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AWARDS/AGREEMENTS—Application for—

2016 WAIRC 00953

WA HEALTH DENTAL TECHNICIANS (DENTAL HEALTH SERVICES) AWARD 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

NORTH METROPOLITAN HEALTH SERVICE ESTABLISHED AS A HEALTH SERVICE PROVIDER PURSUANT TO SECTION 32 OF THE HEALTH SERVICES ACT 2016 (WA)

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER T EMMANUEL

DATE

WEDNESDAY, 21 DECEMBER 2016

FILE NO

PSAA 1 OF 2016

CITATION NO.

2016 WAIRC 00953

Result

Award issued

Representation

Applicant

Ms J Moore (of counsel)

Respondent

Ms R Sinton (as agent)

Order

HAVING heard Ms J Moore (of counsel) on behalf of the applicant and Ms R Sinton (as agent) 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

—
THAT the WA Health Dental Technicians (Dental Health Services) Award 2016 be made in accordance with the following schedule and that such award shall have effect on and from the date of this order.

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

[L.S.]

SCHEDULE

WA Health Dental Technicians (Dental Health Services) Award 2016

1. - TITLE

This Award shall be known as the WA Health Dental Technicians (Dental Health Services) Award 2016 and shall supersede and replace the Hospital Employees' (Perth Dental Hospital) Award 1971.

1B. - MINIMUM ADULT AWARD WAGE

- (1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.
- (2) The minimum adult award wage for full-time employees aged 21 or more is \$692.90 per week payable on and from the commencement of the first pay period on or after 1 July 2016.
- (3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.
- (4) Unless otherwise provided in this clause adults employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the minimum adult award wage according to the hours worked.
- (5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.
- (6) The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993* (WA).
- (7) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.
- (8) Subject to this clause the minimum adult award wage shall –
 - (a) Apply to all work in ordinary hours.
 - (b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.
- (9) **Minimum Adult Award Wage**
 The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2015 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required. Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.
- (10) **Adult Apprentices**
 - (a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than \$593.90 per week on and from the commencement of the first pay period on or after 1 July 2016.
 - (b) The rate paid in the paragraph above to an apprentice 21 years of age or more is payable on superannuation and during any period of paid leave prescribed by this award.
 - (c) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.
 - (d) Nothing in this clause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 5 June 2003.

2. - ARRANGEMENT

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3. - AREA OF OPERATION

This Award shall apply throughout the State of Western Australia.

4. - SCOPE

This Award shall apply to Dental Technicians who are members of or eligible to be members of the Civil Service Association of Western Australia Incorporated, employed by the Employer in the classifications prescribed in "Schedule B – Wages" within Dental Health Services (an administrative entity of the Employer as at the date of registration).

5. - TERM OF AWARD

This Award has effect on and from the date of registration until such time as it is cancelled or replaced.

6. - DEFINITIONS

"Apprentice" means an apprentice under the *Vocational Education and Training Act 1996* (WA) as amended from time to time.

"Board of Reference" means a Board of Reference established under the provisions of Section 48 of the *Industrial Relations Act 1979*.

"Casual employee" means an employee engaged by the hour for a period not exceeding one calendar month in any period of engagement, or any employee employed as a casual on an hourly rate of pay by agreement between the Association and the employer.

"De facto partner" means a relationship (other than a legal marriage) between two persons of either different sexes or the same sex, who live together in a marriage-like relationship, as provided for by the *Interpretation Act 1984* (WA) as amended from time to time.

"Dental Technician" means a person employed within the government health industry who is involved in the construction of dentures, crowns, bridges, orthodontic appliances, cast metal frameworks and other dental appliances. A dental technician also repairs and modifies these appliances and possesses an approved qualification in Dental

Technology to Level 5 within the Australian Qualification Framework (the Diploma of Dental Technology or equivalent).

"Dental Technician Advanced Level 1" means a Dental Technician (as defined);

- (i) who has satisfied all the requirements as a Dental Technician Level 4, or who has had equivalent training according to the employer;
- (ii) who is engaged in all aspects of crown and bridge work, or cast metal dentures, or orthodontics or advanced complete and partial denture construction; and
- (iii) who has satisfied the employer by a practical trade test that he/she possesses a particular skill in which he/she seeks advancement.

"Dental Technician Advanced Level 2" means a Dental Technician (as defined); who in addition to meeting the requirements for a Dental Technician Advanced Level 1, has satisfied the employer by a theoretical trade test that he/she possesses a particular skill in which he/she seeks advancement.

"Employer" means the North Metropolitan Health Service.

"Fixed term employee" means an employee who is employed on a full time or part-time basis on a contract of service of specified duration.

"Fortnightly wage rate" means the authorised weekly wage rate multiplied by two.

"Headquarters" means the place in which the principal work of an employee is carried out, as defined by the employer.

"Metropolitan area" means that area within a radius of 50 kilometres from the Perth city railway station.

"One working day" shall equate to seven hours and thirty six minutes.

"Partner" means a person who is either a spouse or de facto partner.

"Part-time employment" means regular and continuing employment of less than 38 hours per week.

"Spouse" means a person who is lawfully married to that person.

"Trade Test" shall mean a test set by Dental Health Services, comprising of practical and/or theoretical components.

"The Association" means the Civil Service Association of Western Australia Incorporated.

"Union" means the Civil Service Association of Western Australia Incorporated.

"WAIRC" means the Western Australian Industrial Relations Commission.

7. - CERTIFICATE OF SERVICE

On request, the employer shall issue a Certificate of Service containing full information as to the period of service, and nature of duties performed by the employee to the employee on redundancy, retirement, resignation or where contracts of service expire through the effluxion of time.

8. - CONTRACT OF SERVICE

- (1)
 - (a) Every employee appointed to the employ of an employer shall be on probation for a period not exceeding six months, unless otherwise determined by the employer.
However, employees appointed from the Public Sector who have at least six months' continuous satisfactory service immediately prior to their permanent appointment will not be required to serve a probationary period.
 - (b) At any time during the period of probation the employer may annul the appointment and terminate the services of the employee by the giving of one week's notice by either party or payment in lieu thereof, by either party.
 - (c) As soon as possible following the expiry of the period of probation the employer shall:
 - (i) confirm the appointment; or
 - (ii) extend the period of probation for up to six months;
 - (iii) allow the probationary employment to lapse.
 - (d) Where the employer extends the period of probationary employment the contract of employment may be terminated as set out in paragraph (b) of this subclause.
 - (e) The employer may summarily dismiss an employee deemed guilty of gross misconduct or neglect of duty and the employee shall not be entitled to any notice or payment in lieu of notice.
- (2)
 - (a) No employee shall leave the employ of an employer until the expiration of one month's written notice of the employee's intention to do so, without the approval of the employer. An employee who fails to give the required notice shall forfeit a sum of \$500.00. Such monies may be withheld from monies due on termination.
 - (b) One month's written notice shall be given by the employer to an employee whose services are no longer required. Provided that the employer may pay the employee one month's wage in lieu of the said notice.
 - (c) Notwithstanding any of the other provisions contained in this clause a lesser period of notice may be negotiated between the employer and the employee.
 - (d) The employer may summarily dismiss an employee deemed guilty of gross misconduct or neglect of duty and the employee shall not be entitled to any notice or payment in lieu of notice.
 - (e) An employee having attained the age of 55 years shall be entitled to retire from the employ of the employer.
- (3)
 - (a) A part-time employee shall be entitled to the same wage, leave and other conditions prescribed in this award for full-time employees, with payment for paid leave being in the proportion to which the employee's weekly hours bear to the weekly hours of an employee engaged full time in that class of work.
 - (b) The provisions of subclause (2) of this clause shall also apply in respect to part time employees.
- (4)
 - (a) Notwithstanding the other provisions contained in this clause an employer may employ employees for a fixed term.
 - (b) Employees appointed for a fixed term shall be advised in writing of the terms of the appointment and such advice shall specify the dates of commencement and termination of employment.
 - (c) The provisions of paragraphs (a), (b), (c) and (d) of subclause (2) of this clause shall also apply in respect to fixed term employees.

9. - PART-TIME EMPLOYMENT

- (1)
 - (a) Each permanent part-time arrangement shall be confirmed by the employer in writing and should include the following specifications:
 - (i) the agreed period of the arrangement; and
 - (ii) the hours to be worked daily and weekly by the employee, including starting and finishing times, which shall hereinafter be referred to as "ordinary working hours".
 - (b) The employer shall give an employee one (1) months' notice of any proposed variation to that employee's ordinary working hours, provided that the employer shall not vary the employee's total weekly hours of duty without the employee's prior written consent, a copy of which shall be forwarded to the Association.
 - (c) Notwithstanding paragraph (b) of this subclause whenever agreement in writing is reached for a temporary variation to an employee's ordinary working hours:
 - (i) Time worked up to 7 hours and thirty six minutes on any day is not to be regarded as overtime but an extension of the contract hours for that day and should be paid at the normal rate of pay.
 - (ii) Additional days worked, up to a total of five days per week, are also regarded as an extension of the contract and should be paid at the normal rate of pay.

- (2) The provisions of Clause 21. - Overtime of this Award shall apply to all time worked outside the ordinary working hours prescribed by paragraph (a) (ii) of subclause (1) of this clause unless an arrangement pursuant to paragraph (c) of subclause (1) of this clause is in place.
- (3) Nothing in this clause prevents the employer and the employee agreeing to other such arrangements as is approved by the employer, in accordance with subclause (4) of Clause 19. - Hours of this Award.
- (4) (a) An employee who is employed on a part-time basis shall be paid a proportion of the appropriate full-time wage dependent upon time worked. The wage shall be calculated in accordance with the following formula:
- $$\frac{\text{Hours Worked per Fortnight}}{76} \times \frac{\text{Full-time Fortnightly Wage}}{1}$$
- (b) An employee shall be entitled to annual increments as prescribed in Clause 17. - Annual Increments of this Award.
- (5) Employees are entitled to the holidays prescribed in Clause 23. - Public Holidays of this Award without variation of the employee's fortnightly wage provided the holidays occur on a day which is normally worked.
- (6) (a) An employee shall be granted leave in accordance with Clause 22. - Annual Leave of this Award. Payment to an employee proceeding on annual leave shall be calculated having regard for any variations to the employee's ordinary working hours during the accrual period. Payment in such instances shall be calculated as follows:
- (i) Where accrued annual leave only is being taken, the ordinary hours worked by the employee over the accrual period shall be averaged to achieve the average hours worked per fortnight. This average is then applied to the following formula to achieve an average fortnightly rate of pay:
- $$\frac{\text{Average Fortnightly Hours Worked}}{76} \times \frac{\text{Fortnightly Wage}}{1}$$
- (ii) Subject to paragraph (iv) of this subclause, annual leave taken entirely in advance shall be paid according to the wage the employee would have received had the employee not proceeded on leave.
- (iii) Subject to paragraph (iv) of this subclause, annual leave which combines both accrued and leave taken in advance, shall be calculated as follows:
the accrued portion of leave shall be paid at the rate achieved by averaging the hours worked during the accrual period; and
the portion of leave which is being taken in advance shall be paid according to the wage the employee would have received had the employee not proceeded on leave.
- (iv) Payment for annual leave taken in advance pursuant to paragraph (ii) and (iii) of this subclause, shall be subject to financial reconciliation either at the end of the calendar year or when the employee ceases employment to take account of any variations in the hours worked by the employee subsequent to the employee proceeding on annual leave. This may require further payment by the employer to the employee, or repayment by the employee to the employer. In all instances the reconciliation should be based on the appropriate fortnightly wage at the time the leave was taken. An employee taking annual leave in advance shall be advised of the requirements of this section prior to the employee proceeding on such leave.
- (7) Credits provided in Clause 25. - Sick Leave of this Award shall accrue to the employee provided that where an employee is employed for less than 76 hours per fortnight, the credits shall be pro rated according to the number of hours worked each fortnight. Payment made for sick leave granted in respect of part-time service shall be calculated in accordance with the formula set out in paragraph (a) of subclause (4) of this clause.
- (8) An employee shall proceed on long service leave for 13 weeks after ten years continuous service. Payment made for long service leave granted to an employee in respect of such part-time service shall be adjusted according to the hours worked by the employee during that part-time service, subject to the following:
- (a) If an employee consistently worked on a part-time basis for a regular number of hours during the whole of the employee's qualifying service, the employee shall continue to be paid the wage determined on that basis during the long service leave.
- (b) If an employee has worked a varying number of weekly hours during the period of qualifying service, the payment for long service leave granted in respect of part-time service should be calculated on a wage which bears to the full-time wage of the position occupied by the employee when taking leave the same proportion that the hours worked when employed part-time bears to the normal weekly hours of a full-time employee.
- (9) Subject to Clauses 37. - Trade Union Training Leave and 38. - Defence Force Reserves Leave of this Award, part-time employees shall receive the same entitlement as full-time employees, but payment shall only be made for those hours that would normally have been worked but for the leave.
- (10) Subject to Clause 30. - Short Leave of this Award, part-time employees are eligible for short leave on a pro-rata basis calculated in accordance with the following formula:
- $$\frac{\text{Hours Worked Per Fortnight}}{76} \times \frac{22.8 \text{ Hours}}{1}$$

- (11) Subject to Clause 29. - Study Assistance of this Award, part-time employees are entitled to study leave on the same basis as full-time employees.
- (12) Right of Reversion of Employees
- (a) Where a full-time employee is permitted to work part-time for a specified period no greater than 12 months, that employee has a right, (upon written application) to revert to full-time hours in that position, or a position of equal classification, as soon as is deemed practicable by the employer, but no later than the expiry of the agreed period.
- (b) Where a full-time employee is permitted to work part-time for a period greater than 12 months that employee may apply to revert to full-time hours in the position previously occupied before becoming part-time or a position of equal classification but only as soon as deemed practicable by the employer. This should not prevent the transfer of said employee to another full-time position in a classification commensurable to that of their previous full-time position.
- (13) The number or proportion of part-time Dental Technicians shall not exceed any number or proportion that may be agreed in writing between the Civil Service Association and the employer.

10. - CASUAL EMPLOYMENT

- (1) Wage
- (a) A casual employee shall be paid for each hour worked at the appropriate classification contained in Clause 11. - Wages of this Award in accordance with the following formula:
- Fortnightly Wage
76
- With the addition of twenty percent in lieu of annual leave, sick leave, long service leave and payment for public holidays.
- (2) Conditions of Employment
- (a) Conditions of employment, leave and allowances provided under the provisions of this Award shall not apply to a casual employee with the exception of bereavement and carer's leave. However, where expenses are directly and necessarily incurred by a casual employee in the ordinary performance of their duties, he/she shall be entitled to reimbursement in accordance with the provisions of this Award.
- (b) Nothing in this clause shall confer "permanent" or "fixed term contract" employee status to a casual employee.
- (c) The employment of a casual employee may be terminated at any time by the casual employee or the employer giving to the other, one hour's prior notice. In the event of an employer or casual employee failing to give the required notice, one hour's wage shall be paid or forfeited.
- (d) The provisions of Clause 21. - Overtime Allowance of this Award do not apply to casual employees who are paid by the hour for each hour worked. Additional hours are paid at the normal casual rate.
- (e) A casual employee shall be informed that their employment is casual and that they have no entitlement to paid leave, with the exception of bereavement leave before they are engaged.
- (3) Caring Responsibilities
- (a) Subject to the evidentiary and notice requirements in Clause 26 – Carers Leave of this Award, a casual employee shall be entitled to not be available to attend work or to leave work if they need to care for members of their immediate family or household who are sick and require care and support, or who require care due to an unexpected emergency, or the birth of a child.
- (b) The employer and the casual employee shall agree on the period for which the casual employee will be entitled to not be available to attend work. In the absence of agreement, the employee is entitled to not be available to attend work for up to 48 hours (i.e. two days) per occasion. The casual employee is not entitled to any payment for the period of non-attendance.
- (c) An employer must not fail to re-engage a casual employee because the casual employee accessed the entitlements provided for in this subclause. The rights of an employer to engage or not engage a casual employee are otherwise not affected.

11. - WAGES

- (1) The weekly base rate of pay applicable to Dental Technicians and Apprentice Dental Technicians are those contained in Schedule B – Wages of this Award.
- (2) Payment Of Wages
- (a) Wages shall be paid fortnightly but, where the usual pay day falls on a public holiday, payment shall be made on the previous working day.
- (b) The hourly rate shall be computed as one seventy-sixth of the fortnight's wages.
- (c) The hourly rate referred to in paragraph (b) of this subclause shall only be applied to an average of no more than 38 hours per week worked as ordinary hours under this Award.
- (d) Wages shall be paid by direct funds transfer to the credit of an account nominated by the employee at a bank, building society or credit union approved by the Under Treasurer or an Accountable Employee.

- (e) Provided that where such form of payment is impracticable or where some exceptional circumstances exist, and by agreement between the employer and the Association, payment by cheque may be made.
- (3) (a) Apprentice: The weekly rate of wage shall be a percentage of the tradesperson's rate as under:
- | | |
|------------------------------------|----|
| (i) Four Year Term | % |
| 1 st year of employment | 42 |
| 2 nd year of employment | 55 |
| 3 rd year of employment | 75 |
| 4 th year of employment | 88 |
| (ii) Three and a Half Year Term | |
| 1 st six months | 42 |
| Next year | 55 |
| Next following year | 75 |
| Final Year | 88 |
| (iii) Three Year Term | |
| 1 st year of employment | 55 |
| 2 nd year of employment | 75 |
| 3 rd year of employment | |
| and thereafter | 88 |

For the purposes of this part, "Tradesperson's Rate" means the total wage prescribed in Schedule B - Wages for a Dental Technician Year 1.

- (4) Arbitrated Safety Net Adjustments
- (a) The rates of pay in this Award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.
- (b) These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.
- (c) Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.
- (5) Special Allowances
- The employer shall not be prohibited from granting special allowances based on additional duties and responsibilities undertaken by an employee due to expertise and knowledge of the employee.
- (6) Amalgamation of Wage Classes
- In allocating wages or wage ranges the employer may amalgamate any two or more levels or, allocate specific wage points from a level or levels prescribed by this Award.

12. - PURCHASED LEAVE - 44/52 SALARY ARRANGEMENT

- (1) The employer and an employee may agree to enter into an arrangement whereby the employee can purchase up to eight (8) weeks additional leave.
- (2) The employer will assess each application for a 44/52 salary arrangement on its merits and give consideration to the personal circumstances of the employee seeking the arrangement.
- (3) Where an employee is applying for purchased leave of between five (5) and eight (8) weeks the employer will give priority access to those employees with carer responsibilities.
- (4) Access to this entitlement will be subject to the employee having satisfied the agency's accrued leave management policy.
- (5) The employee can agree to take a reduced wage spread over the 52 weeks of the year and receive the following amounts of purchased leave:

Number of Weeks' Salary Spread Over 52 Weeks	Number of Weeks' Purchased Leave
44 weeks	8 weeks
45 weeks	7 weeks
46 weeks	6 weeks
47 weeks	5 weeks
48 weeks	4 weeks
49 weeks	3 weeks
50 weeks	2 weeks
51 weeks	1 week

- (6) The purchased leave will not be able to be accrued. The employee is to be entitled to pay in lieu of the purchased leave not taken. In the event that the employee is unable to take such purchased leave, his/her wage will be adjusted on the last pay period in January to take account of the fact that time worked during the year was not included in the wage.
- (7) Where an employee who is in receipt of an allowance provided for in Clause 18. - Higher Duties Allowance of this Award proceeds on any period of additional purchased leave the employee shall not be entitled to receive payment of the allowance for any period of additional purchased leave. When not on a period of purchased leave the employee shall receive the full entitlement to Higher Duties Allowance in accordance with Clause 18 – Higher Duties Allowance of this Award.
- (8) In the event that a part-time employee's ordinary working hours are varied during the year, the wage paid for such leave taken will be adjusted on the last pay in January to take into account any variations to the employee's ordinary working hours during the previous year.

