pay an employee compensation for loss or injury caused by an unfair dismissal only if it considers reinstatement or re-employment impracticable: s 23A(6) of the Act. The amount of compensation cannot exceed 6 months' pay: s 23A(8) of the Act.
- 367 The principles which apply to assessing compensation for unfair dismissal are well-settled. Some of these principles are set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1999) 79 WAIG 8 by Sharkey P, with whom Coleman CC and Kenner C agreed, at 8-9.
- 368 First, the Commission must make a finding as to the loss and/or injury which Ms Palmer suffered by reason of the dismissal. If no loss or injury is established, there is nothing to compensate.

- 369 The Commission must then assess the proper amount of compensation for loss and/or injury, in light of all the relevant circumstances but disregarding the cap prescribed in s 23A of the Act. If the amount is in excess of the cap, the Commission reduces the amount to be awarded to an amount equal to the permissible maximum.
- 370 'Loss' is a broad concept that includes, but is not limited to 'actual loss of salary or wage, loss of benefits or other amounts which would have been earned, paid to or received by the dismissed employee but for the dismissal': *Capewell v Cadbury Schweppes Australia Ltd* (1997) 78 WAIG 299, 303.
- 371 'Injury' is also a broad concept, incorporating 'all manner of wrongs' and includes, for example, humiliation, injury to feelings and 'being treated with callousness': *Capewell* (303).
- 372 For compensation to be awarded for injury, the injury must 'fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal'. This requires evidence that Ms Palmer has suffered 'loss of dignity, anxiety, humiliation, stress or nervous shock': *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849, 2862 (Coleman CC & Smith C). There will be an element of distress in most dismissal cases: *Lynam v Lataga Pty Ltd* [2001] WAIRC 02420; (2001) 81 WAIG 986 [56].
- 373 In deciding the amount of compensation, the Commission must consider Ms Palmer's efforts to mitigate her loss as a result of the dismissal: s 23A(7) of the Act.
- 374 The employee has a duty to mitigate her loss or injury, but the onus of proof for failure to mitigate rests on the respondent: *Bogunovich* (1999) 79 WAIG 8, 8-9. Whether the employee mitigated her loss is relevant to determining whether the dismissal caused any loss: *Sealanes (1985) Pty Ltd v Foley* [2006] WAIRC 04110; (2006) 86 WAIG 1239 [99]-[105].
- 375 The purpose of compensation under s 23A is to compensate an unfairly dismissed employee for losses caused, not to punish the employer or to confer a windfall on the employee. This means compensation 'must be in respect of a lawful entitlement and/or as compensation for a demonstrated loss or injury caused by the harsh, oppressive or unfair dismissal': *Garbett* [85]. Compensation is not compensation if it does not, as much as possible, put the person who suffered the loss or injury back into the position which, but for the loss or injury, the person would have been in: *Bogunovich* (1999) 79 WAIG 8, 8.

Consideration

- 376 I accept Ms Crittall's evidence that Ms Palmer's salary as COO was \$144,109.
- 377 Remuneration can include superannuation contributions and the cost of providing a car: *Capewell* (301). The parties agree in submissions filed following the hearing that Ms Palmer's remuneration package was \$155,861.68 (gross). This remuneration package includes her salary, over award superannuation contributions and motor vehicle allowance. It equates to \$2,997.34 per week.
- 378 Ms Palmer has been unemployed for 58 weeks.

Mitigation

- 379 Ms Palmer gave evidence that she has registered with recruitment companies, gets automatically generated notification of vacancies and looks for jobs in the newspaper. She has applied for as many jobs as she felt she was suitable for, both locally and interstate. She has attended many interviews locally, and also attended several interstate. In doing so, she has met all of her own costs.
- 380 Ms Palmer tendered a bundle of documents representing some, but not all, of the applications she has made. She gave evidence that she did not keep all of her applications because she had not realised she would need to. The bundle of documents Ms Palmer tendered contained 41 applications. Ms Palmer gave evidence that she has not found an alternative position, she has done some consultancy work. Ms Palmer's earnings from the consultancy work were \$15,305.

Consideration

- 381 Forrest Personnel has not established that Ms Palmer failed to mitigate her loss. I have no difficulty finding Ms Palmer has mitigated her loss.

Conclusion – compensation for unfair dismissal

- 382 Ms Palmer submits that she suffered injury as a result of her dismissal in the amount of \$25,000. While I accept that Ms Palmer suffered injury as a result of Forrest Personnel's very unfair treatment of her, I do not consider that there is sufficient evidence for me to make a finding about that injury.
- 383 In any event, Ms Palmer's loss far exceeds the amount of compensation the Commission can award.
- 384 Ms Palmer's loss is \$113,578.39 (gross). This comprises 58 weeks' remuneration being from Monday 17 August 2015 until the last day of the hearing, from which I have deducted the following:
- \$20,437.42 (gross) - five weeks' payment in lieu of notice;
 - \$24,524.91 (gross) - six weeks' redundancy pay; and
 - \$15,305 (gross) - consultancy work.
- 385 I would award the full loss if I were able to. However, Ms Palmer's loss is in excess of the statutory cap of six months' remuneration. For these reasons, I will order that Forrest Personnel pay Ms Palmer six months' compensation, which is \$77,930.84 (gross).
- 386 A declaration and order now issues.
-

2016 WAIRC 00867

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ALISON PALMER

APPLICANT

-v-

FORREST PERSONNEL INC

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE FRIDAY, 4 NOVEMBER 2016
FILE NO/S U 153 OF 2015
CITATION NO. 2016 WAIRC 00867

Result Application upheld
Representation
Applicant Mr K Trainer (as agent)
Respondent Ms R Lee (of counsel)

Declaration and order

HAVING heard Mr K Trainer (as agent) on behalf of the applicant and Ms R Lee (of counsel) on behalf of the respondent;
AND HAVING given reasons for decision;
NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* (WA), hereby –

1. DECLARE that the applicant was harshly and unfairly dismissed by the respondent.
2. ORDER that the respondent pay the applicant \$77,930.84 (gross), being compensation for loss caused by the dismissal, within 14 days of the date of this order.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2016 WAIRC 00846

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
KYM SHELDON

APPLICANT

-v-

HR DEPARTMENT: CENTRECARE ABN 98 651 609 161

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE THURSDAY, 27 OCTOBER 2016
FILE NO/S U 146 OF 2016
CITATION NO. 2016 WAIRC 00846

Result Application dismissed
Representation
Applicant In person
Respondent Ms C Broers and with her Ms L Broadley

Order

HAVING heard the applicant on his own behalf and Ms C Broers and with her Ms L Broadley for the respondent, on 26 October 2016; and

WHEREAS I gave oral reasons for decision at the conclusion of proceedings on 26 October 2016 dismissing the application for want of jurisdiction; and

WHEREAS I stated I would provide written reasons for decision upon the request of any party to the matter;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under section 27 *Industrial Relations Act 1979* make the following order:

The application be dismissed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Ryan Musiello	Racing and Wagering Western Australia	B 51/2016	Commissioner T Emmanuel	Discontinued
Steven Lorimer	The Brand Agency Pty Ltd	B 114/2016	Commissioner D J Matthews	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2016 WAIRC 00870

DISPUTE RE ALLEGED NON COMPLIANCE WITH THE TERMINATION OF EMPLOYMENT, INTRODUCTION OF CHANGE AND REDUNDANCY GENERAL ORDER 2005 - 2005 WAIRC 01715

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES

APPLICANT

-v-

DR TIM MCDONALD

EXECUTIVE DIRECTOR OF CATHOLIC EDUCATION

RESPONDENT

CORAM

COMMISSIONER D J MATTHEWS

DATE

WEDNESDAY, 9 NOVEMBER 2016

FILE NO.