13. - PURCHASED LEAVE - DEFERRED SALARY ARRANGEMENT

- (1) With the written agreement of the employer, an employee may elect to receive, over a four-year period, 80% of the wage they would otherwise be entitled to receive in accordance with this Award.
- (2) The employer will assess each application for deferred salary on its merits and give consideration to the personal circumstances of the employee seeking the leave.
- (3) On completion of the fourth year, an employee will be entitled to 12 months leave and will receive an amount equal to 80% of the wage they were otherwise entitled to in the fourth year of deferment.
- (4) Where an employee completes four (4) years of deferred salary service and is not required to attend duty in the following year, the period of non-attendance shall not constitute a break in service and shall count as service on a pro-rata basis for all purposes.
- (5) An employee may withdraw from this arrangement prior to completing a four-year period by written notice. The employee will receive a lump sum payment of salary forgone to that time but will not be entitled to equivalent absence from duty.
- (6) The employer will ensure that superannuation arrangements and taxation effects are fully explained to the employee by the relevant Authority. The employer will put any necessary arrangements into place.

Variation of the Arrangements

- (7) As an alternative to subclause (5) of this clause, and only by mutual agreement of the employer and the employee, the provisions of the deferred arrangement may be varied subject to the following:
 - (a) the term of the arrangement will not extend beyond that contemplated by this clause,
 - (b) the variation will not result in any consequential monetary or related gain or loss to either the employer or the employee, and
 - (c) the percentage of salary to apply during the 12 months leave as specified in subclause 3 of this clause will be calculated as 80% of the average ordinary prescribed hours worked over the previous four years.

14. - SALARY PACKAGING ARRANGEMENT

- (1) An employee may, by agreement with the employer, enter into a salary packaging arrangement in accordance with this clause and Australian Taxation Office requirements.
- (2) Salary packaging is an arrangement whereby the entitlements and benefits under this Award, contributing toward the Total Employment Cost (TEC), (as defined in subclause (3) of this clause) of an employee, can be reduced by and substituted with another or other benefits.
- (3) The TEC for salary packaging purposes is calculated by adding the following entitlements and benefits:
 - (a) the base salary;
 - (b) other cash allowances;
 - (c) non cash benefits;
 - (d) any Fringe Benefit Tax liabilities currently paid; and
 - (e) any variable components.
- (4) Where an employee enters into a salary packaging arrangement the employee will be required to enter into a separate written agreement with the employer setting out the terms and conditions of the salary packaging arrangement.
- (5) Notwithstanding any salary packaging arrangement, the salary rate as specified in this Award, is the basis for calculating wage related entitlements specified in the Award.
- (6) Compulsory Employer Superannuation Guarantee contributions are to be calculated in accordance with applicable federal and state legislation. Compulsory employer contributions made to superannuation schemes established under the *State Superannuation Act 2000 (WA)* are calculated on the gross (pre-packaged) salary amount regardless of whether an employee participates in a salary packaging arrangement with their employer.

- (7) A salary packaging arrangement cannot increase the costs to the employer of employing an individual.
- (8) A salary packaging arrangement is to provide that the amount of any taxes, penalties or other costs for which the employer or employee is or may become liable for and are related to the salary packaging arrangement, shall be borne in full by the employee.
- (9) In the event of any increase in taxes, penalties or costs relating to a salary packaging arrangement, the employee may vary or cancel that salary packaging arrangement.

15. - SUPPORTED WAGE

- (1) Employees Eligible for a Supported Wage

This clause defines the conditions that will apply to employees who, because of the effects of a disability, are eligible for a supported wage under the terms of this clause. In the context of this clause, the following definitions will apply:

"Disability Support Pension" means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme; and

"Assessment Instrument" means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

- (2) Eligibility Criteria

Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension. (This clause does not apply to any existing employee who has a claim against the employer, which is subject to the provisions of workers' compensation legislation, or any provision of the Award relating to the rehabilitation of employees who are injured in the course of their current employment).

- (3) Supported Wage Rates

Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by the Award for the class of work, which the person is performing according to the following schedule:

Assessed Capacity (clause 16.5)	% of Prescribed Award Rate
10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall be not less than \$61 per week).

*Where a person's assessed capacity is 10%, they shall receive a high degree of assistance and support.

- (4) Assessment of Capacity

For the purpose of establishing the percentage of the Award rate to be paid to the employees, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

- (a) the employer and the union, in consultation with the employee, or if desired by any of these; or
- (b) the employer and an accredited Assessor from a panel agreed by the parties to the Award and the employee.

- (5) Lodgement of Assessment Instruments

All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage rate to be paid to the employee, shall be lodged by the employer with the Registrar of the Commission.

All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where the union is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

- (6) Review of Assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

- (7) Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of this clause will be entitled to the same terms and conditions of employment as all other employees covered by the Award paid on a pro rata basis.

- (8) Workplace Adjustment
An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re design of job duties, working time arrangements and work organisation in consultation with other employees in the area.
- (9) Trial Period
In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding 4 weeks) may be needed.
During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.
The minimum amount payable to the employee during the trial period shall be no less than \$61 per week.
Work trials should include induction or training as appropriate to the job being trialled.
Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (5) of this clause.

16. - APPRENTICES

- (1) Apprenticeships
- (a) Apprentices may be taken in the ratio of one apprentice for every two or fraction of two (the fraction being not less than one) Dental Technicians and shall not be taken in excess of that ratio unless –
- (i) The Union agrees; or
- (ii) The WAIRC so determines.
- (b) Where an apprentice has a rostered day off duty as prescribed in "Clause 19. – Hours" and that day falls within a period of block release an alternative rostered day off shall be arranged at a mutually convenient time.
- (c) If, through no fault of their own, an apprentice fails to attend a period of training in any week, fortnight or year as prescribed that period shall be made up as agreed between the apprentice, Employer and training authority.
- (d) An apprentice shall be released to attend vocational classes or classes of instruction in accordance with the *Vocational Education and Training Act 1996 (WA)*, the *Vocational Education and Training (General) Regulations 2009 (WA)*, or the Training Contract as the case requires. Apprentices shall be paid the ordinary wages they would otherwise have been paid during the period they are released from work.
- (e) The provisions of this Award shall be read in conjunction with the *Vocational Education and Training Act 1996 (WA)* and the *Vocational Education and Training (General) Regulations 2009 (WA)* as amended from time to time.

17. - ANNUAL INCREMENTS

- (1) Employees shall proceed to the maximum of their wage range by annual increments, after 12 months continuous service at each increment point, unless there is an adverse report on the employee's performance or conduct which recommends the non-payment of an annual increment.
- (2) The following process shall apply where a report on an employee's performance or conduct recommends the non-payment of an annual increment:
- (a) The employee will be shown the report prior to completing 12 months continuous service since their last incremental advance.
- (b) The employee will be provided with an opportunity to comment in writing.
- (c) The employee's comments will be considered immediately by the employer and a decision made as to whether to approve the payment of the increment or withhold payment for a specific period.
- (d) Where the increment is withheld, the employer before the expiry of the specified period will complete a further report and the above provisions will apply.
- (3) The non-payment of an increment will not change the normal anniversary date of any further increment payments.
- (4) For the purposes of this clause "continuous service", except where an increment is payable according to age, shall not include:
- (a) any period exceeding 14 calendar days during which an employee is absent on leave without pay. In the case of leave without pay which exceeds 14 calendar days the entire period of such leave without pay is excised in full;
- (b) any period which exceeds six months in one continuous period during which an employee is absent on workers' compensation. Provided that only that portion of such continuous absence which exceeds six months shall not count as "continuous service";
- (c) any period which exceeds three months in one continuous period during which an employee is absent on sick leave without pay. Provided that only that portion of such continuous absence which exceeds three months shall not count as "continuous service".

18. - HIGHER DUTIES ALLOWANCE

- (1) An employee who is directed by the employer to act in an office which is classified higher than the employee's own substantive office and who performs the full duties and accepts the full responsibility of the higher office for a continuous period of five (5) consecutive working days or more, shall, subject to the provisions of this clause, be paid an allowance equal to the difference between the employee's own wage and the wage the employee would receive if the employee was permanently appointed to the office in which the employee is so directed to act.
Provided that where the hours of duty of an employee performing shift work are greater than 7 hours and 36 minutes per day as provided for in paragraph (3)(a) of Clause 20 – Shift Work Allowance of this Award the allowance shall be payable after the completion of 38 consecutive working hours in the higher classified position. This period shall not include any time worked as overtime.
- (2) Where the full duties of a higher office are temporarily performed by two (2) or more employees they shall each be paid an allowance as determined by the employer.
- (3) An employee who is directed to act in a higher classified office but who is not required to carry out the full duties of the position and/or accept the full responsibilities, shall be paid such proportion of the allowance provided for in subclause (1) of this clause as the duties and responsibilities performed bear to the full duties and responsibilities of the higher office. Provided that the employee shall be informed, prior to the commencement of acting in the higher classified office, of the duties to be carried out, the responsibilities to be accepted and the allowance to be paid.
The allowance paid may be adjusted during the period of higher duties.
- (4) Where an employee who has qualified for payment of higher duties allowance under this clause is required to act in another office or other offices classified higher than the employee's own for periods less than five consecutive working days without any break in acting service, such employee shall be paid a higher duties allowance for such periods: provided that payment shall be made at the highest rate the employee has been paid during the term of continuous acting or at the rate applicable to the office in which the employee is currently acting - whichever is the lesser.
- (5) Where an employee is directed to act in an office which has an incremental range of salaries such an employee shall be entitled to receive an increase in the higher duties allowance equivalent to the annual increment the employee would have received had the employee been permanently appointed to such office; provided that acting service with allowances for acting in offices for the same classification or higher than the office during the eighteen (18) months preceding the commencement of such acting shall aggregate as qualifying service towards such an increase in the allowance.
- (6) Where an employee who is in receipt of an allowance granted under this clause and has been so for a continuous period of twelve (12) months or more, proceeds on -
- (a) a period of normal annual leave; or
 - (b) a period of any other approved leave of absence of not more than four (4) weeks, the employee shall continue to receive the allowance for the period of leave, provided that this subclause shall also apply to an employee who has been in receipt of an allowance for less than twelve (12) months if during the employee's absence no other employee acts in the office in which the employee was acting immediately prior to proceeding on leave and the employee resumes in the office immediately on return from leave.
- (7) For the purpose of this clause the expression "normal annual leave" shall mean the annual period of recreation leave as referred to in Clause 22. - Annual Leave of this Award and shall include any public holidays and leave in lieu accrued during the preceding twelve (12) months taken in conjunction with such annual leave.
- (8) Where employees in receipt of an allowance granted under this clause and proceeds on:
- (a) a period of annual leave in excess of the normal, such employees shall only receive payment of such allowance for the period of normal annual leave and,
 - (b) a period of any other approved leave of absence of more than four (4) weeks, such employees shall not be entitled to receive payment of such allowance for the whole or any part of the period of such leave.

19. - HOURS

- (1) Except as otherwise provided in this clause, the ordinary hours of work shall be 38 hours per week to be worked as determined by the employer between the hours of 7.00 am and 6.00 pm on five days per week Monday to Friday.
- (2)
 - (a) Employees shall be entitled to a meal break between 12.00 noon and 2.00 pm which shall not be less than 30 minutes nor greater than 90 minutes in duration. An employee shall not be required to work for more than five (5) hours on any day without taking a meal break.
 - (b) In the event of an emergency an employer may defer the taking of a meal break.
 - (c) For the purposes of this clause a standard meal break shall be 45 minutes in duration.
- (3) The employer may vary the ordinary hours of attendance observed so as to make provision for -
- (a) the attendance of employees for ordinary duty on a Saturday, Sunday, or Public Holiday as prescribed in Clause 23. - Public Holidays of this Award;
 - (b) the performance of shift work including work on Saturdays, Sundays, and Public Holidays as prescribed in Clause 20. - Shift Work Allowance of this Award;
 - (c) the disposal of public business or the nature of the duties of an employee or class of employees.

Provided that where the ordinary hours of duty are so varied they shall not prescribe ordinary working hours in excess of 152 in a four week period. This provision is subject to subclause (2)(a) of this clause.

- (4) Notwithstanding the provisions of paragraph (a) of this subclause, where it is considered necessary to provide for more economic operations the employer may authorise the operation of alternative working arrangements.

Such alternative working arrangements shall be either -

- (a) the operation of flexitime as specified in subclause (6) of this clause; or
 - (b) the operation of a nine day fortnight as specified in subclause (7) of this clause; or
 - (c) such other arrangement as is considered appropriate by the employer.
- (5) (a) Where an employee is required to relieve in another position which is subject to a different working arrangement the employee relieving shall observe the working arrangement applicable to the position in which the relief is being carried out.
- (b) A period of relief to be carried out in a position subject to a nine day fortnight shall not commence or cease on the substantive occupant's rostered day off.

In respect to the provisions contained in subclause (5) of this clause any period of relief which results in the employee incurring a debit or credit of hours outside of 76 hours a fortnight shall be adjusted upon return to the substantive position subject to consultation with the employer.

- (6) Flexitime Arrangements

- (a) In accordance with subclause (4)(a) of this clause employees may select their own starting and finishing times within the following periods:

7.00 am to 9.30 am

12.00 noon to 2.00 pm

3.30 pm to 6.00 pm

- (b) (i) A flexitime roster shall be maintained by the employer who will indicate the minimum staffing and other requirements in respect to starting and finishing times, lunch break coverage and flexileave.
- (ii) The flexitime roster shall be made available to all affected employees no later than three days prior to the settlement period described in subclause (6)(h)(i) of this clause.
- (iii) The flexitime roster shall be prepared in consultation with the affected employees, subject to the employer retaining the right to determine hours to suit operational needs.
- (iv) Subject to four weeks' notice being given, the employer may withdraw the authorisation of a flexitime roster.

- (c) Employees must work in the following periods:

9.30 am to 12.00 noon

2.00 pm to 3.30 pm

For the purposes of this subclause such periods are to be known as core periods.

- (d) An employee shall be allowed a meal break between 12.00 noon and 2.00 pm of not less than 30 minutes but not exceeding 45 minutes except where approved by the employer.
- (e) Notwithstanding any provisions contained in this subclause an employee may be allowed a maximum of two full days or any combination of half days and full days that does not exceed two days in any one settlement period as described in subclause (6)(h)(i) of this clause.
- (f) Flexileave may be taken before accrual subject to such conditions as the employer may impose.
- (g) Full days of flexileave may not be taken on consecutive working days.
- (h) For the purposes of this subclause a settlement period shall -
 - (i) consist of four weeks;
 - (ii) commence at the beginning of a pay period;
 - (iii) have the required hours of duty of 152 hours.
- (i) (i) Credit hours a maximum of seven hours 36 minutes shall be allowed at the end of each settlement period and shall be carried forward to the next settlement period.
- (ii) In the case of credit hours greater than seven hours 36 minutes gained in one settlement period, the hours in excess of seven hours 36 minutes shall be lost.
- (iii) Credit hours at any point within the settlement period shall not exceed 38.
- (j) (i) Debit hours below the required 152 hours prescribed in paragraph (i) of this subclause to a maximum of four hours shall be allowed at the end of each settlement period and shall be carried forward to the next settlement period.

- (ii) For debit hours in excess of four hours, employees shall be required to take leave without pay for the period necessary to reduce debit hours to those specified in subclause (j)(i) of this clause.
- (k) Notwithstanding any of the provisions contained in this subclause, maximum of ten hours may be worked in any one day.
- (l) Where study leave as provided in Clause 29. - Study Assistance of this Award has been approved credits will be given for education commitments provided in that clause and for which leave is necessary to allow for attendance at formal classes.
- (m)
 - (i) Employees receiving at least one day's prior notice of overtime shall be required to work the prescribed hours of duty determined by the employee under subclause (1) of this clause.
 - (ii) Where an employee is required to work overtime at the conclusion of a day with less than one day's notice, and
 - (aa) where the employee has at the commencement of that day two hours or more flexitime credits, the employee shall be paid overtime after five hours' work on that day or for time worked after 3.30 pm, whichever is the later; or
 - (bb) where that employee has commenced duty prior to 8.30 am and has, at the commencement of that day, less than two hours' flexitime credits, the employee shall be paid overtime, for time worked after the completion of prescribed hours of duty or after working seven hours 36 minutes on that day, whichever is the earlier; or
 - (cc) where that employee has commenced work after 8.30 am and has, at the commencement of that day, less than two hours' flexitime credits, the employee shall be paid overtime, for time worked after 5.30 pm or after working seven hours 36 minutes, on that day whichever is the earlier.
 - (iii) Where an employee is required to work overtime at the beginning of a day with less than one day's notice, that employee shall be paid overtime for any time worked prior to the commencing time for prescribed hours of duty determined by the Dental Health Services under subclause (1) of this clause.
- (7) **Nine Day Fortnight**
 - (a) In accordance with the provision contained in paragraph (b) of subclause (4) of this clause, the ordinary hours of duty of 76 hours a fortnight may be worked over nine days of the fortnight exclusive of work performed on Saturday, Sunday and the rostered day off.
 - (b) For the purposes of this subclause the ordinary hours of duty to be worked shall be eight hours 20 minutes worked between 7.00 am and 6.00 pm, on five days per week excluding Saturday and Sunday.
 - (c) Each employee shall be allowed one rostered day off per fortnight.
 - (d) When a public holiday falls on a rostered day off that employee shall be granted a day in lieu of the public holiday prior to the conclusion of the current fortnight.
 - (e) In taking annual leave, where a period of leave involves a part day, the part day shall be availed of at the commencement of the period of leave.

20. - SHIFT WORK ALLOWANCE

- (1) In this Clause the following expressions shall have the following meaning:
 - "Day shift" means a shift commencing after 6.00 am and before 12.00 noon.
 - "Afternoon shift" means a shift commencing at or after 12.00 noon and before 6.00 pm.
 - "Night shift" means a shift commencing at or after 6.00 pm and before 6.01 am.
 - "Public holiday" shall mean a holiday provided in Clause 23. - Public Holidays of this Award.
- (2)
 - (a)
 - (i) An employee required to work a weekday afternoon or night shift, will in addition to the ordinary weekly wage rate of pay, be paid a fixed loading of \$21.93 for each shift so worked.
 - (ii) For the purposes of clause 20(2)(a)(i), "weekly wage" is the ordinary weekly wage payable for the position as listed in Schedule B - Wages.
 - (b) Work performed during ordinary rostered hours on the following days shall be paid for at the following rates, in lieu of the allowance prescribed in clause 20(2)(a):
 - (i) Saturdays - time and one-half;
 - (ii) Sundays - time and three quarters; and
 - (iii) Public holidays – double time and one half.

Provided that in lieu of the provisions of clause 20(2)(b)(iii) and subject to agreement between the employer and the employee, work performed during ordinary rostered hours on a public holiday shall be paid for at the rate of time and one-half and the employee may, in addition be allowed a day's leave with pay to be added to annual leave to be taken at some other time within a period on one year.