C 23 OF 2016

CITATION NO.

2016 WAIRC 00870

Result Recommendation issued

Representation

Applicant Ms S Tobin (of Counsel)

Respondent Ms J Maccarone

Recommendation

HAVING heard Ms S Tobin, of Counsel, for the applicant and Ms J Maccarone for the respondent on 9 November 2016 the Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby-

RECOMMENDS that by 11 November 2016 Dr Tim McDonald, Executive Director of the Catholic Education Office, meet with Ms Angela Bryant, State Secretary of the Independent Education Union of Western Australia Union of Employees, to discuss application C 23 of 2016 and the matters relating to that application. Both parties may invite others to attend.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2016 WAIRC 00708

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 25 JANUARY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PAUL EDWARD CHORLEY

APPELLANT**-v-**

DIRECTOR GENERAL DEPARTMENT OF TRANSPORT

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIRMAN
MR G RICHARDS - BOARD MEMBER
MR A LEE - BOARD MEMBER**DATE**

TUESDAY, 16 AUGUST 2016

FILE NO.

PSAB 7 OF 2016

CITATION NO.

2016 WAIRC 00708

Result

Directions issued

Directions

HAVING heard Mr P Chorley on his own behalf and Mr S Barrett and Ms A Tovey on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby directs:

1. THAT the parties file a statement of agreed facts by 13 September 2016.
2. THAT the appellant file and serve outlines of evidence for any witnesses it intends to call by 27 September 2016.
3. THAT the respondent file and serve outlines of evidence for any witnesses it intends to call by 11 October 2016.
4. THAT the appellant file and serve an outline of written submissions by 25 October 2016.
5. THAT the respondent file and serve an outline of written submissions by 8 November 2016.
6. THAT this matter be listed for a two day hearing not before 14 November 2016.
7. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2016 WAIRC 00854

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 13 JULY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MARK GRIFFITHS

APPELLANT**-v-**

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR D HILL - BOARD MEMBER
MS C SEENIKATTY - BOARD MEMBER**DATE**

TUESDAY, 1 NOVEMBER 2016

FILE NO.

PSAB 10 OF 2016

CITATION NO.

2016 WAIRC 00854

Result Direction issued

Direction

HAVING heard Ms P Marcano (as agent) on behalf of the appellant and Mr M Aulfrey (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby directs:

1. THAT the parties file a statement of agreed facts by Monday 28 November 2016.
2. THAT the parties confer about a bundle of agreed documents and, if documents can be agreed, file a bundle of agreed documents by Monday 28 November 2016.
3. THAT the appellant file and serve outlines of evidence by Friday 23 December 2016.
4. THAT the respondent file and serve outlines of evidence by Monday 13 February 2017.
5. THAT the appellant file and serve an outline of written submissions by Monday 6 March 2017.
6. THAT the respondent file and serve an outline of written submissions by Monday 27 March 2017.
7. THAT this matter be listed for a four-day hearing not before Monday 10 April 2017.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.] On behalf of the Public Service Appeal Board.

2016 WAIRC 00855

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 13 JULY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MATTHEW MARSH

APPELLANT

-v-

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR D HILL - BOARD MEMBER
MS C SEENIKATTY - BOARD MEMBER

DATE

TUESDAY, 1 NOVEMBER 2016

FILE NO.

PSAB 11 OF 2016

CITATION NO.

2016 WAIRC 00855

Result Direction issued

Direction

HAVING heard Ms P Marcano (as agent) on behalf of the appellant and Mr M Aulfrey (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby directs:

1. THAT the parties file a statement of agreed facts by Monday 28 November 2016.
2. THAT the parties confer about a bundle of agreed documents and, if documents can be agreed, file a bundle of agreed documents by Monday 28 November 2016.
3. THAT the appellant file and serve outlines of evidence by Friday 23 December 2016.
4. THAT the respondent file and serve outlines of evidence by Monday 13 February 2017.
5. THAT the appellant file and serve an outline of written submissions by Monday 6 March 2017.
6. THAT the respondent file and serve an outline of written submissions by Monday 27 March 2017.
7. THAT this matter be listed for a four-day hearing not before Monday 10 April 2017.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.] On behalf of the Public Service Appeal Board.

2016 WAIRC 00856

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 13 JULY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JIM BILTSOURIS

APPELLANT

-v-

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR D HILL - BOARD MEMBER
MS C SEENIKATTY - BOARD MEMBER**DATE**

TUESDAY, 1 NOVEMBER 2016

FILE NO.

PSAB 12 OF 2016

CITATION NO.

2016 WAIRC 00856

Result

Direction issued

Direction

HAVING heard Ms P Marcano (as agent) on behalf of the appellant and Mr M Aulfrey (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby directs:

1. THAT the parties file a statement of agreed facts by Monday 28 November 2016.
2. THAT the parties confer about a bundle of agreed documents and, if documents can be agreed, file a bundle of agreed documents by Monday 28 November 2016.
3. THAT the appellant file and serve outlines of evidence by Friday 23 December 2016.
4. THAT the respondent file and serve outlines of evidence by Monday 13 February 2017.
5. THAT the appellant file and serve an outline of written submissions by Monday 6 March 2017.
6. THAT the respondent file and serve an outline of written submissions by Monday 27 March 2017.
7. THAT this matter be listed for a four-day hearing not before Monday 10 April 2017.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2016 WAIRC 00857

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 13 JULY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JOHN PSZONKA

APPELLANT

-v-

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR D HILL - BOARD MEMBER
MS C SEENIKATTY - BOARD MEMBER**DATE**

TUESDAY, 1 NOVEMBER 2016

FILE NO.

PSAB 13 OF 2016

CITATION NO.

2016 WAIRC 00857

Result Direction issued

Direction

HAVING heard Ms P Marcano (as agent) on behalf of the appellant and Mr M Aulfrey (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby directs:

1. THAT the parties file a statement of agreed facts by Monday 28 November 2016.
2. THAT the parties confer about a bundle of agreed documents and, if documents can be agreed, file a bundle of agreed documents by Monday 28 November 2016.
3. THAT the appellant file and serve outlines of evidence by Friday 23 December 2016.
4. THAT the respondent file and serve outlines of evidence by Monday 13 February 2017.
5. THAT the appellant file and serve an outline of written submissions by Monday 6 March 2017.
6. THAT the respondent file and serve an outline of written submissions by Monday 27 March 2017.
7. THAT this matter be listed for a four-day hearing not before Monday 10 April 2017.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2016 WAIRC 00668

DISPUTE RE INTERPRETATION OF CLAUSE 24(14) OF THE DEPARTMENT OF HEALTH MEDICAL PRACTITIONERS (METROPOLITAN HEALTH SERVICES) AMA INDUSTRIAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED

APPLICANT

-v-

MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER T EMMANUEL

DATE

THURSDAY, 21 JULY 2016

FILE NO.

PSACR 5 OF 2016

CITATION NO.

2016 WAIRC 00668

Result Directions issued

Directions

HAVING heard Mr S Bibby on behalf of the applicant and Ms R Sinton on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the matter be listed for a one day hearing no sooner than 20 August 2016.
2. THAT the applicant file and serve its outlines of submissions and evidence by 29 July 2016.
3. THAT the respondent file and serve its outlines of submissions and evidence by 12 August 2016.
4. THAT the applicant file and serve any reply by 19 August 2016.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

Public Service Arbitrator.

2016 WAIRC 00835

DISPUTE RE CHANGE TO PRESCRIBED HOURS OF DUTY AND FLEXIBLE WORKING ARRANGEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT**-v-**

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM**

PUBLIC SERVICE ARBITRATOR

COMMISSIONER T EMMANUEL

DATE

WEDNESDAY, 19 OCTOBER 2016

FILE NO

PSACR 12 OF 2016

CITATION NO.