- (c) Weekend Penalty Rates for Casual Employees
- (i) Notwithstanding the provisions of clause 10(2)(a) – Casual Employment, casual employees are entitled to weekend shift penalties. Work performed during ordinary rostered hours on the following days shall be paid for at the following rates:
Saturdays and public holidays - time and one-half (casuals are already paid a loading in lieu of public holidays); and
Sundays - time and three quarters.
- (ii) These rates are paid in addition to but not compounded on the casual loading provided for clause 10(1)(a) – Casual Employment.
- (d) An employee rostered off duty on a public holiday shall be paid at ordinary rates for such day or, subject to agreement between the employer and the employee, be allowed a day's leave with pay in lieu of the holiday to be added to the employee's next annual leave entitlement or taken at a mutually convenient time within a period of one year.
- (e) An employee engaged on shift work who is rostered to work regularly on Sundays and/or public holidays shall be entitled to one week's leave in addition to the employee's normal entitlement to annual leave of absence for recreation.
- (f) Additional leave provided by paragraphs (b) and (d) of this subclause shall not be subject to the annual leave loading prescribed by subclause (12) of Clause 22. - Annual Leave of this Award.
- (g) Work performed by an employee in excess of the ordinary hours of the employee's shift or on a rostered day off shall be paid for in accordance with the overtime provisions of Clause 21. - Overtime of this Award.
- (h) (i) When an employee begins or ceases a shift between the hours of 11.00 pm and 7.00 am and no public transport is available, reimbursement at the appropriate rate of hire prescribed by subclause (4) of Clause 41- Motor Vehicle Allowance of this Award shall be made if the employee's private motor vehicle or cycle is used for the journey between the employee's residence and headquarters and the return journey.
Provided however, that any employee who, elects to be permanently retained on a fixed or non - rotating shift that begins or ceases between or on the hours of 11.00 pm and 7.00 am shall not be eligible to claim this reimbursement.
- (ii) The provisions of this subclause shall only be applied to employees living and working within a radius of 50 km of the Perth City Railway Station.
- (3) Hours of Duty and Rosters
- (a) An employee engaged on shifts shall work a 76-hour fortnight, exclusive of meal intervals, on the basis of not more than ten (10) shifts per fortnight of not more than seven and hours and 36 minutes duration. Provided that where agreement is reached between the employer and the Association the length and/or number of shifts worked per fortnight may be altered.
Provided that when the agreed length of a shift is extended past seven hours and 36 minutes, overtime shall be payable only for time worked in excess of the rostered shift.
Provided also that whenever an agreed alteration to the number of hours per shift has occurred then the allowance per shift shall be varied on a pro rata basis to reflect any variation to other than seven hours and 36 minutes.
- (b) Meal breaks shall be for a period of at least thirty (30) minutes, but not greater than one hour for each meal.
- (c) Employees may be rostered to work on any of the seven days of the week provided that no employee shall be rostered for more than six (6) consecutive days.
Provided that where agreement is reached between the employer and the Association, shift workers may be exempted from this provision.
- (d) The roster period shall commence at the beginning of a pay period and continue for fourteen (14) consecutive days. Rosters shall be available to employees at least five (5) clear working days prior to the commencement of the roster.
- (e) A roster may only be altered on account of a contingency, which the employer could not have been reasonably expected to foresee. When a roster is altered, the employee concerned shall be notified of the changed shift 24 hours before the changed shift commences. Provided that where such notice is not given, the employee shall be paid overtime in accordance with Clause 21. - Overtime Allowance of this Award for the duration of the changed shift. This provision shall not apply to an employee who was absent from duty on the employee's last rostered shift.
- (f) An employee shall not be rostered for duty until at least ten (10) hours have elapsed from the time the employee's previous rostered shift ended. Provided that where agreement is reached between the Association and the employer the ten (10) hour break may be reduced to accommodate special shift arrangements, except that under no circumstances shall such an agreement provide for a break of less than eight (8) hours.

- (g) An employee shall not be retained permanently on one shift unless the employee so elects in writing.
- (h) Employees shall be allowed to exchange shifts or days off with other employees provided the approval of the employer has been obtained and provided further that any excess hours worked shall not involve the payment of overtime.

21. - OVERTIME ALLOWANCE

- (1) In this clause the following expressions shall have the following meaning:
- "prescribed hours of duty" means the employee's normal working hours as prescribed in Clause 19. - Hours of this Award, or written instruction issued out of that clause.
- "public holiday means the days prescribed in Clause 23 – Public Holidays of this Award.
- "ordinary travelling time" means the time which an employee would ordinarily spend in travelling by public transport once daily from the employee's home to the employee's usual headquarters and home again. It is the time elapsing between the time of departure from home and the official time of commencement of duty and the official time of cessation of duty and arrival at home. Where an employee has a continuing approval to use a vehicle for official business, ordinary travelling time means the time spent in travelling by that vehicle from home to headquarters and home again each day.
- "a day" shall mean from midnight to midnight.
- (2) When and as often as it is necessary to overcome arrears of work or to meet pressure of business, any employee may be required by the employer to perform overtime duty at times other than the ordinary hours of attendance applicable to that employee.
- (3) Reasonable Hours of Overtime
- (a) An employer may require an employee to work reasonable overtime at overtime rates.
 - (b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
 - (i) any risk to employee health and safety;
 - (ii) the employee's personal circumstances including any family responsibilities;
 - (iii) the needs of the workplace or enterprise;
 - (iv) the notice, if any, given by the employer of the overtime and by the employee of his or her intention to refuse it; and
 - (v) any other relevant matter.
- (4) (a) All work performed by an employee whose hours of attendance are determined in accordance with subclause (1) of Clause 19. - Hours of this Award by direction of the employer:
- (i) before or after the prescribed hours of duty on a weekday; and
 - (ii) on a Saturday, Sunday or public holiday, shall be classed as overtime and, subject to the provisions of this clause, shall be paid for the hourly rate prescribed in paragraph (b) of this subclause.
- (b) (i) Payment for overtime shall be calculated on an hourly basis in accordance with the following formula –
- Weekdays:**
- For the first three hours on any one week day –
- | | | |
|--------------------------------------|---|---------------|
| $\frac{\text{Fortnightly wage}}{76}$ | X | $\frac{3}{2}$ |
|--------------------------------------|---|---------------|
- After the first three hours on any one week day -
- | | | |
|--------------------------------------|---|---------------|
| $\frac{\text{Fortnightly wage}}{76}$ | X | $\frac{2}{1}$ |
|--------------------------------------|---|---------------|
- Saturday:**
- First three hours on any Saturday -
- | | | |
|--------------------------------------|---|---------------|
| $\frac{\text{Fortnightly wage}}{76}$ | X | $\frac{3}{2}$ |
|--------------------------------------|---|---------------|
- After the first three hours or after 12.00 noon, whichever is the earlier, on any Saturday -
- | | | |
|--------------------------------------|---|---------------|
| $\frac{\text{Fortnightly wage}}{76}$ | X | $\frac{2}{1}$ |
|--------------------------------------|---|---------------|
- Sundays:**
- | | | |
|--------------------------------------|---|---------------|
| $\frac{\text{Fortnightly wage}}{76}$ | X | $\frac{2}{1}$ |
|--------------------------------------|---|---------------|

Public Holidays:

During prescribed hours of duty		
<u>Fortnightly wage</u>	X	$\frac{3}{2}$
76		

in addition to the normal day's pay.

During hours outside of prescribed hours of duty -		
<u>Fortnightly wage</u>	X	$\frac{5}{2}$
76		

- (ii) For the purposes of this clause fortnightly wage shall not include any district allowances, personal allowances, service allowances, special allowances or higher duties allowance, unless otherwise approved by the employer.
- Provided that a special allowance or higher duties allowance shall be included in "fortnightly wage" when overtime is worked on duties for which these allowances are specifically paid.
- (c) Subject to prior agreement in writing, time off in lieu of payment may be granted by the employer. Such time off in lieu to be determined on an hourly basis by dividing the normal hourly rate of pay into the amount to which the employee would otherwise have been entitled at the prescribed rate in accordance with paragraph (b) of this subclause.
- The employee shall be required to clear accumulated time off in lieu within two months of the overtime being performed. If the employer is unable to release the employee to clear such leave, then the employee shall be paid for the overtime worked.
- Provided that by agreement between the employer and the employee, time off in lieu of overtime may be able to be accumulated beyond two months from the time the overtime is performed so as to be taken in conjunction with periods of leave.
- (d) Any time off in lieu of overtime, other than that provided in paragraph (c) of this subclause shall be only negotiated between the employer and the Association.
- (e) No claim for payment of overtime or time off in lieu under the provisions of this clause shall be allowed in respect of any day on which the additional time worked amounts to 30 minutes or less.
- (f) (i) Where an employee having received prior notice is required to return to duty –
- (aa) On a Saturday, Sunday or public holiday otherwise than during prescribed hours of duty the employee shall be entitled to payment at the rate in accordance with paragraph (b) of this subclause for a minimum period of three hours.
- (bb) Before or after the prescribed hours of duty on a weekday the employee shall be entitled to payment at the rate in accordance with paragraph (b) of this subclause for a minimum period of one hour 30 minutes.
- (ii) For the purposes of this paragraph, where an employee is required to return to duty more than once, each duty period shall stand alone in respect to the application of minimum period payment except where the second or subsequent return to duty is within any such minimum period.
- (iii) The provisions of this subparagraph shall not apply in cases where it is customary for an employee to return to the employee's place of employment to perform a specific job outside the employee's prescribed hours of duty or where the overtime is continuous (subject to a meal break) with the completion or commencement of prescribed hours of duty.
- (g) When an employee is directed to work overtime at a place other than the usual headquarters, and provided that place where the overtime is to be worked is situated in the area within a radius of 50 kilometres from the usual headquarters, and the time spent in travelling to and from that place is in excess of the time which an employee would ordinarily spend in travelling to and from the usual headquarters, and provided such travel is undertaken on the same day as the overtime is worked, then such excess time shall be deemed to form part of the overtime worked.
- (h) Except as provided in paragraph (b) of subclause (6) and paragraph (b) of subclause (5) of this clause when an employee is directed to work overtime at a place other than the usual headquarters and provided that place where the overtime is to be worked is situated outside the area within the radius of 50 kilometres from the usual headquarters and the time spent in travelling to and from that place is in excess of the time which an employee would ordinarily spend in travelling to and from the usual headquarters, then the employee shall be granted time off in lieu of such excess time spent in actual travel in accordance with subclause (7).
- (i) Except as provided in paragraph (k) of this subclause, payment for overtime, or the granting of time off in lieu of overtime or travelling time, shall not be approved where the employee's work is not subject to close supervision.

- (j) Notwithstanding the provisions of paragraph (i) of this subclause, where from the nature of the duties required or from other relevant circumstances it appears just and reasonable, any such employee as is referred to in that paragraph shall, with the special approval of the employer be paid overtime or granted time off in lieu as prescribed by paragraph (b) or paragraph (c) respectively of this subclause and where in any such case the employer declines to give such special approval the matter may be referred to the Public Service Arbitrator. When an employee not subject to close supervision is directed by the employer to carry out specific duties involving the working of overtime, and provided such overtime can be reasonably determined, then such employee shall be entitled to payment or time off in lieu of overtime worked in accordance with paragraph (b) or paragraph (c) of this subclause.
- (k) (i) Where an employee performs overtime duty after the time at which the employee's normal hours of duty end on one day and before the time at which the employee's normal hours of duty are to commence on the next succeeding day which results in the employee not being off duty between these times for a continuous period of not less than ten hours, the employee is entitled to be absent from duty without loss of wage from the time of ceasing overtime duty, until the employee has been off duty for a continuous period of ten hours.
- (ii) Provided that where an employee is required to return to or continue work without the break provided in subparagraph (i) of this paragraph then the employee shall be paid at double the ordinary rate until released from duty or until the employee has had ten consecutive hours off duty without loss of wage for ordinary working time occurring during such absence.
- (iii) The provisions of this paragraph shall not apply to employees included in subclause (5) of this clause.
- (l) Where an employee is required to work a continuous period of overtime which extends passed midnight into the succeeding day the time worked after midnight shall be included with that worked before midnight for the purpose of calculation of payment provided for in paragraph (b) of this subclause.
- (5) (a) For the purpose of this subclause:
 "Standby" shall mean a written instruction or other authorised direction by the employer or a duly authorised employee to an employee to remain at the employee's place of employment during any period outside the employee's normal hours of duty, and to perform certain designated tasks periodically or on an irregular basis. Such employee shall be provided with appropriate facilities for sleeping if attendance is overnight, and other personal needs, where practicable.
 Other than in extraordinary circumstances, employees shall not be required to perform more than two periods of standby in any rostered week.
 This provision shall not replace normal overtime or shift work requirements.
 "On Call" shall mean a written instruction or other authorised direction by the employer or a duly authorised employee to an employee rostered to remain at the employee's residence or to otherwise be immediately contactable by telephone or other means outside the employee's normal hours of duty in case of a call out requiring an immediate return to duty.
 "Availability" shall mean a written instruction or other authorised direction by the employer or a duly authorised employee to an employee to remain contactable, but not necessarily immediately contactable by telephone or other means, outside the employee's normal hours of duty and be available and in a fit state at all such times for recall to duty.
 "Availability" will not include situations in which employees carry telephones or other means or make their telephone numbers or other contact details available only in the event that they may be needed for casual contact or recall to work. Subject to paragraph (i) of subclause (4) of this clause recall to work under such circumstances would constitute emergency duty in accordance with subclause (6) of this clause.
- Out of Hours Contact
- (b) Except as otherwise agreed between the employer and the Association, an employee who is required by the employer to be on "out of hours contact" during periods off duty shall be paid the fixed allowance prescribed in Part 1 - Out Of Hours Contact of Schedule D - Clause 21.- Overtime Allowance, for each hour or part thereof that the employee is on "out of hours contact"
 Provided that payment in accordance with this paragraph shall not be made with respect to any period for which payment is made in accordance with the provisions of subclause (4) of this clause when the employee is recalled to work.
- (c) Where an employee is required to be on "on call" or "available" and the means of contact is to be by landline or satellite telephone fixed at the employee's residence the employer shall:
- (i) Where the telephone is not already installed, pay the cost of such installation;
- (ii) Where an employee pays or contributes towards the payment of the rental of such telephone, pay the employee 1/52nd of the annual rental paid by the employee for each seven days or part thereof on which an employee is rostered to be on "on call" or "availability";
- (iii) Provided that where as a usual feature of the duties an employee is regularly rostered to be on "on call" or "availability", pay the full amount of the telephone rental.

- (iv) When an employee is required to "on call" or "available" and the means of contact is other than a landline/satellite telephone fixed at the employee's residence, the employer shall provide the employee with the means of contact free of charge for the purposes of work related activity.
- (d) An employee shall be reimbursed the cost of all telephone calls made on behalf of the employer as a result of contact pursuant to paragraph (a) of this subclause.
- (e) Where an employee rostered for "on call" or "availability" is recalled for duty during the period for which the employee is on "out of hours contact" then the employee shall receive payment for hours worked in accordance with paragraph (b) of subclause (4) of this clause.
- (f) Time spent in travelling to and from the place of duty where an employee rostered on "on call" or "availability" is actually recalled to duty, shall be included with actual duty performed for purposes of overtime payment.
- (g) Minimum payment provisions do not apply to an employee rostered for "out of hours contact" duty.
- (h) An employee in receipt of an "out of hours contact" allowance and who is recalled to duty shall not be regarded as having performed emergency duty in accordance with subclause (6) of this clause.
- (i) Employees subject to this clause shall, where practicable, be periodically absented from any requirement to hold themselves on "standby", "on call" or "availability".
- (6) (a) (i) Where an employee is called on duty to meet an emergency at a time when the employee would not ordinarily have been on duty and no notice of such call was given prior to completion of usual duty on the last day of work prior to the day on which the employee is called on duty, then, if called to duty
 - (aa) on a Saturday, Sunday or public holiday otherwise than during the prescribed hours of duty the employee shall be entitled to payment at the rate in accordance with paragraph (b) of subclause (4) of this clause for a minimum period of three hours;
 - (bb) before or after the prescribed hours of duty on a weekday the employee shall be entitled to payment at the rate in accordance with paragraph (b) of subclause (4) of this clause for a minimum period of two hours 30 minutes;
- (ii) for the purpose of this subclause, where an employee is recalled more than once, each period of emergency duty shall stand alone in respect to the application of the minimum period payment, subject to paragraph (c) of this subclause.
- (b) Time spent in travelling to and from the place of duty where the employee is actually recalled to perform emergency duty shall be included with actual duty performed for the purposes of overtime payment.
- (c) An employee recalled to work to perform emergency duty shall not be obliged to work for the minimum period if the work is completed in less time, provided that an employee called out more than once within any such minimum period shall not be entitled to any further payment for the time worked within that minimum period.
- (7) An employee eligible for payment of overtime in accordance with paragraph (j) of subclause (4) of this clause, who is required to travel on official business outside of the employee's normal working hours and away from the employee's usual headquarters, shall be granted time off in lieu of such actual time spent in travelling at equivalent or ordinary rates on weekdays and at time and one half rates on Saturdays, Sundays, and public holidays, provided:-
 - (a) Such travel is undertaken at the direction of the employer.
 - (b) Such travel shall not include -
 - (i) time spent in travelling by an employee on duty at a temporary headquarters to the employee's home for weekends for the employee's own convenience;
 - (ii) time spent in travelling by plane between the hours of 11.00 pm and 6.00 am;
 - (iii) time spent in travelling by train or coach between the hours of 11.00 pm and 6.00 am;
 - (iv) time spent in travelling by ship when meals and accommodation are provided;
 - (v) time spent in travel resulting from the permanent transfer or promotion of an employee to a new location;
 - (vi) time in travelling in which an employee is required by the employer to drive, outside ordinary hours of duty, an employer's vehicle or to drive the employee's own motor vehicle involving the payment of motor vehicle allowance but such time shall be deemed to be overtime and paid in accordance with paragraph (b) of subclause (4) of this clause.
 - (c) Time off in lieu will not be granted for periods of less than thirty minutes.
 - (d) Where such travel is undertaken on a normal working day, time off in lieu is granted only for such time spent in travelling before and/or after the usual hours of duty, and where an employee is required to travel during the employee's usual lunch interval such additional travelling time is not to be taken into account in computing the number of hours of travelling time due.
 - (e) Where such travel is undertaken on a normal working day, time off in lieu is granted only for such time spent in travelling before and/or after the usual hours of duty which is in excess of the employee's ordinary travelling time.

- (f) Except as provided in paragraph (b) of this subclause, all time spent in actual travel on Saturdays, Sundays, and public holidays provided in Clause 23. - Public Holidays of this Award, shall be deemed to be excess travelling time.
- (8) (a) A break of 30 minutes, shall be made for meals between 12.00 noon and 2.00 p.m. and between 5.00 p.m. and 7.00 p.m. when overtime duty is being performed.
 Except in the case of emergency, an employee shall not be compelled to work more than five hours' overtime duty without a meal break. At the conclusion of a meal break the calculation of the five hours limit recommences.
- (b) An employee required to work overtime who purchases a meal shall be reimbursed for each meal purchased at the rate prescribed for that meal in Part 2 of Schedule D – Clause 21. – Overtime Allowance of this Award.
 Provided that the overtime worked when such a meal is purchased totals not less than two hours, such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.
- (c) If an employee, having received prior notification of a requirement to work overtime, is no longer required, then the employee shall be entitled, in addition to any other penalty, to reimbursement for a meal previously purchased.
- (9) Any group of employees whose duties necessarily entail special conditions of employment shall not be subject to the prescribed hours of duty as defined in subclause (1) of this clause if the employer and the Association so agree.