2016 WAIRC 00835

Result

Order issued

Order

HAVING heard Mr D Wayda on behalf of the applicant and Mr N van Hattem on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on her under the *Industrial Relations Act 1979* (WA) hereby orders –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 9 November 2016.
2. THAT the applicant file and serve outlines of evidence by 7 December 2016.
3. THAT the respondent file and serve outlines of evidence by 11 January 2017.
4. THAT the applicant file and serve an outline of written submissions by 1 February 2017.
5. THAT the respondent file and serve an outline of written submissions by 22 February 2017.
6. THAT this matter be listed for a one-day hearing not before 6 March 2017.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,
Public Service Arbitrator.

[L.S.]

2016 WAIRC 00831

DISPUTE RE ALLEGED BREACH OF DISCIPLINE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT**-v-**

COMMISSIONER OF MAIN ROADS WESTERN AUSTRALIA

RESPONDENT**CORAM**

PUBLIC SERVICE ARBITRATOR

COMMISSIONER T EMMANUEL

DATE

TUESDAY, 18 OCTOBER 2016

FILE NO

PSACR 30 OF 2015

CITATION NO.

2016 WAIRC 00831

Result

Order issued

Order

HAVING heard Ms C Allen (of counsel) on behalf of the applicant and Mr E Fearis (of counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on her under the *Industrial Relations Act 1979* (WA) hereby orders –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 16 November 2016.
2. THAT the applicant file and serve outlines of evidence by 13 January 2017.
3. THAT the respondent file and serve outlines of evidence by 27 January 2017.
4. THAT the applicant file and serve an outline of written submissions by 10 February 2017.
5. THAT the respondent file and serve an outline of written submissions by 24 February 2017.
6. THAT this matter be listed for a three-day hearing not before 20 March 2017.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,
Public Service Arbitrator.

[L.S.]

2016 WAIRC 00123

REFERRAL OF DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

STAR TRACK EXPRESS PTY LTD, STARTRACK RETAIL PTY

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

THURSDAY, 3 MARCH 2016

FILE NO.

RFT 1 OF 2016

CITATION NO.

2016 WAIRC 00123

Result

Direction issued

Representation**Applicant**

Mr A Dzieciol of counsel

Respondent

Ms E Taylor of counsel

Direction

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

- (1) THAT the applicant provide a detailed response to the respondent's proposed contract and cost structure in relation to those owner-drivers it represents by no later than 23 March 2016.
- (2) THAT the respondent provide any reply to the applicant's response by no later than 7 April 2016.
- (3) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2016 WAIRC 00840

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BARRY LANDWEHR

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT

DATE

FRIDAY, 21 OCTOBER 2016

FILE NO.

U 93 OF 2016

CITATION NO.

2016 WAIRC 00840

Result	Direction issued
Representation	
Applicant	Ms R Cosentino of counsel
Respondent	Mr J Carroll of counsel

Direction

HAVING heard Ms R Cosentino of counsel on behalf of the applicant and Mr J Carroll of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT the applicant is granted leave to proceed on the basis of the Form 2 filed by him in this matter.
2. THAT the parties are to file any statement of agreed facts by no later than Monday, 28 November 2016.
3. THAT the parties are to file any agreed bundle of documents by no later than Thursday, 2 February 2017.
4. THAT the applicant is to file and serve an outline of any witness evidence upon which he intends to rely by no later than Sunday, 11 December 2016.
5. THAT the respondent is to file and serve an outline of any witness evidence upon which she intends to rely by no later than Friday, 6 January 2017.
6. THAT the applicant is to file and serve an outline of submissions and any list of authorities upon which he intends to rely by no later than Friday, 13 January 2017.
7. THAT the respondent is to file and serve an outline of submissions and any list of authorities upon which she intends to rely by no later than Friday, 20 January 2017.
8. THAT the matter is listed for two days, being Thursday, 9 and Friday, 10 February 2017.
9. THAT the parties have liberty to apply.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Quintilian School Enterprise Bargaining Agreement 2016 - The AG 41/2016	1/02/2016	The Independent Education Union of Western Australia, Union of Employees The Quintilian School United Voice WA	(Not applicable)	Commissioner T Emmanuel	Agreement registered
WA Health System - Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses - Industrial Agreement 2016 AG 45/2016	25/10/2016	The Health Service Providers established pursuant to section 32(1)(b) of the Health Services Act 2016 which include: (i) Child and Adolescent Health Service; (ii) East Metropolitan Health Service;	Australian Nursing Federation Industrial Union of Workers Perth	Commissioner T Emmanuel	Agreement registered
Western Australia Police Agency Specific Agreement 2016 PSAAG 3/2016	26/10/2016	Commissioner of Police	Civil Service Association of Western Australia	Senior Commissioner S J Kenner	Agreement registered