22. - ANNUAL LEAVE

- (1) (a) Except as provided in subclause (10) of this clause, each employee is entitled to four weeks' leave on full pay for each year of service. Annual leave shall be calculated on a calendar year basis commencing on January 1 in each year.
- (b) An employee may take annual leave during the calendar year in which it accrues, but the time during which the leave may be taken is subject to the approval of the employer.
- (c) An employee who is first appointed after January 1 is entitled to pro-rata annual leave for that year in accordance with the formula contained in subclause (2) of this clause.
- (d) To assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to accrue and carry forward a maximum of two years annual leave from the date of the entitlement.
- (2) Entitlement
- (a) An employee employed after the first day of January in any year is entitled to pro rata annual leave for that year calculated on a daily basis. At the end of each calendar day of the year the employee will accrue 0.416 hours of paid annual leave provided the maximum accrual will not exceed 152 hours for each completed calendar year of service.
- (b) Where employers have systems in place which record and report pro rata accrual of annual leave entitlements in a manner other than prescribed by this clause, that method of accrual may continue provided the system provides the same accrual over a full year. Employers must ensure that upon the cessation of employment, all pro rata annual leave entitlements accrued are equivalent to the pro rata annual leave entitlement provided by clause 22(2)(a).
- (3) Annual leave shall be taken in one period unless otherwise approved by the employer.
- (4) On written application, an employee shall be paid wage in advance when proceeding on annual leave.
- (5) (a) When the convenience of the employer is serviced, the employer may approve the deferment of the commencing date for taking annual leave, but such approval shall only remain in force for a period of one year.
- (b) The employer may renew the approval referred to in subclause (a) of this clause for a further period of a year or further periods of a year but so that an employee does not at any time accumulate more than three years' entitlement.
- (c) Where the convenience of the employer is served, the employer may approve the deferment of the commencement date for taking leave so that an employee accumulates more than three years' entitlement, subject to any condition which the employer may determine.
- (d) When an employee who has received approval to defer the commencement date for taking annual leave under paragraph (a), (b) or (c) of this subclause next proceeds on annual leave, the annual leave first accrued shall be the first leave taken.
- (6) An employee who, during an accrual period was subject to variations in ordinary working hours or whose ordinary working hours during the accrual period are less than the employee's ordinary working hours at the time of commencement of annual leave, may elect to take a lesser period of annual leave calculated by converting the average ordinary working hours during the accrual period to the equivalent ordinary hours at the time of commencement of annual leave.

- (7) On application to the employer, a lump sum payment for the money equivalent of any:
- (a) Accrued annual leave as prescribed by subclause (1) or sub clause (6) of this clause shall be made to an employee who resigns, retires, is retired or in respect of an employee who dies. The provisions of this paragraph shall also apply to an employee who is dismissed unless the misconduct for which the employee has been dismissed occurred prior to the completion of the qualifying period; and
- (b) Pro rata annual leave shall be made to an employee who resigns, retires, is retired or in respect of an employee who dies but not to an employee who is dismissed.
- (8) An employee who has been permitted to proceed on annual recreation leave and who ceases duty before completing the required continuous service to accrue the leave must refund the value of the unearned pro rata portion calculated at the rate of wage as at the date the leave was taken, but no refund is required in the event of the death of an employee.
- (9) When computing the annual leave due under this clause, no deduction shall be made from such leave in respect of the period an employee is on annual leave, observing a public holiday prescribed by this award, absence through sickness with or without pay. This provision applies except for that portion of an absence through sickness without pay that exceeds three months, absence on workers' compensation except for that portion of an absence that exceeds six months, or any period exceeding two weeks during which the employee is absent on leave without pay.
- (10) Every employee, to whom the employer has granted annual leave in excess of four weeks because of special circumstances shall be credited with such additional leave on a pro rata basis according to the following formula:-

Completed Month of Service	Pro rata Annual Leave (working days)	
	Five (5) Additional Days	Ten (10) Additional Days
1	Nil	Nil
2	Nil	1
3	1	2
4	1	3
5	2	4
6	2	5
7	2	5
8	3	6
9	3	7
10	4	8
11	4	9

- (11) Notwithstanding the foregoing, but subject to paragraph (1)(d) of this clause, the employer may direct an employee to take accrued annual leave and may determine the date on which such leave shall commence. Should the employee not comply with the direction, disciplinary action may be taken against the employee.
- (12) (a) Subject to subclauses (2) and (4) of this clause a loading equivalent to 17½% of normal wage is payable to employees proceeding on annual leave, including accumulated annual leave.
- (b) Subject to the provisions of subclauses (4) of this clause shift workers who are granted an additional week's penalty leave when proceeding on annual leave including accumulated annual leave shall be paid:
- (i) shift and weekend penalties the employee would have received had the employee not proceeded on annual leave; or
- (ii) loading equivalent to 20% of normal salary for five weeks' leave; whichever is greater.
- (c) Subject to the provisions of subclause (6) the loading is paid on a maximum of four weeks' annual leave, or five weeks in the case of shift workers who are granted an additional week's penalty leave. Payment of the loading is not made on additional leave granted for any other purpose.
- (d) Annual leave commencing in any year and extending without a break into the following year attracts the loading calculated on the wage applicable on the day the leave commenced. The maximum loading payable shall be that applicable on the day the leave is commenced.
- (e) The loading payable on approved accumulated annual leave shall be at the rate applicable at the date the leave is commenced. Under these circumstances an employee can receive up to the maximum loading for the approved accumulated annual leave in addition to the loading for the current year's entitlement.
- (f) A pro rata loading is payable on periods of approved annual leave less than four weeks.
- (g) The loading is calculated on the rate of wage the employee receives at the commencement of leave under Schedule B – Wages of this Award and, where applicable, the wage shall include the following allowances:
- (i) Protective Clothing Allowance, where it is paid as an annual amount;
- (ii) Higher Duties Allowance, but only where the specific conditions of Clause 18. - Higher Duties Allowance of this Award are satisfied.

- (h) Where payment in lieu of accrued or pro rata annual leave is made on the death, dismissal, resignation or retirement of an employee, a loading calculated in accordance with the terms of this clause is to be paid. Provided that no loading shall be payable in respect of pro rata annual leave paid on resignation or where an employee is dismissed for misconduct.
- (i) Part-time employees shall be paid a pro rata loading at the wage rate applicable.
- (j) An employee who has been permitted to proceed on annual leave and who ceases duty before completing the required continuous service to accrue the leave must refund the value of the unearned pro rata portion. Provided that no refund shall be necessary in the event of the death of an employee.

23. - PUBLIC HOLIDAYS

- (1) The following days shall be allowed as holidays with pay:
New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Sovereign's Birthday, Western Australia Day, Labour Day, provided that the employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.
- (2) When any of the days mentioned in subclause (1) of this clause falls on a Saturday or on a Sunday, the holiday shall be observed on the next succeeding Monday.
When Boxing Day falls on a Sunday or Monday, the holiday shall be observed on the next succeeding Tuesday.
In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

24. - LONG SERVICE LEAVE

- (1) Subject to subclause (4) of this clause an employee who has completed ten years' continuous service with the employer shall be entitled to 13 weeks' long service leave on full pay.
- (2) For each subsequent period of seven years' service an employee shall be entitled to an additional 13 weeks' long service leave on full pay.
- (3)
 - (a) Subject to the employer's convenience, an employer may approve an employee's application to take a complete entitlement of long service leave on full pay or half pay, or may allow the employee to take the leave in minimum periods of one (1) day.
 - (b) Employees may by agreement with their employer, access any portion of an accrued entitlement to long service leave on double pay for half the period accrued. In these circumstances the leave actually taken is 50 percent of the accrued entitlement accessed.
 - (c) Where employees proceed on long service leave on double pay in accordance with this subclause, the entitlement accessed is excised for the purpose of continuous service in accordance with subclause (4).
- (4) For the purposes of determining an employee's long service leave entitlement under the provisions of subclauses (1), (2) and (3) of this clause the expression "continuous service" includes any period during which the employee is absent on full pay or part pay from the employee duties, but does not include:
 - (a) any period exceeding two weeks during which the employee is absent on leave without pay or parental leave without pay, unless the employer determines otherwise;
 - (b) any period during which the employee is taking long service leave entitlement or any portion thereof except in the case of subclause (13) of this clause when the period excised will equate to a full entitlement of 13 weeks;
 - (c) any service by an employee who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when that prior service had actually entitled the employee to the long service leave provided under this clause;
 - (d) any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave;
- (5) Any public holiday prescribed in Clause 23. - Public Holidays of this Award which occurs during the period an employee is on long service leave shall be treated as part of the long service leave and extra days in lieu thereof shall not be granted.
- (6)
 - (a) Long service leave shall be taken within three years of it becoming due, at the convenience of the employer. Provided that the employer may approve the deferment of long service leave in exceptional circumstances. Provided further that such exceptional circumstances shall include retirement within five years of the date of entitlement.
 - (b) Approval to defer the taking of long service leave may be withdrawn or varied at any time by the employer giving the employee notice in writing of the withdrawal or variation.
- (7) On application to the employer a lump sum payment for the money equivalent of any:
 - (a) long service leave entitlement for continuous service as provided in subclause (1) and subclause (2) of this clause shall be made to an employee who resigns, retires, is retired or is dismissed or in respect of an employee who dies;

- (b) pro rata long service leave based on continuous service of a lesser period than that provided in subclause (1) and subclause (2) of this clause for a long service leave entitlement shall be made -
 - (i) to an employee who retires at or over the age of 55 years or who is retired on the grounds of ill health, if the employee has completed not less than 12 months' continuous service before the date of retirement;
 - (ii) to an employee who, not having resigned, is retired by the employer for any other cause, if the employee has completed not less than three years' continuous service before the date of retirement; or
 - (iii) in respect of an employee who dies, if the employee has completed not less than 12 months' continuous service before the date of death.
- (c) in the case of a deceased employee, payment shall be made to the estate of the employee unless the employee is survived by a legal dependant approved by the employer, in which case payment shall be made to the legal dependant.
- (8) The calculation of the amount due for long service leave accrued and for pro rata long service leave shall be made at the rate of wage of an employee at the date of retirement or resignation or death, whichever applies.
- (9) An employee prior to commencing long service leave may request approval for the substitution of another date for commencement of long service leave and the employer may approve such substitution.
- (10) (a) Notwithstanding the provisions contained in this subclause where an employee was, immediately prior to being employed by the employer, employed in the service of the public in Western Australia or any other state body in Western Australia that employee shall be entitled to long service leave determined in the manner contained in this subclause. Provided that the period immediately prior to being employed in Dental Health Services and the date the employee ceased the previous employment described in this subclause does not exceed one week or a further period as determined by the employer.
- (b) (i) The pro rata portion of long service leave to which the employee would have been entitled to up to the date of appointment shall be calculated in accordance with the provisions that applied to the previous employment referred to. However in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the employee may become entitled to under this clause;
- (ii) The balance of long service leave entitlement of the employee shall be calculated in accordance with the provisions contained in this clause.
- (c) Nothing in this clause confers on any employee previously employed by those bodies specified in subclause (10)(a) of this clause any entitlement to a complete period of long service leave that accrued in the employee's favour prior to the date on which the employee commenced employment in the public authority.
- (11) An employee who has elected to retire at or over the age of 55 years and who will complete not less than 12 months' continuous service before the date of retirement may make application to take pro rata long service leave before the date of retirement.
- (12) (a) A full time employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on both a full and part time basis may elect to take a lesser period of long service leave calculated by converting the part-time service to equivalent full time service.
- (b) A full time employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on a part time basis may elect to take a lesser period of long service leave calculated by converting the part time service to equivalent full time service.
- (13) Cash Out of Accrued Long Service Leave Entitlement
 - (a) Employees may by agreement with their employer, cash out any portion of an accrued entitlement to long service leave, provided the employee proceeds on a minimum of ten (10) days annual leave in that calendar year.
 - (b) Where employees cash out any portion of an accrued entitlement to long service leave in accordance with this subclause, the entitlement accessed is excised for the purpose of continuous service in accordance with subclause (4) of this clause.

25. - SICK LEAVE

- (1) For the purposes of this clause "service" shall not include:
 - (a) any period exceeding 14 calendar days during which an employee is absent on leave without pay. In the case of leave without pay which exceeds 14 calendar days, the entire period of such leave without pay is excised in full;
 - (b) any period which exceeds six months in one continuous period during which an employee is absent on workers' compensation. Provided that only that portion of such continuous absence which exceeds six months shall not count as "service";
 - (c) any period which exceeds three months in one continuous period during which an employee is absent on sick leave without pay. Provided that only that portion of such continuous absence which exceeds three months shall not count as "service".

(2) In the case of personal illness or injury of an employee the employer shall grant the employee leave of absence in accordance with the provisions contained in this clause.

(3) The basis for determining the entitlement to leave of absence on the grounds of illness which an employee may be granted shall be ascertained by crediting the employee concerned with the following sick leave credits, which shall be cumulative:

	Leave On full pay (Hours)	Leave On half pay (Hours)
On date of appointment	38	15.2
On completion of six months' continuous service	38	22.8
On completion of twelve months' continuous service and on completion of each further period of twelve months' continuous service	76	38

(4) An application for sick leave exceeding two consecutive working days shall be supported by evidence to satisfy a reasonable person.

(5) The number of days sick leave which may be granted without production of evidence that would satisfy a reasonable person required by subclause (4) of this clause shall not exceed, in the aggregate, five working days in any one credit year.

(6) Where an application for sick leave is supported by the certificate of a registered medical practitioner, a further certificate from a registered medical practitioner nominated by the employer may be required and if that certificate does not confirm or substantially confirm the certificate of the medical practitioner, the employee making the application for sick leave shall pay the fee due to the nominated medical practitioner in respect of the certificate.

(7) Where the employer has occasion to doubt the cause of illness or the reason for the absence the employer may arrange for a registered medical practitioner to visit and examine the employee or may direct the employee to attend the registered medical practitioner for examination. If the report of the medical practitioner does not confirm that the employee is ill or if the employee is not available for examination at the time of the visit of the medical practitioner or if the employee fails, without reasonable cause to attend the medical practitioner when directed to do so, the fee payable for the examination, appointment or visit shall be paid by the employee.

(8) Where an employee is ill during the period of annual leave for a period of at least seven consecutive calendar days; or long service leave for a period of at least 14 consecutive calendar days and produces at the time or as soon as possible thereafter medical evidence satisfactory to the employer that the employee is or was as a result of the illness confined to the employee's place of residence or a hospital, the employer may grant sick leave for the period during which the employee was so confined and reinstate annual or long service leave equivalent to the period of confinement.

(9) Where an employee is absent on account of illness and that employee's entitlement to sick leave on full pay is exhausted, the employee may elect to convert any part of the entitlement to sick leave on half pay to sick leave on full pay, but so that the employee's sick leave entitlement on half pay is reduced by two hours for each hour of sick leave on full pay that the employee receives by the conversion.

(10) An employee who is absent on leave without pay is not eligible for sick leave during the currency of that leave without pay.

(11) No sick leave shall be granted with pay if the illness or injury has been caused by the misconduct of the employee or in any case of absence from duty without sufficient cause.

(12) An employee, who has resigned, is subsequently reappointed such employee shall for the purposes of this clause be regarded as a new appointee as from the date of reappointment.

(13) Where an employee who has been retired on medical grounds resumes duty, sick leave credits at the date of retirement shall be reinstated.

(14) (a) If the employer has reason to believe that an employee is in such a state of health as to render him a danger to fellow employees or the public, the employer may require the employee to obtain and furnish a report as to the employee's condition from a registered medical practitioner or may require the employee to submit him/herself for examination by a medical practitioner nominated by the employer. The fee for any such examination shall be paid by the employer.

(b) Upon receipt of the medical report, the employer may direct the employee to be absent from duty for a specified period or, if already on leave of absence, direct the employee to continue on leave for a specified period. Such leave shall be regarded as sick leave.

(15) (a) Upon report by a registered medical practitioner that, by reason of contact with a person suffering from an infectious disease and through the operation of restrictions imposed by Commonwealth or State law in respect of that disease, an employee is unable to attend for duty, the employee concerned may be granted sick leave or, at the option of the employee, the whole or any portion of the leave may be deducted from accrued annual leave or long service leave.

(b) Leave granted under paragraph (a) of this subclause shall not be granted for any period beyond the earliest date at which it would be practicable for the employee to resume duty, having regard to the restrictions imposed by law.

- (16) Where an employee suffers an injury within the meaning of *Section 5* of the *Workers' Compensation and Injury Management Act 1981* (WA), which necessitates that the employee being absent from duty, sick leave with pay shall be granted to the extent of sick leave credits. In accordance with *Section 80(2)* of the *Workers' Compensation and Injury Management Act 1981* (WA) where the claim for workers' compensation is decided in favour of the employee, sick leave credit is to be reinstated and the period of absence shall be granted as sick leave without pay.
- (17) (a) An employee who produces a certificate from the Department of Veterans' Affairs stating that the employee suffers from war caused illness, may be granted special sick leave credits of 15.2 working days per annum on full pay in respect of that war caused illness.
- These credits shall accumulate up to a maximum credit of 49.4 working days, and shall be recorded separately to the employee's normal sick leave credits.
- (b) Every application for sick leave for war caused illness shall be supported by a certificate from a registered medical practitioner as to the nature of the illness.
- (18) Where an employee was, immediately prior to being employed in Dental Health Services, employed in the service of the public service of Western Australia or any other State body of Western Australia and the period between the date when the employee ceased previous employment and the date of commencing employment in Dental Health Services, does not exceed one week or such other period as approved by the employer, the employer may credit that employee additional sick leave credits up to those held at the date the employee ceased previous employment.

26. - CARERS LEAVE

- (1) An employee is entitled to use, each year, up to ten (10) days of the employee's sick leave entitlement per year to be the primary care giver of a member of the employee's family or household who is ill or injured and in need of immediate care and attention.
- (2) Employees shall, wherever practical, give the employer notice of the intention to take carers leave and the estimated length of absence. If it is not practicable to give prior notice of absence employees shall notify the employer as soon as possible on the first day of absence.
- (3) Employees shall provide, where required by the employer, evidence to establish the requirement to take carers leave. An application for carers leave exceeding two (2) consecutive working days shall be supported by evidence that would satisfy a reasonable person of the entitlement.
- (4) The definition of family shall be a person who is related to the employee by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the employee.
- (5) Carers leave may be taken on an hourly basis or part thereof.

27. - PARENTAL LEAVE

- (1) Definitions
- "Employee" includes full time, part-time, permanent and fixed term contract employees.
- "Partner" means a person who is a spouse or de facto partner.
- "Primary Care Giver" is the employee who will assume the principal role for the care and attention of a child/children. The employer may require confirmation of primary care giver status.
- "Public sector" means an employing authority as defined in *Section 5* of the *Public Sector Management Act 1994* (WA).
- "Replacement Employee" is an employee specifically engaged to replace an employee proceeding on parental leave.
- (2) Entitlement to Parental and Partner Leave
- (a) An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:
- (i) birth of a child to the employee or the employee's partner; or
- (ii) adoption of a child who is not the child or the stepchild of the employee or the employee's partner; is under the age of five (5); and has not lived continuously with the employee for six (6) months or longer.
- (b) An employee identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to fourteen (14) weeks paid parental leave which will form part of the 52 week entitlement provided in paragraph (2)(a) of this clause:
- (c) An employee may take the paid parental leave specified in paragraph (2)(b) at half pay for a period equal to twice the period to which the employee would otherwise be entitled
- (d) A pregnant employee can commence the period of paid parental leave any time up to six (6) weeks before the expected date of birth and no later than four (4) weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the placement of the child but no later than four (4) weeks after the birth or placement of the child.
- (e) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed the period specified in paragraphs (2)(b) and (2)(c) above.

- (f) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners assuming the role of primary care giver.
 - (g) Parental leave may only be taken concurrently by an employee and his or her partner as provided for in subclause (3) or under special circumstances with the approval of the employer.
 - (h) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.
 - (i) An employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.
 - (j) An employee is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.
- (3) Partner Leave
- (a) An employee who is not a primary care giver shall be entitled to a period of unpaid partner leave of up to one (1) weeks at the time of the birth of a child/children to his or her partner. In the case of adoption of a child this period shall be increased to up to three (3) weeks unpaid leave.
 - (b) The employee may request to extend the period of unpaid partner leave up to a maximum of eight weeks.
- (4) Birth of a child
- (a) An employee shall provide the employer with a medical certificate from a registered medical practitioner naming the employee, or the employee's partner confirming the pregnancy and the estimated date of birth.
 - (b) If the pregnancy results in other than a live child or the child dies in the six weeks immediately after the birth, the entitlement to paid parental leave remains intact.
- (5) Adoption of a child
- (a) An employee seeking to adopt a child shall be entitled to two (2) days unpaid leave to attend interviews or examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The employee may take any paid leave entitlement in lieu of this leave.
 - (b) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.
- (6) Other leave entitlements
- (a) An employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.
 - (b) Subject to all other leave entitlements being exhausted an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years.
 - (c) The employer shall only refuse such a request on reasonable grounds related to the effect on the workplace or the employer's business. Such grounds might include:
 - (i) cost;
 - (ii) lack of adequate replacement staff;
 - (iii) loss of efficiency; and
 - (iv) the impact on customer service.
 - (d) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both partners work for the employer the total combined period of leave without pay following parental leave will not exceed two (2) years.
 - (e) An employee on parental leave is not entitled to paid sick leave and other paid absences other than as specified in paragraphs (6)(a) and (6)(f).
 - (f) Should the birth or adoption result in other than the arrival of a living child, the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner. Such paid sick leave cannot be taken concurrently with paid parental leave.
 - (g) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.
- (7) Notice and Variation
- (a) An employee shall give not less than four (4) weeks' notice in writing to the employer of the date the employee proposes to commence paid or unpaid parental leave stating the period of leave to be taken.
 - (b) An employee seeking to adopt a child shall not be in breach of paragraph (7)(a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

- (c) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four (4) weeks written notice is provided.
- (8) **Transfer to a Safe Job**
Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the pregnant employee make it inadvisable for the employee to continue in her present duties, the duties shall be modified or the employee may be transferred to a safe position at the same classification level until the commencement of parental leave.
- (9) **Communication during Parental Leave**
- (a) Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:
- (i) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and
- (ii) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.
- (b) The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee's decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to return to work on a part-time basis.
- (c) The employee shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with paragraph (9)(a).
- (10) **Replacement Employee**
Prior to engaging a replacement employee the employer shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the employee on parental leave.
- (11) **Return to Work**
- (a) An employee shall confirm the intention to return to work by notice in writing to the employer not less than four (4) weeks prior to the expiration of parental leave.
- (b) An employee on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to proceeding on parental leave. Where the employee was transferred to a safe job the employee is entitled to return to the position occupied immediately prior to transfer.
- (c) An employee may return on a part-time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with Clause 9. – Part-Time Employment of this Award.
- (d) Employees who return to work on a part-time basis have access to the right of reversion provisions of Clause 9. – Part-Time Employment of this Award.
- (12) **Effect of Parental Leave on the Contract of Employment**
- (a) An employee employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.
- (b) Paid parental leave will count as qualifying service for all purposes of this Award. During paid parental leave at half pay all entitlements will accrue as if the employee had taken the entitlement to paid parental leave at full pay.
- (c) Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose of this Award.
- (d) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with subclause (2) of Clause 8. – Contract of Service of this Award.
- (e) An employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave, or absence on parental leave, but otherwise the rights of the employer in respect of termination of employment are not affected.

28. - LEAVE WITHOUT PAY

- (1) Subject to the provisions of subclauses (2) and (3) of this clause, the employer may grant an employee leave without pay for any period and is responsible for that employee on their return.
- (2) Subject to the provisions of subclause (3) every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:
- (a) The work of the Dental Health Services, is not inconvenienced; and
- (b) All other leave credits of the employee are exhausted.
- (3) An employee shall, upon request be entitled to two days unpaid personal (caring) leave.

- (4) An employee on a fixed term contract may not be granted leave without pay for any period beyond that employee's approved period of engagement.
- (5) Any period that exceeds two weeks during which an employee is on leave of absence without pay shall not, for any purpose, be regarded as part of the period of service of that employee.

29. - STUDY ASSISTANCE

- (1)
 - (a) To ensure the maintenance of a trained public sector an employer may provide an employee with paid study leave and/or financial assistance for study purposes in accordance with the provisions of this clause.
 - (b) Employees are not eligible for study assistance if they have previously received study assistance for an approved course from their employer. Further study assistance towards additional qualifications may, however, be granted in special cases, at the discretion of the employer.
- (2) Study Leave
 - (a) An employee may be granted time off with pay for study purposes at the discretion of the employer.
 - (b) In every case the approval of time off to attend lectures and tutorials will be subject to:
 - (i) agency convenience;
 - (ii) employees undertaking an acceptable formal study load in their own time;
 - (iii) employees making satisfactory progress with their studies;
 - (iv) the course being an approved course as defined by clause 29(4);
 - (v) the course being of value to the agency; and
 - (vi) the employer's discretion when the course is only relevant to the employee's career in the service and being of value to the State.
 - (c) Part-time employees are entitled to study leave on the same basis as full time employees, with their entitlement calculated on a pro rata basis. Employees working shift work or on fixed term contracts have the same access to study leave as all other employees.
 - (d) Time off with pay may be granted up to a maximum of five hours per week including travelling time, where subjects of approved courses are available during normal working hours, or where approved study by correspondence is undertaken.
 - (e) Employees who are obliged to attend educational institutions for compulsory block sessions may be granted time off with pay, including travelling time, up to the maximum annual amount allowed in clause 29(2)(d).
 - (f) Where an employee is undertaking approved study via distance education and/or is not required to attend formal classes, an employer may allow the employee to access study leave up to the maximum annual amount allowed in clause 29(2)(d).
 - (g) Employees shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study.
 - (h) An acceptable part-time study load should be regarded as not less than five hours per week of formal tuition with at least half of the total formal study commitment being undertaken in the employee's own time, except in special cases such as where the employee is in the final year of study and requires less time to complete the course, or the employee is undertaking the recommended part-time year or stage and this does not entail five hours formal study.
 - (i) In cases where employees are studying subjects which require fortnightly classes the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.
 - (j) In workplaces which are operating on flexi-time, time spent attending or travelling to or from formal classes for approved courses between 8.15 am and 4.30 pm, less the usual lunch break, and for which "time off" would usually be granted, is to be counted as credit time for the purpose of calculating total hours worked per week.
 - (k) Travelling time returning home after lectures or tutorials is to be calculated as the excess time taken to travel home from such classes, compared with the time usually taken to travel home from the employee's normal place of work.
 - (l) An employee shall not be granted more than 5 hours' time off with pay per week except in exceptional circumstances where the employer may decide otherwise.
 - (m) Time off with pay for those who have failed a unit or units may be considered for one repeat year only.
 - (n) An employee performing service with the Australian Defence Force is not entitled to study leave for any period of service with the Australian Defence Force that they receive defence force reserves leave as provided for by clause 38 – Defence Force Reserves Leave.
 - (o) A service agreement or bond will not be required.
- (3) Financial Assistance
 - (a) An employer may reimburse an employee for the full or any part of any reasonable cost of enrolment fees, Higher Education Contribution Surcharge, compulsory text books, compulsory computer software and other necessary study materials for studies commenced during their employment.

- (b) Half of the value of the agreed costs shall be reimbursed immediately following production of written evidence of enrolment and costs incurred, and the remaining half shall be reimbursed following production of written evidence of successful completion of the subject for which reimbursement has been claimed.
 - (c) The employer and employee may agree to alternative reimbursement arrangements.
- (4) Approved Courses for Study Purposes
- (a) For the purposes of clauses 29(2) and (3), the following are approved courses:
 - (i) Degree or associate diploma courses at a university within the Australia;
 - (ii) Degree or diploma courses at an authorised non-university institution;
 - (iii) Diploma courses provided by registered training organisations, including TAFE;
 - (iv) Two-year full time certificate courses provided by registered training organisations, including TAFE;
 - (v) Courses recognised by the National Authority for the Accreditation of translators and Interpreters (NAATI) in a language relevant to the needs of the public sector; and
 - (vi) Secondary courses leading to the Tertiary Entrance Examination or courses preparing students for the mature age entrance conducted by the Tertiary Institutions Service Centre.
 - (b) For the purposes of clause 29(4)(a):
 - (i) The term 'university' includes recognised Australian universities and recognised overseas universities as defined by the *Higher Education Act 2004* (WA);
 - (ii) An authorised non-university institution is a non-university institution that is authorised under the *Higher Education Act 2004* (WA) to provide a higher education course; and
 - (iii) A registered training organisation is an organisation that is registered with the Training Accreditation Council or equivalent registering authority and complies with the nationally agreed standards set out in the Australian Quality Training Framework (AQTF).
 - (c) An employee who has completed a diploma through TAFE is eligible for study assistance to undertake a degree course at a university within Australia or an authorised non-university institution.
 - (d) An employee who has completed a two year full time certificate through TAFE is eligible for study assistance to undertake a diploma course specified in clause 29(4)(a)(iii) or a degree or diploma course specified in clauses 29(4)(a)(i) or (ii).
- (5) Full Time Study
- (a) Subject to the provisions of clause 29(5)(b), the employer may grant an employee full time study leave with pay to undertake:
 - (i) post graduate degree studies at Australian or overseas tertiary education institutions; or
 - (ii) study tours involving observations and/or investigations; or
 - (iii) a combination of postgraduate studies and study tour.
 - (b) Applications for full time study leave with pay are to be considered on their merits and may be granted provided that the following conditions are met:
 - (i) The course or a similar course is not available locally. Where the course of study is available locally, applications are to be considered in accordance with the provisions of clauses 29(2) and (4) and clause 28 - Leave without Pay.
 - (ii) It must be a highly specialised course with direct relevance to the employee's profession.
 - (iii) It must be highly relevant to the agency's corporate strategies and goals.
 - (iv) The expertise or specialisation offered by the course of study should not already be available through other employees employed within the agency.
 - (v) If the applicant was previously granted study leave, studies must have been successfully completed at that time. Where an employee is still under a bond, this does not preclude approval being granted to take further study leave if all the necessary criteria are met.
 - (vi) A fixed term contract employee may not be granted study leave with pay for any period beyond that employee's approved period of engagement.
 - (c) Full time study leave with pay may be approved for more than 12 months subject to a yearly review of satisfactory performance.
 - (d) Where an outside award is granted and the studies to be undertaken are considered highly desirable by an employer, financial assistance to the extent of the difference between the employee's normal wage and the value of the award may be considered. Where no outside award is granted and where a request meets all the necessary criteria then part or full payment of wage may be approved at the discretion of the employer.
 - (e) The employer supports recipients of coveted awards and fellowships by providing study leave with pay. Recipients normally receive as part of the award or fellowship; return airfares, payment of fees, allowance for books, accommodation or a contribution towards accommodation.

- (f) Where recipients are in receipt of a living allowance, this amount should be deducted from the employee's wage for that period.
- (g) Where the employer approves full time study leave with pay the actual wage contribution forms part of the agency's approved average staffing level funding allocation. Employers should bear this in mind if considering temporary relief.
- (h) Where study leave with pay is approved and the employer also supports the payment of transit costs and/or an accommodation allowance, the employer will gain approval for the transit and accommodation costs as required.
- (i) Where employees travelling overseas at their own expense wish to participate in a study tour or convention whilst on tour, study leave with pay may be approved by the employer together with some local transit and accommodation expenses providing it meets the requirements of clause 29(5)(b). Each case is to be considered on its merits.
- (j) The period of full time study leave with pay is accepted as qualifying service for leave entitlements and other privileges and conditions of service prescribed for employees under the award.

30. - SHORT LEAVE

- (1) The employer may, upon sufficient cause being shown, grant an employee leave of absence not exceeding two consecutive working days but any leave of absence granted shall not exceed, in the aggregate, three working days in any one (1) calendar year.
- (2) An employee who desires short leave shall except in emergency situations, make written application, in a form approved by the employer for the purpose, prior to the commencement of such leave.
- (3) Short leave shall not be granted for sick leave purposes.

31. - BEREAVEMENT LEAVE

- (1) Employees including casuals shall on the death of:
 - (a) the spouse or de-facto partner of the employee;
 - (b) the child, step-child or grandchild of the employee (including an adult child, step-child or grandchild);
 - (c) the parent, step-parent or grandparent of the employee;
 - (d) the brother, sister, step brother or step sister; or
 - (e) any other person who, immediately before that person's death, lived with the employee as a member of the employee's household;

be eligible for up to two (2) days paid bereavement leave, provided that at the request of an employee the employer may exercise a discretion to grant bereavement leave to an employee in respect of some other person with whom the employee has a special relationship.
- (2) The two (2) days need not be consecutive.
- (3) Bereavement leave is not to be taken during any other period of leave.
- (4) Payment of such leave may be subject to the employee providing evidence, if so requested by the employer, of the death or relationship to the deceased, that would satisfy a reasonable person.
- (5) An employee requiring more than two days bereavement leave in order to travel overseas in the event of the death overseas of a member of the employee's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave or leave without pay provided all accrued leave is exhausted.
- (6) Travelling time for Regional Employees
 - (a) Subject to prior approval from the employer, an employee entitled to bereavement leave and who, as a result of such bereavement, travels to a location within Western Australia that is more than 240 km from their workplace will be granted paid time off for the travel period undertaken in the employee's ordinary working hours up to a maximum of 15 hours per bereavement. The employer will not unreasonably withhold approval.
 - (b) The employer may approve additional paid travel time within Western Australia where the employee can demonstrate to the satisfaction of the employer that more than two days travel time is warranted.
 - (c) The provisions of clause 31(6) are not available to employees whilst on leave without pay or sick leave without pay.
 - (d) The provisions of clauses 31(6)(a) and (b) apply as follows.
 - (i) An employee employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent employee for each full year of service and pro rata for any residual portion of employment.
 - (ii) An employee employed on a fixed term contract for a period less than 12 months shall be credited with the same entitlement on a pro rata basis for the period of employment.

- (iii) A part time employee shall be entitled to the same entitlement as a full time employee for the period of employment, but on a pro rata basis according to the number of ordinary hours worked each fortnight.
- (iv) For casual employees, the provisions apply to the extent of their agreed working arrangements.

32. - CULTURAL/CEREMONIAL LEAVE

- (1) Cultural/ceremonial leave shall be available to all employees.
- (2) Such leave shall include leave to meet the employee's customs, traditional law and to participate in cultural and ceremonial activities.
- (3) Employees are entitled to time off without loss of pay for cultural/ceremonial purposes, subject to agreement between the employer and employee and sufficient leave credits being available.
- (4) The employer will assess each application for ceremonial/cultural leave on its merits and give consideration to the personal circumstances of the employee seeking the leave.
- (5) The employer may request reasonable evidence of the legitimate need for the employee to be allowed time off.
- (6) Cultural/ceremonial leave may be taken as whole or part days off. Each day or part thereof, shall be deducted from:
 - (a) the employee's annual leave entitlements;
 - (b) the employee's accrued long service leave entitlements, but in full days only;
 - (c) accrued days off or time in lieu; or
 - (d) short leave when entitlements under subclauses (a), (b) and (c) have been fully exhausted.
- (7) Time off without pay may be granted by arrangement between the employer and the employee for cultural/ceremonial purposes.

33. - BLOOD/PLASMA DONORS LEAVE

- (1) Subject to operational requirements, employees shall be entitled to absent themselves from the workplace in order to donate blood or plasma in accordance with the following general conditions:
 - (a) prior arrangements with the employer have been made and at least two (2) days' notice has been provided; or
 - (b) the employee is called upon by the Red Cross Blood Centre.
- (2) The notification period shall be waived or reduced where the employer is satisfied that operations would not be unduly affected by the employee's absence.
- (3) The employee shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.
- (4) Employees shall be entitled to two (2) hours of paid leave per donation for the purpose of donating blood to the Red Cross Blood Centre.

34. - EMERGENCY SERVICE LEAVE

- (1) Subject to operational requirements, paid leave of absence shall be granted by the employer to an employee who is an active volunteer member of State Emergency Service Units, St John Ambulance Brigade, Volunteer Fire and Rescue Service Brigades, Bush Fire Brigades, Volunteer Marine Rescue Services Groups or Department of Fire and Emergency Service Units, in order to allow for attendance at emergencies as declared by the recognised authority.
- (2) The employer shall be advised as soon as possible by the employee, the emergency service, or other person as to the absence and, where possible, the expected duration of leave.
- (3) The employee must complete a leave of absence form immediately upon return to work.
- (4) The application form must be accompanied by a certificate from the emergency organisation certifying that the employee was required for the specified period.
- (5) An employee, who during the course of an emergency, volunteers their services to an emergency organisation, shall comply with subclauses (2), (3) and (4) of this clause.

35. - UNION FACILITIES FOR UNION REPRESENTATIVES

- (1) The employer recognises the rights of the union to organise and represent its members. Union representatives in the agency have a legitimate role and function in assisting the union in the tasks of recruitment, organising, communication and representing members' interests in the workplace, agency and union electorate.
- (2) The employer recognises that, under the union's rules, union representatives are members of an Electorate Delegates Committee representing members within a union electorate. A union electorate may cover more than one agency.
- (3) The employer will recognise union representatives in the agency and will allow them to carry out their role and functions.
- (4) The union will advise the employer in writing of the names of the union representatives in the agency.

- (5) The employer shall recognise the authorisation of each union representative in the agency and shall provide them with the following:
- (a) Paid time off from normal duties to perform their functions as a union representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the electorate delegates committee and to attend union business in accordance with Clause 36. - Leave to Attend Association Business of this Award.
 - (b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the organisation and shall be in accordance with normal agency protocols.
 - (c) A noticeboard for the display of union materials including broadcast email facilities.
 - (d) Paid access to periods of leave for the purpose of attending union training courses in accordance with Clause 37. - Trade Union Training Leave of this Award. Country representatives will be provided with appropriate travel time.
 - (e) Notification of the commencement of new employees, and as part of their induction, time to discuss the benefits of union membership with them.
 - (f) Access to awards, agreements, policies and procedures.
 - (g) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.
- (6) The employer recognises that it is paramount that union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a union representative.

36. - LEAVE TO ATTEND ASSOCIATION BUSINESS

- (1) The employer shall grant paid leave at the ordinary rate of pay during normal working hours to an employee:
- (a) who is required to attend or give evidence before any Industrial Tribunal;
 - (b) who as a Union-nominated representative is required to attend any negotiations and/or proceedings before an Industrial Tribunal and/or meetings with Ministers of the Crown, their staff or any other representative of Government;
 - (c) when prior arrangement has been made between the Union and the employer for the employee to attend official Union meetings preliminary to negotiations and/or Industrial Tribunal proceedings; and
 - (d) who as a Union-nominated representative is required to attend joint union/management consultative committees or working parties.
- (2) The granting of leave is subject to convenience and shall only be approved:
- (a) where reasonable notice is given for the application for leave;
 - (b) for the minimum period necessary to enable the union business to be conducted or evidence to be given; and
 - (c) for those employees whose attendance is essential.
- (3) The employer shall not be liable for any expenses associated with an employee attending to union business.
- (4) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.
- (5) An employee shall not be entitled to paid leave to attend to union business other than as prescribed by this Clause.
- (6) The provisions of the Clause shall not apply to:
- (a) special arrangements made with the union which provide for unpaid leave for employees to conduct union business;
 - (b) when an employee is absent from work without the approval of the employer; and
 - (c) casual employees.