PUBLIC SERVICE APPEAL BOARD—**2016 WAIRC 00726****APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 14 MARCH 2016**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JUSTIN MATTHEW LANE

APPELLANT**-v-**

CENTRAL INSTITUTE OF TECHNOLOGY

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
 SENIOR COMMISSIONER S J KENNER - CHAIRMAN
 MR G LEE - BOARD MEMBER
 MS V TOMLIN - BOARD MEMBER

DATE

THURSDAY, 25 AUGUST 2016

FILE NO

PSAB 5 OF 2016

CITATION NO.

2016 WAIRC 00726

Result	Order issued
Representation	
Appellant	In person
Respondent	Mr R Bathurst of counsel

Order and Direction

HAVING heard the appellant on his own behalf and Mr R Bathurst of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

- (1) ORDERS that the time for filing the herein appeal be and is hereby extended to 11 April 2016.
- (2) ORDERS that the appellant be granted leave to amend his appeal in the terms as set out in the amended notice of appeal to Public Service Appeal Board filed on 6 July 2016.
- (3) ORDERS that the respondent be granted leave to file a re-amended notice of answer by no later than 6 September 2016.
- (4) DIRECTS that any request for production of documents by either party be by list served no later than 30 August 2016.
- (5) DIRECTS that the appeal be listed for hearing for three days on dates to be fixed.
- (6) DIRECTS that the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
 Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2016 WAIRC 00804**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 14 MARCH 2016**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JUSTIN MATTHEW LANE

APPELLANT**-v-**

CENTRAL INSTITUTE OF TECHNOLOGY

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
 SENIOR COMMISSIONER S J KENNER - CHAIRMAN
 MR G LEE - BOARD MEMBER
 MS V TOMLIN - BOARD MEMBER

DATE

TUESDAY, 11 OCTOBER 2016

FILE NO

PSAB 5 OF 2016

CITATION NO.

2016 WAIRC 00804

Result	Discontinued by leave
Representation	
Appellant	In person
Respondent	Mr R Bathurst of counsel

Order

WHEREAS the appellant 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 appeal be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner,
On behalf of the Public Service Appeal Board.

2016 WAIRC 00834

APPEAL AGAINST DISCIPLINARY PENALTY ON 21 JUNE 2016
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2016 WAIRC 00834
CORAM	:	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER- CHAIRMAN MR C FOGLIANI - BOARD MEMBER MR H FALCONER - BOARD MEMBER
HEARD	:	THURSDAY, 13 OCTOBER 2016
DELIVERED	:	WEDNESDAY, 19 OCTOBER 2016
FILE NO.	:	PSAB 16 OF 2016
BETWEEN	:	MARK DARRYL NELSON Appellant AND PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