37. - TRADE UNION TRAINING LEAVE

- (1) Subject to the employer's convenience and the provisions of this clause:
- (a) The employer shall grant paid leave of absence to employees who are nominated by the Association to attend short courses relevant to the public sector or the role of union workplace representative, conducted by the Civil Service Association.
 - (b) The employer shall grant paid leave of absence to attend similar courses or seminars as from time to time approved by agreement between the employer and the Association.
- (2) An employee shall be granted up to a maximum of five (5) days paid leave per calendar year for trade union training or similar courses or seminars as approved. However, leave of absence in excess of five (5) days and up to ten (10) days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten (10) days.

- (3) (a) Leave of absence will be granted at the ordinary rate of pay and shall not include shift allowances, penalty rates or overtime.
- (b) Where a Public Holiday or rostered day off falls during the duration of a course, a day off in lieu of that day will not be granted.
- (c) Subject to paragraph (3)(a) of this clause, shift workers attending a course shall be deemed to have worked the shifts they would have worked had leave not been taken to attend the course.
- (d) Part-time employees shall receive the same entitlement as full time employees, but payment shall only be made for those hours that would normally have been worked but for the leave.
- (4) (a) Any application by an employee shall be submitted to the employer for approval at least four weeks before the commencement of the course unless the employer agrees otherwise.
- (b) All applications for leave shall be accompanied by a statement from the union indicating that the employee has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue and the authority, which is conducting the course.
- (5) A qualifying period of twelve months service shall be served before an employee is eligible to attend courses or seminars of more than a half-day duration. The employer may, where special circumstances exist, approve an application to attend a course or seminar where an employee has less than twelve months service.
- (6) (a) The employer shall not be liable for any expenses associated with an employee's attendance at trade union training courses.
- (b) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours immediately before or after the course.

38. - DEFENCE FORCE RESERVES LEAVE

- (1) The employer must grant leave of absence for the purpose of Defence service to an employee who is a volunteer member of the Defence Force Reserves or the Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.
- (2) Leave of absence may be paid or unpaid in accordance with the provisions of this clause.
- (3) Application for leave of absence for Defence service shall, in all cases, be accompanied by evidence of the necessity for attendance. At the expiration of the leave of absence granted, the employee shall provide a certificate of attendance to the employer.
- (4) Paid Leave
 - (a) An employee who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for Defence service, subject to the conditions set out hereunder.
 - (b) Part-time employees shall receive the same paid leave entitlement as full-time employees, but payment shall only be made for those hours that would normally have been worked but for the leave.
 - (c) On written application, an employee shall be paid wage in advance when proceeding on such leave.
 - (d) Casual employees are not entitled to paid leave for the purpose of Defence service.
 - (e) An employee is entitled to paid leave for a period not exceeding 105 hours on full pay in any period of twelve months commencing on 1 July in each year.
 - (f) An employee is entitled to a further period of leave, not exceeding 16 calendar days, in any period of twelve months commencing on July 1. Pay for this leave shall be at the rate of the difference between the normal remuneration of the employee and the Defence Force payments to which the employee is entitled if such payments do not exceed normal wage. In calculating the pay differential, pay for Saturdays, Sundays, Public Holidays and rostered days off is to be excluded, and no account is to be taken of the value of any board or lodging provided for the employee.
- (5) Unpaid Leave
 - (a) Any leave for the purpose of Defence service that exceeds the paid entitlement prescribed in subclause (4) of this clause shall be unpaid.
 - (b) Casual employees are entitled to unpaid leave for the purpose of Defence service.
- (6) Use of Other Leave
 - (a) An employee may elect to use annual or long service leave credits for some or all of their absence on Defence service, in which case they will be treated in all respects as if on normal paid leave.
 - (b) An employer cannot compel an employee to use annual leave or long service leave for the purpose of Defence service.

39. - WITNESS AND JURY SERVICE

Witness

- (1) An employee subpoenaed or called as a witness to give evidence in any proceeding shall as soon as practicable notify the manager/supervisor who shall notify the employer.

- (2) Where an employee is subpoenaed or called as a witness to give evidence in an official capacity that employee shall be granted by the employer leave of absence with pay, but only for such period as is required to enable the employee to carry out duties related to being a witness. If the employee is on any form of paid leave, the leave involved in being a witness will be reinstated, subject to the satisfaction of the employer. The employee is not entitled to retain any witness fee but shall pay all fees received into the Consolidated Fund. The receipt for such payment with a voucher showing the amount of fees received shall be forwarded to the employer.
- (3) An employee subpoenaed or called as a witness to give evidence in an official capacity shall, in the event of non-payment of the proper witness fees or travelling expenses as soon as practicable after the default, notify the employer.
- (4) An employee subpoenaed or called, as a witness on behalf of the Crown, not in an official capacity shall be granted leave with full pay entitlements. If the employee is on any form of paid leave, this leave shall not be reinstated as such witness service is deemed to be part of the employee's civic duty. The employee is not entitled to retain any witness fees but shall pay all fees received into the Consolidated Fund.
- (5) An employee subpoenaed or called as a witness under any other circumstances other than specified in subclauses (2) and (4) of this clause shall be granted leave of absence without pay except when the employee makes an application to clear accrued leave in accordance with Award provisions.

Jury

- (6) An employee required to serve on a jury shall as soon as practicable after being summoned to serve, notify the supervisor/manager who shall notify the employer.
- (7) An employee required to serve on a jury shall be granted by the employer leave of absence on full pay, but only for such period as is required to enable the employee to carry out duties as a juror.
- (8) An employee granted leave of absence on full pay as prescribed in subclause 7 of this clause is not entitled to retain any juror's fees but shall pay all fees received into the Consolidated Fund. The receipt for such payment shall be forwarded with a voucher showing the amount of juror's fees received to the employer.

40. - DISTURBANCE ALLOWANCE

- (1) Where an employee is transferred and incurs expenses in the areas referred to in subclause (2) of this clause as a result of that transfer then the employee shall be granted a disturbance allowance and shall be reimbursed by the employer the actual expenditure incurred upon production of receipts or such other evidence as may be required.
- (2) The disturbance allowance shall include -
 - (a) costs incurred for telephone installation at the employee's new residence provided that the cost of telephone installation shall be reimbursed only where a telephone was installed at the employee's former residence including Government owned accommodation;
 - (b) costs incurred with the connection or reconnection of services to the employee's household including Government owned accommodation for water, gas or electricity;
 - (c) costs incurred with the redirection of mail to the employee's new residence for a period of no more than three months.

41. - MOTOR VEHICLE ALLOWANCE

- (1) For the purposes of this clause the following expressions shall have the following meaning:

"A year" means 12 months commencing on the first day of July and ending on the thirtieth day of June next following.

"Metropolitan area" means that area within a radius of 50 kilometres from the Perth Railway Station.

"Southwest land division" means the South-west Division as defined by Schedule 1, *Land Administration Act 1997* (WA) excluding the area contained within the metropolitan area.

"Rest of the state" means that area south of 23.5 degrees south latitude, excluding the metropolitan area and the southwest land division.

"Term of employment" means a requirement made known to the employee at the time of applying for the position by way of publication in the advertisement for the position, written advice to the employee contained in the offer for the position or oral communication at interview by interviewing employee and such requirement is accepted by the employee either in writing or orally.

"Qualifying service" shall include all service in positions where there is a requirement as a term of employment to supply and maintain a motor vehicle for use on official business but shall exclude all absences which affect entitlements as provided by this Award.
- (2)
 - (a) An employee who is required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment shall be reimbursed in accordance with the appropriate rates set out in Part I of Schedule C – Motor Vehicle Allowance of this Award for journeys travelled on official business and approved by the employer or an authorised employee.
 - (b) An employee who is reimbursed under the provisions of subclause (2)(a) of this clause will also be subject to the following conditions -

- (i) for the purposes of subclause (2)(a) of this clause an employee shall be reimbursed with the appropriate rates set out in Part 1 of Schedule C – Motor Vehicle Allowance of this Award for the distance travelled from the employee's residence to the place of duty and for the return distance travelled from place of duty to residence except on a day where the employee travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day;
 - (ii) where an employee in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Part 1 of Schedule C – Motor Vehicle Allowance of this Award;
 - (iii) where an employee does not travel in excess of 4000 kilometres in a year an allowance calculated by multiplying the appropriate rate per kilometre by the difference between the actual distance travelled and 4000 kilometres shall be paid to the employee provided that where the employee has less than 12 months' qualifying service in the year then the 4000 kilometre distance will be reduced on a pro rata basis and the allowance calculated accordingly;
 - (iv) where a part-time employee is eligible for a payment of an allowance under subclause (2)(b)(iii) of this clause such allowance shall be calculated on the proportion of total hours worked in that year by the employee to the annual standard hours had the employee been employed on a full-time basis for the year;
 - (v) an employee who is required to supply and maintain a motor vehicle for use on official business is excused from this obligation in the event of his or her vehicle being stolen, consumed by fire, or suffering a major and unforeseen mechanical breakdown or accident, in which case all entitlement to reimbursement ceases while the employee is unable to provide the motor vehicle or a replacement;
 - (vi) the employer may elect to waive the requirement that an employee supply and maintain a motor vehicle for use on official business, but three months' written notice of the intention so to do shall be given to the employee concerned.
- (3) (a) Subject to subclause (2) of this clause, an employee who is not normally required to supply and maintain a motor vehicle as a term of employment and who is required to relieve an employee required to supply and maintain a motor vehicle as a term of employment shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in Part I of Schedule C – Motor Vehicle Allowance of this Award for all journeys travelled on official business and approved by the employer where the employee is required to use the vehicle on official business whilst carrying out the relief duty.
- (b) For the purposes of paragraph (a) of this subclause an employee shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in Part I of Schedule C – Motor Vehicle Allowance of this Award for the distance travelled from the employee's residence to place of duty and the return distance travelled from the place of duty to residence except on a day where the employee travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day.
- (c) Where an employee in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Part I of Schedule C – Motor Vehicle Allowance of this Award.
- (d) For the purpose of this subclause the allowance prescribed in subclause (2)(b)(iii) and (iv) of this clause shall not apply.
- (4) (a) An employee who is not required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment, but when requested by the employer voluntarily consents to use the vehicle shall for journeys travelled on official business approved by the employer be reimbursed all expenses incurred in accordance with the appropriate rates set out in Parts II and III of Schedule C – Motor Vehicle Allowance of this Award.
- (b) For the purpose of paragraph (a) of this subclause an employee shall not be entitled to reimbursement for any expenses incurred in respect to the distance between the employee's residence and headquarters and the return distance from headquarters to residence.
- (c) Where an employee in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Part II of Schedule C – Motor Vehicle Allowance of this Award if applicable.
- (5) Allowance for towing employer's caravan or trailer.
In cases where employees are required to tow the employer's caravans on official business, the additional rate shall be 8.0 cents per kilometre. When the employer's trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

42. - PROPERTY ALLOWANCE

- (1) In this clause the following expressions shall have the following meanings:
"Agent" means a person carrying on business as an estate agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law.

"Dependant" in relation to an employee means:

- (a) spouse including de facto partner;
- (b) child/children; or
- (c) other dependant family;

who resides with the employee and who relies on the employee for support.

"Expenses" in relation to an employee means all costs incurred by the employee in the following areas -

- (a) legal fees paid to a solicitor, or in lieu thereof fees charged by a settlement agent, for professional costs incurred in respect of the sale or purchase, the maximum fee to be claimed shall be as set out in the Solicitors Cost Determination for non-contentious business matters made under section 275 of the *Legal Profession Act 2008* (WA);
- (b) disbursements duly paid to a solicitor or a settlement agent necessarily incurred in respect of the sale or purchase of the residence;
- (c) real estate agent's commission in accordance with that fixed by the Real Estate and Business Agents Supervisory Board, acting under Section 61 of the *Real Estate and Business Agents Act 1978* (WA), duly paid to an agent for services rendered in the course of and incidental to the sale of the property, the maximum fee to be claimed shall be fifty percent (50%) as set out under Items 1 or 2 - Sales by Private Treaty or Items 1 or 2 - Sales by Auction of the Maximum Remuneration Notice;
- (d) stamp duty;
- (e) fees paid to the Registrar of Titles or to the employee performing duties of a like nature and for the same purpose in another State of the Commonwealth;
- (f) expenses relating to the execution or discharge of a first mortgage;
- (g) the amount of expenses reasonably incurred by the employee in advertising the residence for sale.

"Locality" in relation to an employee means -

- (a) within the metropolitan area, that area within a radius of 50 kilometres from the Perth City Railway Station, and
- (b) outside the metropolitan area, that area within a radius of 50 kilometres from an employee's headquarters when they are situated outside of the metropolitan area.

"Property" shall mean a "residence" as defined in this clause, including a block of land purchased for the purpose of erecting a residence thereon to the extent that it represents a normal urban block of land for the particular locality.

"Residence" includes any accommodation of a kind commonly known as a flat or a home unit that is, or is intended to be, a separate tenement, including dwelling/house, and the surrounding land, exclusive of any other commercial property, as would represent a normal urban block of land for the particular locality.

"Settlement agent" means a person carrying on business as settlement agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law.

"Transfer" or "Transferred" means a permanent transfer or permanently transferred.

- (2) When an employee is transferred from one locality to another in the public interest or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, the employee shall be entitled to be paid a property allowance for reimbursement of expenses incurred -
 - (a) In the sale of a residence in the employee's former locality, which, at the date on which the employee received notice of transfer to a new locality -
 - (i) the employee owned and occupied; or
 - (ii) the employee was purchasing under a contract of sale providing for vacant possession; or
 - (iii) the employee was constructing for the employee's own permanent occupation, on completion of construction and
 - (b) In the purchase of residence or land for the purpose of erecting a residence thereon for the employee's own permanent occupation in the new locality.
- (3) An employee shall be reimbursed such following expenses as are incurred in relation to the sale of a residence:
 - (a) if the employee engaged an agent to sell the residence on the employee's behalf - 50% of the amount of the commission paid to the agent in respect of the sale of the residence;
 - (b) if the employee engaged a solicitor to act in connection with the sale of the residence - the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor in respect of the sale of the residence;

- (c) if the land on which the residence is created was subject to a first mortgage and that mortgage was discharged on the sale, then an employee shall, if, in a case where a solicitor acted for the mortgagee in respect of the discharge of the mortgage and the employee is required to pay the amount of the professional costs and disbursements necessarily incurred by the mortgagee in respect of the discharge of the mortgage - the amount so paid by the employee;
- (d) if the employee did not engage an agent to sell the residence on the employee's behalf - the amount of the expenses reasonably incurred by the employee in advertising the residence for sale.
- (4) An employee shall be reimbursed such following expenses as are incurred in relation to the purchase of a residence:-
 - (a) if the employee engaged a solicitor or settlement agent to act in connection with the purchase of the residence - the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor or settlement agent in respect of the purchase of the residence;
 - (b) if the employee mortgaged the land on which the residence was erected in conjunction with the purchase of the residence, then an employee shall, if, in a case where a solicitor acted for the mortgagee and the employee is required to pay and has paid the amount of the professional costs and disbursements (including valuation fees but not a procuracy fee payable in connection with the mortgage) necessarily incurred by the mortgagee in respect of the mortgage - the amount so paid by the employee;
 - (c) if the employee did not engage a solicitor or settlement agent to act for him/her in connection with the purchase or such a mortgage - the amount of the expenses reasonably incurred by the employee in connection with the purchase or the mortgage, as the case may be other than a procuracy fee paid by the employee in connection with the mortgage.
- (5) An employee is not entitled to be paid a property allowance under subclause (2)(b) unless the employee is entitled to be paid a property allowance under subclause (2)(a), provided that the employer may approve the payment of a property allowance under subclause (2)(b) to an employee who is not entitled to be paid a property allowance under subclause (2)(a) if the employer is satisfied that it was necessary for the employee to purchase a residence or land for the purpose of erecting a residence thereon in the new locality because of the employee's transfer from the former locality.
- (6) For the purpose of this clause it is immaterial that the ownership, sale or purchase carried out on behalf of an employee who owns solely, jointly or in common with:-
 - (a) the employee's spouse, or
 - (b) a dependant relative, or
 - (c) the employee's spouse and a dependant relative.
- (7) Where an employee sells or purchases a residence jointly or in common with another person - not being a person referred to in subclause (6) of this clause - the employee shall be paid only the proportion of the expenses for which the employee is responsible.
- (8) An application by an employee for a property allowance shall be accompanied by evidence of the payment by the employee of the expenses, being evidence that is satisfactory to the employer.
- (9) Notwithstanding the foregoing provisions, an employee is not entitled to the payment of a property allowance -
 - (a) in respect of a sale or purchase prescribed in subclause (1) of this clause which is effected -
 - (i) more than 12 months after the date on which the employee took up duty in a new locality; or
 - (ii) after the date on which the employee received notification of the transfer back to the former locality;
 provided that the employer may, in exceptional circumstances grant an extension of time for such period as is deemed reasonable.
 - (b) Where the employee is transferred from one locality to another solely at the employee's own request or on account of misconduct.
- (10) Where there is a dispute or disagreement concerning -
 - (a) the necessity to purchase a residence or land;
 - (b) the amount of the disbursements necessarily incurred and duly paid by the employee;
 - (c) the amount of expenses reasonably incurred by an employee when -
 - (i) the employee did not engage an agent to sell the residence on behalf of the employee, or
 - (ii) the employee did not engage a solicitor or settlement agent to act in connection with the purchase or a mortgage, the matter shall be referred to the Public Service Arbitrator.

43. - PROTECTIVE CLOTHING ALLOWANCE

An employee engaged on work which requires the provision of protective clothing shall be:

- (a) provided with the requisite protective clothing, with the laundering costs for such protective clothing being at the expense of the employer; or
- (b) provided with an annual allowance, as agreed between the association and the employer, which shall incorporate the cost of purchase and laundry of the requisite protective clothing.

Provided that nothing contained in this clause shall affect the obligations of the employer to provide clothing pursuant to the *Occupational Safety and Health Act 1984* (WA).

44. - RELIEVING ALLOWANCE

- (1) An employee who is required to take up duty away from headquarters on relief duty or to perform special duty, and necessarily resides temporarily away from the employee's usual place of residence, shall be reimbursed reasonable expenses on the following basis:-
 - (a) Where the employee is:-
 - (i) supplied with accommodation and meals free of charge, or
 - (ii) accommodated at a Government institution, hostel or similar establishment and supplied with meals, reimbursement shall be in accordance with the rates prescribed in Column A, Items 1, 2 or 3 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award.
 - (b) Where the employee is fully responsible for accommodation, meals and incidental expenses and hotel or motel accommodation is utilised:-
 - (i) For the first 42 days after arrival at the new locality reimbursement shall be in accordance with the rates prescribed in Column A, Items 4 to 8 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award.
 - (ii) For periods in excess of 42 days after arrival in the new locality reimbursement shall be in accordance with the rates prescribed in Column B, Items 4 to 8 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award for employees with dependants or Column C, Items 4 to 8 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award for employees without dependants: Provided that the period of reimbursement under this subclause shall not exceed forty nine days without the approval of the employer.
 - (c) Where the employee is fully responsible for accommodation, meals and incidental expenses and other than hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items 9, 10 or 11 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award.
- (2) Reimbursement of expenses shall not be suspended should an employee become ill whilst on relief duty, provided leave for the period of such illness is approved in accordance with the provisions of Clause 25. - Sick Leave of this Award and the employee continues to incur accommodation, meal and incidental expenses.
- (3) When an employee, who is required to relieve or perform special duties in accordance with subclause (1) of this clause is authorised by the employer to travel to the new locality in the employee's own motor vehicle such employee shall be reimbursed for the return journey as follows:-
 - (a) An employee who is required to supply and maintain a motor vehicle as a term of employment for the period of relieving or special duties shall be reimbursed the appropriate rate prescribed by subclause (2) of Clause 41. - Motor Vehicle Allowance of this Award for the distance necessarily travelled.
 - (b) Where the employee will not be required to maintain a motor vehicle for the performance of the relieving or special duties reimbursement shall be on the basis of one half of the appropriate rate prescribed by subclause (4) of Clause 41. - Motor Vehicle Allowance of this Award. Provided that the maximum amount of reimbursement shall not exceed the cost of the fare by public conveyance which otherwise would be utilised for such return journey.
- (4) Where it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred, an appropriate rate of reimbursement shall be determined by the employer.
- (5) The provisions of Clause 47. - Travelling Allowance of this Award shall not operate concurrently with the provisions of this clause to permit an employee to be paid allowances in respect of both travelling and relieving expenses for the same period: Provided that where an employee is required to travel on official business which involves an overnight stay away from the employee's temporary headquarters the employer may extend the periods specified in paragraph (b) of subclause (1) of this clause by the time spent in travelling.
- (6) An employee who is directed to relieve another employee or to perform special duty away from the employee's usual headquarters and is not required to reside temporarily away from the employee's usual place of residence shall, if the employee is not in receipt of a higher duties or special allowance for such work, be reimbursed the amount of additional fares paid in travelling by public transport to and from the place of temporary duty.

45. - REMOVAL ALLOWANCE

- (1) When an employee is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, the employee shall be reimbursed
 - (a) The actual reasonable cost of conveyance of the employee and dependants.
 - (b) The actual cost (including insurance) of the conveyance of an employee's household furniture effects and appliances up to a maximum volume of 45 cubic metres provided that a larger volume may be approved by the employer in special cases.

- (c) An allowance of \$572.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport their furniture, effects and appliances provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least \$3,429.00.
- (d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of \$184.00.
 Pets are defined as dogs, cats, birds or other domestic animals kept by the employee or the employee's dependants for the purpose of household enjoyment.
 Pets do not include domesticated livestock, native animals or equine animals.
- (2) An employee who is transferred solely at their own request or on account of misconduct must bear the whole cost of removal unless otherwise determined by the employer prior to removal.
- (3) An employee shall be reimbursed the full freight charges necessarily incurred in respect of the removal of the employee's motor vehicle. If authorised by the employer to travel to a new locality in the employee's own motor vehicle, reimbursement shall be as follows:
 - (a) Where the employee will be required to maintain a motor vehicle for use on official business at the new headquarters, reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by clause 41(2) - Motor Vehicle Allowance.
 - (b) Where the employee will not be required to maintain a motor vehicle for use on official business at the new headquarters reimbursement for the distance necessarily travelled shall be on the basis of one half (½) of the appropriate rate prescribed by subclause clause 41(3) - Motor Vehicle Allowance.
 - (c) Where an employee or their dependants have more than one vehicle, and all the vehicles are to be relocated to the new residence, the cost of transporting or driving up to two vehicles shall be deemed to be part of the removal costs.
 - (d) Where only one vehicle is to be relocated to the new residence, the employee may choose to transport a trailer, boat or caravan in lieu of the second vehicle. The employee may be required to show evidence of ownership of the trailer, boat or caravan to be transported.
 - (e) If the employee tows the caravan, trailer or boat to the new residence, the additional rate per kilometre is to be 3.5 cents per kilometre for a caravan or boat and 2.0 cents per kilometre for a trailer.
- (4) The employee shall, before removal is undertaken obtain quotes from at least two carriers which shall be submitted to the employer, who may authorise the acceptance of the more suitable: Provided that payment for a volume amount beyond 45 cubic metres shall not occur without the prior written approval of the employer.
- (5) The employer may, in lieu of conveyance, authorise payment to compensate for any loss in any case where an employee, with prior approval of the employer, disposes of their household furniture effects and appliances instead of removing them to the new headquarters: Provided that such payments shall not exceed the sum which would have been paid if the employee's household furniture effects and appliances had been removed by the cheapest method of transport available and the volume was 45 cubic metres.
- (6) Where an employee is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the employee is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of \$1,065.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.
- (7) Receipts must be produced for all sums claimed.
- (8) New appointees to the public service shall be entitled to receive the benefits of this clause if they are required by the employer to participate in any training course prior to being posted to their respective positions in the service. This entitlement shall only be available to employees who have completed their training and who incur costs when moving to their first posting.
- (9) An employer may agree to provide removal assistance greater than specified in this award and if in that event that the employee to whom the benefit is granted elects to leave the position, on a permanent basis, within twelve months, the employer may require the employee to repay the additional removal assistance on a pro rata basis. Repayment can be deducted from any monies due to the employee.
- (10) For the purposes of clause 45(9), "elects to leave the position," means the employee freely chooses to leave the position in the ordinary course of promotion, transfer or resignation and this necessitates the employer obtaining a replacement employee.

46. - TRANSFER ALLOWANCE

- (1) Subject to subclauses (2) and (5) of this clause, an employee who is transferred to a new locality in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, shall be paid at the rates prescribed in Column A, Items 4, 5 or 6 of Schedule E- Travelling, Transfer and Relieving Allowance of this Award for a period of 14 days after arrival at new headquarters within Western Australia or Column A, Items 7 and 8 of Schedule E - Travelling, Transfer and Relieving Allowance of this Award for a period of 21 days after arrival at new headquarters in another State of Australia. Provided that if an employee is required to travel on official business during the said periods, such period will be extended by the time spent in travelling. Under no circumstances, however, shall the provisions of this subclause operate concurrently with those of Clause 47- Travelling Allowance of this Award to permit an employee to be paid allowances in respect of both travelling and transfer expenses for the same period.

- (2) Prior to the payment of an allowance specified in subclause (1), the employer shall:
- (a) require the employee to certify that permanent accommodation has not been arranged or is not available from the date of transfer. In the event that permanent accommodation is to be immediately available, no allowance is payable; and
 - (b) require the employee to advise the employer that should permanent accommodation be arranged or become available within the prescribed allowance periods, the employee shall refund a pro rata amount of the allowance for that period the occupancy in permanent accommodation takes place prior to the completion of the prescribed allowance periods.
 Provided also that should an occupancy date which falls within the specified allowance periods be notified to the employer prior to the employee's transfer, the payment of a pro rata amount of the allowance should be made in lieu of the full amount.
- (3) If an employee is unable to obtain reasonable accommodation for the transfer of the employee's home within the prescribed period referred to in subclause (1) of this clause and the employer is satisfied that the employee has taken all possible steps to secure reasonable accommodation, such employee shall, after the expiration of the prescribed period to be paid in accordance with the rates prescribed by Column B, Items 4, 5, 6, 7 or 8 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award as the case may require, until such time as reasonable accommodation has been secured: Provided that the period of reimbursement under this subclause shall not exceed 77 days without approval of the employer.
- (4) When it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred by an employee on transfer, an appropriate rate of reimbursement shall be determined by the employer.
- (5) An employee who is transferred to Government owned accommodation shall not be entitled to reimbursement under this clause: Provided that -
- (a) where entry into the Government owned accommodation is delayed through circumstances beyond the employee's control an employee may, subject to the production of receipts, be reimbursed actual reasonable accommodation and meal expenses for the employee and dependants less a deduction for normal living expenses prescribed in Column A, Items 15 and 16 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award; and provided that:-
 - (b) if any costs are incurred under subclause (2) of Clause 40. - Disturbance Allowance of this Award they shall be reimbursed by the employer.

47. - TRAVELLING ALLOWANCE

An employee who travels on official business shall be reimbursed reasonable expenses on the following basis:

- (1) When a trip necessitates an overnight stay away from headquarters and the employee:
 - (a) is supplied with accommodation and meals free of charge; or
 - (b) attends a course, conference, etc., where the fee paid includes accommodation and meals; or
 - (c) travels by rail and is provided with a sleeping berth and meals; or
 - (d) is accommodated at a Government institution, hostel or similar establishment and supplied with meals; reimbursement shall be in accordance with the rates prescribed in Column A, Items 1, 2 or 3 of Schedule E - Travelling, Transfer and Relieving Allowance of this Award.
- (2) When a trip necessitates an overnight stay away from the employee's headquarters and the employee is fully responsible for the provision of accommodation, meals and incidental expenses:
 - (a) where hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items 4 to 8 of Schedule E - Travelling, Transfer and Relieving Allowance of this Award;
 - (b) where other than hotel or motel accommodation is utilised reimbursement shall be in accordance with rates prescribed in Column A, Items 9, 10 or 11 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award.
- (3) When a trip necessitates an overnight stay away from headquarters and accommodation only is provided at no charge to the employee, reimbursement shall be made in accordance with the rates prescribed in Column A, Items 1, 2 or 3 and Items 12, 13 or 14 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award subject to the employees' certification that each meal claimed was actually purchased.
- (4) To calculate reimbursement under subclauses (1) and (2) for a part of a day, the following formula shall apply-
 - (a) If departure from headquarters is:
 - before 8.00am - 100% of the daily rate.
 - 8.00am or later but prior to 1.00pm - 90% of the daily rate.

- 1.00pm or later but prior to 6.00pm - 75% of the daily rate.
6.00pm or later - 50% of the daily rate.
- (b) If arrival back at headquarters is:
8.00am or later but prior to 1.00pm - 10% of the daily rate.
1.00pm or later but prior to 6.00pm - 25% of the daily rate.
6.00pm or later but prior to 11.00pm - 50% of the daily rate.
11.00pm or later - 100% of the daily rate.
- (5) When an employee travels to a place outside a radius of 50 kilometres measured from the employee's headquarters, and the trip does not involve an overnight stay away from headquarters, reimbursement for all meals claimed shall be at the rates set out in Column A, Items 12 or 13 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award subject to the employee's certification that each meal claimed was actually purchased. Provided that when an employee departs from headquarters before 8.00am and does not arrive back at headquarters until after 11.00pm on the same day reimbursement shall be at the appropriate rate prescribed in Column A, Items 4 to 8 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award.
- (6) When it can be shown to the satisfaction of the employer by the production of receipts that reimbursement in accordance with Schedule E – Travelling, Transfer and Relieving Allowance of this Award does not cover an employee's reasonable expenses for a whole trip the employee shall be reimbursed the excess expenditure.
- (7) In addition to the rates contained in Schedule E – Travelling, Transfer and Relieving Allowance of this Award an employee shall be reimbursed reasonable incidental expenses such as train, bus and taxi fares, official telephone calls, laundry and dry cleaning expenses, on production of receipts.
- (8) If, on account of lack of suitable transport facilities, an employee necessarily engages reasonable accommodation for the night prior to commencing travelling on early morning transport the employee shall be reimbursed the actual cost of such accommodation.
- (9) Reimbursement of expenses shall not be suspended should an employee become ill whilst travelling, provided leave for the period of such illness is approved in accordance with the provisions of this Award and the employee continues to incur accommodation, meal and incidental expenses.
- (10) Reimbursement claims for travelling in excess of 14 days in one month shall not be passed for payment by a certifying employee unless the employer has endorsed the account.
- (11) An employee who is relieving at or temporarily transferred to any place within a radius of 50 kilometres measured from the employees headquarters shall not be reimbursed the cost of midday meals purchased, but an employee travelling on duty within that area which requires absence from the employees headquarters over the usual midday meal period shall be paid at the rate prescribed by Item 17 of Schedule E - Travelling, Transfer and Relieving Allowance of this Award for each meal necessarily purchased, provided that:
- (a) such travelling is not a normal feature in the performance of the employee's duties;
 - (b) such travelling is not within the suburb in which the employee resides; and
 - (c) total reimbursement under this subclause for any pay period shall not exceed the amount prescribed by Item 18 of Schedule E – Travelling, Transfer and Relieving Allowance of this Award.

48. - WEEKEND ABSENCE FROM RESIDENCE

- (1) An employee who is temporarily absent from normal headquarters on relieving duty or travelling on official business outside a radius of 320 kilometres measured from normal headquarters, and is necessarily absent from his or her residence and separated from dependants, shall be granted an additional day's leave for every group of three consecutive weekends so absent provided that each weekend shall be counted as a member of only one group. Provided that:
- (a) the relief duty or travelling on official business is within Australia and the employee is not directed to work on the weekend by the employer;
 - (b) an additional day's leave shall not be allowed if the employer has approved the employee's family accompanying the employee during the period of relief or travelling;
 - (c) additional leave under this subclause shall be commenced within one month of the period of relief duty or travelling being completed unless the employer approves otherwise;
 - (d) the annual leave loading provided by subclause (12) of Clause 22. - Annual Leave of this Award shall not apply to any leave entitlement under this clause.
- (2) An employee who is temporarily absent from normal headquarters on relieving duty or travelling on official business outside a radius of 320 and up to 400 kilometres measured from normal headquarters, may elect to have the benefit of concessions provided by subclause (3) of this clause in lieu of those provided by subclause (1). Kalgoorlie, Albany and Geraldton shall be regarded as being within a radius of 400 kilometres for the purposes of this subclause in the case of an employee resident in the metropolitan area.

- (3) An employee who is temporarily absent from normal headquarters on relieving duty or travelling on official business within a radius of 320 kilometres measured from normal headquarters, and such relief duty or travel would normally necessitate the employee being absent from the employee's residence for a weekend, shall be allowed to return to the residence for the weekend. Provided that:
- (a) an employee who is directed to work on a weekend by the employer shall not be entitled to the concessions provided by this subclause;
 - (b) all travelling to and from the employee's residence shall be undertaken outside of the hours of duty prescribed by Clause 19. - Hours of this Award;
 - (c) an employee, who has obtained the approval of the employer for the family to accompany the employee during the period of relief or travelling shall not be entitled to the concessions provided by this subclause;
 - (d) when an employee is authorised by the employer to use the employee's own motor vehicle to travel to the locality where the relief duty is being performed or when travelling on official business the employee shall be reimbursed on the basis of one half of the appropriate rate prescribed by subclause (4) of Clause 41. - Motor Vehicle Allowance of this Award, for the journey to the employee's residence for the weekend and the return to the place of relief duty. Provided that the maximum amount of reimbursement shall not exceed the cost of the rail or bus fare by public conveyance which otherwise would be utilised for such journey and payment shall be made only to the owner of such vehicle;
 - (e) when an employee has been authorised by the employer to use the employer's motor vehicle in connection with the relief duty or travelling on official business, the employee shall be allowed to use that vehicle for the purpose of returning to the employee's residence for the weekend;
 - (f) an employee who does not use a private motor vehicle or the employer's motor vehicle as provided by paragraphs (d) and (e) of this subclause, shall be reimbursed the cost of the fare by public conveyance by road or rail for the journey, to and from the employee's residence for the weekend;
 - (g) an employee who does not make use of the provisions of this subclause shall be paid travelling allowance or relieving allowance as the case may require in accordance with the provisions of Clause 47. - Travelling Allowance of this Award or Clause 44. - Relieving Allowance of this Award;
 - (h) employees who return to their residence for the weekend in accordance with the provisions of this subclause shall not be entitled to the reimbursement of any expenses allowed by Clause 44. - Relieving Allowance and Clause 47. - Travelling Allowance of this Award during the period from the time when the employee returns to the employee's other residence to the time of departing from such residence to travel to resume duty at the place away from the residence.

49. - PRESERVATION OF RIGHTS

As a result of this Award, nothing herein contained shall in itself operate so as to detrimentally alter the conditions of employment or wage that is the minimum prescribed in this Award or any benefit superior to any contained herein.

50. - KEEPING OF AND ACCESS TO EMPLOYMENT RECORDS

Employers must ensure that the keeping of employment records and access to employment records of employees is in accordance with *Industrial Relations Act 1979 (WA) Part II Division 2F Keeping of and access to employment records*. If the employer maintains a personal or other file on an employee subject to the employer's convenience, the employee shall be entitled to examine all material maintained on that file.

51. - NOTIFICATION OF CHANGE

- (1)
 - (a) Where an employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and the Association.
 - (b) For the purpose of this clause "significant effects" include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs.
Provided that where this Award or any other Award or Agreement makes provision for alteration of any of the matters referred to in this clause an alteration shall be deemed not to have significant effect.
- (2)
 - (a) The employer shall discuss with the employees affected and the Association, inter alia, the introduction of the changes referred to in subclause (1) of this clause, the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or the Association in relation to the changes.
 - (b) The discussion shall commence as early as practicable after a firm decision has been made by the employer to make the changes referred to in subclause (1) of this clause, unless by prior arrangement, the Association is represented on the body formulating recommendations for change to be considered by the employer.

- (c) For the purposes of such discussion an employer shall provide to the employees concerned and the Association all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees. Provided that any employer shall not be required to disclose confidential information, the disclosure of which would be inimical to the employer's interest.

52. - RIGHT OF ENTRY AND INSPECTION BY AUTHORISED REPRESENTATIVES

The parties shall act consistently with the terms of the Division 2 G - Right of Entry and *Inspection by Authorised Representatives* - of the *Industrial Relations Act 1979* (WA).

An authorised representative shall on notification to the employer have the right to enter any premises where relevant employees covered by this award work during working hours, including meal breaks, for the purpose of holding discussions at the premises with relevant employees covered by the award who wish to participate in those discussions, the legitimate business of the Association or for the purpose of investigating complaints concerning the application of this Award, but shall in no way unduly interfere with the work of employees.

53. - COPIES OF AWARD

Every employee shall be entitled to have access to a copy of this Award. Sufficient copies shall be made available by the employer for this purpose and shall be located in each of the employer's premises.

54. - ACCESS TO INFORMATION AND RESOURCES

- (1) The parties recognise that information technology resources have major implications for industrial and human resource functions within the workplace.
- (2) The employer recognises the need to provide appropriate information to all employees, so it is accessible in the workplace in either electronic or hard copy format.
- (3) Where the employer utilises information technology as the means of communicating to employees, the employer must ensure that where employees do not have access to technology, then alternative methods of providing this information will be used.
- (4) The information includes, but is not limited to policies and practice guidelines, human resource manuals, awards and agreements, internal agency news bulletins and updates and job opportunities.

55. - ESTABLISHMENT OF CONSULTATIVE MECHANISMS

The parties to this Award are required to establish a consultative mechanism/s and procedures appropriate to their size, structure and needs, for consultation and negotiation on matters affecting the efficiency and productivity of the Dental Health Service.

56. - DISPUTE SETTLEMENT PROCEDURE

- (1) Any questions, difficulties or disputes arising under this Award of employees bound by the award shall be dealt with in accordance with this clause.
- (2) The employee/s and the manager with whom the dispute has arisen shall discuss the matter and attempt to find a satisfactory solution, within three (3) working days.
- (3) If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant manager's supervisor and an attempt made to find a satisfactory solution, within a further three (3) working days.
- (4) If the dispute is still not resolved, it may be referred by the employee/s or Association representative to the employer or his or her nominee.
- (5) Where the dispute cannot be resolved within five (5) working days of the Association representatives' referral of the dispute to the employer or his or her nominee, either party may refer the matter to the Western Australian Industrial Relations Commission.
- (6) The period for resolving a dispute may be extended by agreement between the parties.
- (7) At all stages of the procedure the employee may be accompanied by an Association representative.