Catchwords	:	<i>Industrial Law (WA) - Appeal against a decision of the respondent to undertake disciplinary action - Application for an extension of time in which to file the appeal - Whether the appeal is beyond the Public Service Appeal Board's jurisdiction in any event - Whether employee is a "government officer" for the purposes of s 80C(1) of the Industrial Relations Act 1979 - Principles applied - Extension of time cannot be granted where the substance of the appeal is beyond jurisdiction - Appeal dismissed</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA) ss 27(1)(n), 80C(1), 80I Industrial Relations Commission Regulations 2005 (WA) reg 107(2) Public Sector Management Act 1994 (WA) ss 78(1),(2), 82A(3)(b) Public Transport Authority Act 2003 (WA) s 10(1)</i>
Result	:	Dismissed for want of jurisdiction
Representation:		
Appellant	:	Mr K Chan as agent
Respondent	:	Mr R Farrell

Case(s) referred to in reasons:

Capewell v Department of Corrective Services (2013) 93 WAIG 1454

McGinty v Department of Corrective Services [2012] WAIRC 00054

Nicholas v Department of Education and Training (2008) 89 WAIG 817

Case(s) also cited:

Berke v Director General, Department of Education [2014] WAIRC 00478

Reasons for Decision

- 1 These are the unanimous reasons for decision of the Appeal Board.
- 2 The appellant Mr Nelson commenced an appeal to the Appeal Board purportedly under s 80I of the *Industrial Relations Act 1979* (WA). Mr Nelson was a Senior Transit Officer employed by the respondent, the Public Transport Authority. His employment commenced in July 2005. He was the subject of disciplinary action which was not specified in the notice of appeal. The relief sought by Mr Nelson was the setting aside of the penalty imposed by the Authority and in lieu thereof, a penalty of a temporary demotion with reinstatement to his original position.
- 3 The appeal was launched outside of the 21 day time limit as required by reg 107(2) of the *Industrial Relations Commission Regulations 2005* (WA). Additionally, the Authority maintained that the appeal was beyond the Appeal Board's jurisdiction in any event. Accordingly, the Appeal Board listed the appeal for hearing as to whether the time for lodging the appeal should be extended. Naturally, given the challenge to jurisdiction, that matter was determined at the same time.
- 4 Having heard from the parties by way of both written and oral submissions, at the conclusion of the hearing, for reasons to be published in due course, the Appeal Board dismissed the appeal. This was on the basis that an extension of time could not be granted in circumstances where the substance of the appeal was beyond jurisdiction. These are those reasons.

Jurisdiction

- 5 As the appeal is brought under s 80I of the Act, a jurisdictional fact necessary to ground the appeal is that Mr Nelson was at all material times a "government officer" for the purposes of s 80C(1). Relevantly, s 80C(1) as to the meaning of "government officer" is as follows:

80C. Terms used and construction and application of Division

government officer means —

- (a) every public service officer; and
 - (aa) each member of the Governor's Establishment within the meaning of the *Governor's Establishment Act 1992*; and
 - (ab) each member of a department of the staff of Parliament referred to in, and each electorate officer within the meaning of, the *Parliamentary and Electorate Staff (Employment) Act 1992*; and
 - (b) every other person employed on the salaried staff of a public authority; and
 - (c) any person not referred to in paragraph (a) or (b) who would have been a government officer within the meaning of section 96 of this Act as enacted before the coming into operation of section 58 of the *Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984*¹,
- but does not include —
- (d) any teacher; or
 - (e) any railway officer as defined in section 80M; or
 - (f) any member of the academic staff of a post-secondary education institution;

- 6 In this case, in his written outline of submissions, Mr Nelson conceded that he was not at any time a government officer for the purposes of par (b) of the above definition. That is clearly so. Mr Nelson was and is employed under the terms of the Public Transport Authority / ARTBIU (Transit Officers) Industrial Agreement 2015 which, by cl 1 and Schedule 1, plainly refers to the employees employed as "wages employees" of the Authority. In no sense, could Mr Nelson be described as being employed on "the salaried staff of a public authority": *McGinty v Department of Corrective Services* (2012) 92 WAIG 190; *Capewell v Department of Corrective Services* (2013) 93 WAIG 1454.
- 7 However, in his written outline of submissions, Mr Nelson maintained that s 78(2) of the *Public Sector Management Act 1994* (WA) (the PSM Act) provides that an employee who is not a government officer and who was aggrieved by a disciplinary decision under s 82A(3)(b) of the PSM Act, may refer such a decision to the Industrial Commission. That is so too. The difficulty Mr Nelson faces however is that such a matter cannot be referred to the Appeal Board. The Appeal Board is not the Industrial Commission. It is a constituent authority of the Commission under the Act, but its jurisdiction and powers are quite separate to the Commission. The Appeal Board's jurisdiction in relation to matters arising under the PSM Act is confined to those matters set out in s 78(1) of the PSM Act. Mr Nelson having conceded that he was not a government officer, then the present appeal must be considered incompetent on that basis.
- 8 Furthermore, whilst it is strictly unnecessary to do so, we observe that in order for Mr Nelson to have a remedy under s 78(2) of the PSM Act, he would need to establish that he was subject to the provisions of Part 5 of the PSM Act, dealing with substandard performance and disciplinary matters. This is so, because referrals under s 78(2) to the Industrial Commission can only be made where a person, not being a government officer, is aggrieved by a decision or finding made under Part 5 of the PSM Act. As Mr Nelson conceded that he was a permanent employee of the Authority, his employment was under s 10(1) of the *Public Transport Authority Act 2003* (WA) and not Part 3 of the PSM Act. Having regard to the written outline of submissions filed by the Authority on this issue, we consider that Mr Nelson will have considerable difficulty in establishing that the terms of Part 5 of the PSM Act applied to him, in order to ground a referral of proceedings to the Industrial Commission under s 78(2) of the PSM Act.

Extension of time

- 9 The Appeal Board has power to extend the time prescribed by reg 107(2) of the Regulations under s 27(1)(n) of the Act. The relevant principles in relation to extensions of time in Appeal Board matters were set out in *Nicholas v Department of*

Education and Training (2008) 89 WAIG 817. The factors include the length of the delay; the reasons for the delay, whether the appellant has an arguable case; and whether any prejudice will be suffered by the opposing party.

- 10 As to the question of an arguable case, this factor could never be satisfied in circumstances where the appeal is beyond the jurisdiction of the Appeal Board. In those circumstances an extension of time should not be granted and the appeal should be dismissed. This was the course taken by the Appeal Board at the hearing.

		2016 WAIRC 00824
	APPEAL AGAINST DISCIPLINARY PENALTY ON 21 JUNE 2016	
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MARK DARRYL NELSON	APPELLANT
	-v-	
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN Mr C FOGLIANI - BOARD MEMBER Mr H FALCONER - BOARD MEMBER	
DATE	THURSDAY, 13 OCTOBER 2016	
FILE NO	PSAB 16 OF 2016	
CITATION NO.	2016 WAIRC 00824	
Result	Appeal dismissed	
Representation		
Appellant	Mr K Chan as agent	
Respondent	Mr R Farrell	

Order

HAVING heard Mr K Chan as agent on behalf of the appellant and Mr R Farrell on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

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

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner,
On behalf of the Public Service Appeal Board.

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

		2016 WAIRC 00832
	REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994	
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MIHALJ OLMAN	APPLICANT
	-v-	
	DEPARTMENT OF CORRECTIVE SERVICES	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 19 OCTOBER 2016	
FILE NO/S	APPL 54 OF 2016	
CITATION NO.	2016 WAIRC 00832	

Result Application dismissed

Order

WHEREAS this is an application pursuant to section 78 of the *Public Sector Management Act 1994*; and
WHEREAS the applicant concurrently filed several applications or appeals in respect of the same decision of the respondent; and
WHEREAS by letter dated 5 October 2016, the Commission noted the other matters and directed the applicant to elect which matter he would pursue; and
WHEREAS on 12 October 2016, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance* in respect of this matter.
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

 THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.