SCHEDULE A - RESPONDENT EMPLOYER

The Employer party to and bound by this Award is the North Metropolitan Health Service.

SCHEDULE B - WAGES

- (1) The weekly wage applicable to employees covered by this Award.

	Registration
Apprentice Dental Technician Year 1	365.19
Apprentice Dental Technician Year 2	478.23
Apprentice Dental Technician Year 3	652.13
Apprentice Dental Technician Year 4	765.16
Adult Apprentice Dental Technician (21 years and over) Years 1, 2 and 3	652.13
Adult Apprentice Dental Technician (21 years and over) Year 4	765.16

Registration

Dental Technician Year 1	869.50
Dental Technician Year 2	885.00
Dental Technician Year 3	901.20
Dental Technician Year 4	918.30
Dental Technician Advanced Level 1 Year 1	893.30
Dental Technician Advanced Level 1 Year 2	907.70
Dental Technician Advanced Level 1 Year 3	922.90
Dental Technician Advanced Level 1 Year 4	947.10
Dental Technician Advanced Level 2 Year 1	918.00
Dental Technician Advanced Level 2 Year 2	935.40
Dental Technician Advanced Level 2 Year 3	954.30
Dental Technician Advanced Level 2 Year 4	973.30

SCHEDULE C - MOTOR VEHICLE ALLOWANCE

Part 1 - Motor Car

Area Details

	Rate (cents) per kilometre		
	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc to 2600cc	1600cc and under
Metropolitan Area			
First 4000 kilometres	185.5	127.4	101.0
Over 4000 up to 8000 kms	80.7	58.8	48.9
Over 8000 up to 16000 kms	45.8	35.9	31.5
Over 16000 kms	50.6	38.1	32.4
South West Land Division			
First 4000 kilometres	187.4	128.6	102.2
Over 4000 up to 8000 kms	82.2	59.6	49.7
Over 8000 up to 16000 kms	47.1	36.6	32.2
Over 16000 kms	51.9	38.7	33.0
North of 23.5° South Latitude			
First 4000 kilometres	203.9	139.4	110.7
Over 4000 up to 8000 kms	89.1	64.3	53.5
Over 8000 up to 16000 kms	50.8	39.3	34.4
Over 16000 kilometres	53.9	40.4	34.5
Rest of State			
First 4000 kilometres	194.7	133.1	105.3
Over 4000 up to 8000 kms	85.2	61.6	51.1
Over 8000 up to 16000 kms	48.7	37.7	33.1
Over 16000 kilometres	52.7	39.4	33.6

Part 2 - Motor Car

Area Details

	Rate (cents) per kilometre		
	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc to 2600cc	1600cc and under
Metropolitan Area	89.5	64.5	53.2
South West Land Division	91.0	65.4	54.0
North of 23.5o South Latitude	98.6	70.6	58.3
Rest of the State	94.3	67.5	55.6

Part 3 - Motor Cycle

Rate - Cents per kilometre

31.0

Part 4 – Motor Vehicle Allowance Zone Maps





SCHEDULE D - CLAUSE 21. - OVERTIME ALLOWANCEPART 1 - OUT OF HOURS CONTACT

Standby	\$ 8.90 per hour
On Call	\$ 4.45 per hour
Availability	\$ 2.22 per hour

PART 2 - MEALS

Breakfast	\$10.80 per meal
Lunch	\$13.30 per meal
Evening Meal	\$15.95 per meal

SCHEDULE E - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE EMPLOYEES WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 44 (1)(b) (ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 46(3))	COLUMN C DAILY RATE EMPLOYEES WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 44 (1)(b) (ii))
	ALLOWANCE TO MEET INCIDENTAL EXPENSES	\$	\$	\$
(1)	WA - South of 26° South Latitude	14.55		
(2)	WA - North of 26° South Latitude	21.70		
(3)	Interstate	21.70		
	ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL	\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	305.45	152.70	101.80
(5)	Locality South of 26° South Latitude	208.55	104.30	69.50
(6)	Locality North of 26° South Latitude			
	Broome	456.70	228.35	152.25
	Carnarvon	255.15	127.55	85.05
	Dampier	366.70	183.35	122.25
	Derby	342.20	171.10	114.05
	Exmouth	292.70	146.35	97.55
	Fitzroy Crossing	370.20	185.10	123.40
	Gascoyne Junction	291.70	145.85	97.25
	Halls Creek	247.20	123.60	82.40
	Karratha	445.70	222.85	148.55
	Kununurra	331.70	165.85	110.55
	Marble Bar	271.70	135.85	90.55
	Newman	338.95	169.50	113.00
	Nullagine	256.70	128.35	85.55
	Onslow	273.30	136.65	91.10
	Pannawonica	192.70	96.35	64.25
	Paraburdoo	259.70	129.85	86.55
	Port Hedland	367.15	183.55	122.40
	Roebourne	241.70	120.85	80.55
	Shark Bay	240.20	120.10	80.05
	Tom Price	320.20	160.10	106.75
	Turkey Creek	235.70	117.85	78.55
	Wickham	508.70	254.35	169.55
	Wyndham	254.70	127.35	84.90

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE EMPLOYEES WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 44 (1)(b) (ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 46(3))	COLUMN C DAILY RATE EMPLOYEES WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 44 (1)(b) (ii))
(7)	Interstate - Capital City			
	Sydney	304.90	152.45	101.60
	Melbourne	288.55	144.30	96.15
	Other Capitals	270.10	135.05	89.95
(8)	Interstate - Other than Capital City	208.55	104.30	69.50

ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL

(9)	WA - South of 26° South Latitude	93.65		
(10)	WA - North of 26° South Latitude	128.25		
(11)	Interstate	128.25		

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE
ACCOMMODATION ONLY IS PROVIDED.

(12)	WA - South of 26° South Latitude:			
	Breakfast	16.30		
	Lunch	16.30		
	Dinner	46.50		
(13)	WA - North of 26° South Latitude			
	Breakfast	21.20		
	Lunch	33.20		
	Dinner	52.20		
(14)	Interstate			
	Breakfast	21.20		
	Lunch	33.20		
	Dinner	52.20		

DEDUCTION FOR NORMAL LIVING EXPENSES (Clause 52. Transfer Allowance)

(15)	Each Adult	26.25		
(16)	Each Child	4.50		

MIDDAY MEAL (Clause 53. Travelling Allowance)

(17)	Rate per meal	6.35		
(18)	Maximum reimbursement per pay period	31.75		

SCHEDULE F - SHIFT WORK ALLOWANCE

An employee required to work a weekday afternoon or night shift of 7.6 hours worked, will in addition to the ordinary rate of salary, be paid an allowance of \$21.93 is payable for each afternoon or night shift of 7.6 hours worked.

SCHEDULE G - NAMED UNION PARTY

The Civil Service Association of Western Australia Incorporated.

NOTICES—Award/Agreement matters—

2017 WAIRC 00010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 44 of 2016

APPLICATION FOR A NEW AGREEMENT TITLED

“ROCKINGHAM MONTESSORI SCHOOL (ENTERPRISE BARGAINING) AGREEMENT 2015”

NOTICE is given that an application has been made to the Commission by the Rockingham Montessori School, The Independent Education Union of Western Australia, Union of Employees and United Voice WA, under the *Industrial Relations Act 1979* for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

3. – PARTIES TO THE AGREEMENT

This Agreement is made between the Rockingham Montessori School (the School), The Independent Education Union of Western Australia, Union of Employees (IEUwa) and United Voice WA.

4. – SCOPE OF AGREEMENT

- (1) (a) This Agreement shall apply to teachers who are employed within the scope of the Independent Schools' Teachers' Award 1976 in Western Australia and who are members or are eligible to be members of the IEUwa.
- (b) This Agreement shall apply to all non-teaching staff who are employed within the scope of the Awards identified in Clauses 5 (b), (c), and (d) in Western Australia and who are members or are eligible to be members of the Unions party to this Agreement.

5. – RELATIONSHIP TO PARENT AWARD

- (1) This agreement shall be read and interpreted in conjunction with the following awards:
- (a) Independent Schools Teachers' Award 1976
- (b) Independent School's Administrative and Technical Officers Award 1993
- (c) Teachers' Aides (Independent Schools) Award 1998
- (d) School Employees (Independent Day & Boarding Schools) Award 1980
- (1) Where there is any inconsistency between this Agreement and the relevant Award, this Agreement will prevail to the extent of the inconsistency.

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

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2017 WAIRC 00017

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2017 WAIRC 00017
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 16 NOVEMBER 2016

SUBMISSIONS RECEIVED : FRIDAY, 25 NOVEMBER 2016
DELIVERED : THURSDAY 12 JANUARY 2017
FILE NO. : M 184 OF 2015
BETWEEN : GLENN EDWARD TRIGG

CLAIMANT

AND
 GROUP TRAINING SOUTH WEST INC

FIRST RESPONDENT

STAN LIAROS

SECOND RESPONDENT

FILE NO.	:	M 185 OF 2015	
BETWEEN	:	ADRIAN TROY BESTWICK	CLAIMANT
		AND	
		GROUP TRAINING SOUTH WEST INC	FIRST RESPONDENT
		STAN LIAROS	SECOND RESPONDENT
FILE NO.	:	M 186 OF 2015	
BETWEEN	:	GREGORY PAUL TOMLINSON	CLAIMANT
		AND	
		GROUP TRAINING SOUTH WEST INC	FIRST RESPONDENT
		STAN LIAROS	SECOND RESPONDENT

Catchwords	:	Alleged contravention of s 44 of the <i>Fair Work Act 2009</i> – Failure to make redundancy payment as required by s 119 of the <i>Fair Work Act 2009</i> – Alleged failure to pay redundancy in accordance with contract of employment – Accessorial liability.
Legislation	:	<i>Fair Work Act 2009</i>
Case(s) referred to in reasons	:	<p><i>Miller v Minister of Pensions</i> [1947] 2 All ER 372 <i>Melbourne Stadium Ltd v Sautner</i> [2015] FCAFC 20 <i>Automatic Fire Sprinklers v Watson</i> (1946) 72 CLR 435 <i>Shop Distributive and Allied Employees Association v Countdown Stores and others</i> (1983) 7 IR 273 <i>Hodgson v Amcor Ltd; Amcor Ltd v Barnes</i> (2012) 264 FLR 1 <i>Crawford v Steadmark Pty Ltd No.2</i> [2015] FCCA 2697 <i>Kavanagh v National Tertiary Education Industry Union</i> (1997) 42 AILR <i>Attwood v Wangka Maya Pilbara Aboriginal Language Centre</i> [2010] FMCA 342 <i>Phillip Martin Andersen v Umbakumba Community Council</i> [1995] IRCA 165 <i>Lee Crane Hire Pty Ltd</i> [2015] FWC 4727 <i>Maritime Union of Australia v FBIS International Protective Services Australia Pty Ltd</i> [2014] FWCFB 6737 <i>FBIS International Protective Services (Aust) Pty Ltd v Maritime Union of Australia</i> [2015] FCAFC 90 <i>York v Lucas</i> (1985) 158 CLK 661 <i>CFMEU v Director Fair Work Building Industry Inspectorate</i> [2012] 209 FCR 448 <i>Fair Work Ombudsman v Devine Marine Group Pty Ltd</i> [2014] FCA 1365</p>
Result	:	Claims proven
Representation:		
Claimants	:	Mr G. McCorry as agent.
Respondents	:	Mr D S Mare as agent.

REASONS FOR DECISION

Introduction

- 1 Mr Glenn Edward Trigg, Mr Adrian Troy Bestwick and Mr Gregory Paul Tomlinson (the claimants) are former employees of Group Training South West Inc (the first respondent).
- 2 They allege that their former employer has, in contravention of s 119 of the *Fair Work Act 2009* (FW Act), failed to pay them their redundancy entitlements.

- 3 They also allege that the first respondent's director, Mr Stan Liaros (Mr Liaros), was 'involved' in the first respondent's contravention and therefore is personally liable (see s 550 of the FW Act).
- 4 Mr Gregory Paul Tomlinson (Mr Tomlinson) separately alleges that the first respondent has contravened s 323 of the FW Act by failing to pay him his redundancy entitlements as required by the terms of his contract of employment.
- 5 The claimants seek from the first respondent, the payment of their redundancy entitlements with interest. They also ask the court to penalise the respondents for the contraventions and submit that such penalties be paid to them.
- 6 The respondents deny that the claimants' positions were made redundant. They say that the claimants were dismissed for other reasons.
- 7 Further, and in any event, the respondents contend that the claimants are, pursuant to s 121 of the FW Act, excluded from an entitlement to redundancy payments because they were employed for a continuous period of less than 12 months or alternatively they are, pursuant to s 123 of the FW Act, excluded because they were employed for a specified period of time.

Background facts

- 8 Save as otherwise indicated, the following background facts are not in dispute.
- 9 The first respondent carries on the business of supplying apprentices and trainees to businesses in southwestern Australia. Mr Liaros is the first respondent's chief executive officer.
- 10 The claimants were appointed by the first respondent as business development managers. Mr Tomlinson commenced on 22 August 2005, Mr Adrian Troy Bestwick (Mr Bestwick) on 10 March 2010 and Mr Glenn Edward Trigg (Mr Trigg) on 15 August 2011. Their core function was to obtain clients for the first respondent's business.
- 11 The first respondent's business activities were funded by money received from the Commonwealth of Australia under contracts that were usually, but not always, renegotiated triennially.
- 12 The first respondent had held Australian government contracts for 17 years leading up to 27 April 2015. However, on that date, it became aware that the Commonwealth would not be entering into a new contract with it at the expiration of its then current contract. The first respondent informed the claimants and other employees of that development the following day, 28 April 2015.
- 13 The claimants assert that during the meeting in which they were informed about the loss of the government contract, Mr Liaros, on behalf of the first respondent, informed them that without a Commonwealth contract there would be no work for them to carry out, and that with effect on 30 June 2015 the first respondent would no longer require their jobs to be done by anyone. The respondents deny that was said and point out that the first respondent was required to continue rendering services to the Commonwealth until 30 September 2015.
- 14 In any event, it is common ground that immediately upon being informed about the loss of the Commonwealth contract, the respondents and each of the claimants set about seeking to find alternate employment for the claimants.
- 15 On 18 May 2015 the claimants were offered a job by 'BUSY At Work' which was one of the providers that was to replace the first respondent in its provision of services to the Commonwealth. After having accepted that employment, the claimants informed their new employer that if 'BUSY At Work' were to be co-located with the first respondent, then they would have to reconsider their decision to accept employment with it. Subsequently 'BUSY At Work' chose not to co-locate at the first respondent's premises and the claimants continued in their employment with 'BUSY At Work'.
- 16 Mr Liaros was unhappy with what the claimants had done in that regard and was of the view that they had effectively undermined his negotiations with 'BUSY At Work' to secure approximately \$30,000 per annum income through lease agreements.
- 17 On 22 May 2015 Mr Liaros met with Mr Tomlinson and Mr Bestwick. Mr Tomlinson and Mr Bestwick testified that during the course of that meeting Mr Liaros was angry, swore at them, raised his voice, and repeatedly thumped his desk before informing them that their employment was terminated. They say that he instructed them to immediately hand back the first respondent's car keys, office keys, mobile telephone and fuel card. Thereafter he caused them to be escorted from the first respondent's premises.
- 18 Mr Liaros admits that he terminated Mr Tomlinson's and Mr Bestwick's employment but does not admit that he raised his voice at them, swore at them, or thumped his desk.
- 19 Immediately after their employment had been terminated Mr Bestwick and Mr Tomlinson telephoned Mr Trigg, who was then in Melbourne, to advise him about what had transpired. They told him that in all probability he would be facing termination upon his return to work the following Monday.
- 20 When Mr Trigg returned to work on 25 May 2015, he found Ms Stephanie Adlam (Ms Adlam), the first respondent's manager, waiting for him. She told him that his employment was terminated and she requested that he return to the first respondent its door keys, car keys, fuel card and mobile telephone. She then escorted him inside the premises so that he could clear his desk. At that time Mr Trigg asked Ms Adlam why he had been terminated and she responded by saying that it was because of the co-location issue.
- 21 Mr Liaros testified that the termination of the claimants' employment occurred because he had lost confidence in them. He felt hurt and injured by their total disregard/disrespect, not only for him and their long personal association, but also for the effort and time he had spent in brokering meetings and sourcing employment for them.

- 22 On 27 May 2015 each claimant received a letter confirming the termination of their employment. However the next day they each received an email from Mr Liaros, addressed to them jointly, stating that he was withdrawing the termination of their employment. Mr Liaros testified that he had reflected on his decision to terminate the claimants' employment and after having taken into account the fact that he had known them for a long time and that the first respondent was starting a new labour hire company, he had decided to offer them re-employment. It suffices to say that the claimants ignored Mr Liaros' email containing the offer to rescind the termination of their employment.
- 23 Thereafter the claimants attempted to commence unfair dismissal claims against the first respondent but were precluded from doing so because their claims were lodged out of time. Their application to extend time in that regard was refused.
- 24 The claimants were never paid any redundancy entitlements and consequently lodged these claims on 13 November 2015.

Issues and Facts Not in Dispute

1. The first respondent is a national systems employer, within the meaning of the FW Act.
2. The first respondent employed:
 - a. Mr Trigg from 15 August 2011 until 25 May 2015; and
 - b. Mr Bestwick from 10 March 2010 until 22 May 2015; and
 - c. Mr Tomlinson from 22 August 2005 until 22 May 2015.
3. The claimants each signed several contracts of employment and that those contracts were indicated to be for fixed terms usually, but not always, of 12 months' duration.
4. Mr Trigg's final contract was for the period 15 August 2014 to 15 August 2015.
5. Mr Bestwick's final contract was for period 30 September 2014 to 30 September 2015.
6. Mr Tomlinson's final contract was for period 22 August 2014 to 22 August 2015.
7. At termination:
 - a. Mr Trigg earned \$1,368 gross per week; and
 - b. Mr Bestwick earned \$1,368 gross per week; and
 - c. Mr Tomlinson earned \$1,482 gross per week.

Issues and Facts in Dispute

1. The date on which the claimants' employment was terminated.
2. Whether the claimants' employment was terminated by reasons of redundancy or for some other reason.
3. Whether the claimants' contracts of employment were fixed term contracts or whether they were ongoing and not limited in duration.
4. Whether, at the time each claimant entered into his first contract of employment, he was informed by Mr Liaros that their employment contract needed to be of limited duration because of the limited duration of the first respondent's contract with the Commonwealth.
5. Whether the claimants knew they were employed on the basis of a series of separate contracts for specified times.

Issues to be Determined

25 The issues to be determined in these matters are:

1. The date on which the first respondent terminated each claimant's employment;
2. Whether each claimant was terminated at the first respondent's initiative because it no longer required the claimant's job to be done by anyone or for some other reason;
3. Whether each claimant is entitled to a redundancy payment;
4. Whether Mr Tomlinson is separately entitled to a redundancy payment pursuant to the terms of his contract of employment;
5. Whether s 121 and s 123 of the FW Act operate to exclude the claimants from the operation of s 119(1) of the FW Act;
6. In the event that the claimants are found to have a redundancy entitlement under s 119(1) of the FW Act, whether the first respondent's liability is capable of being absolved or reduced by virtue of s 120 of the FW Act;
7. Whether the first respondent has contravened s 44 and/or s 323 of the FW Act; and
8. In the event that the first respondent is found to have contravened the FW Act, whether Mr Liaros was knowingly concerned in such contravention and was, for the purposes of s 550 of the FW Act, 'involved' in the contravention.

Burden of Proof and Standard of Proof

- 26 Each claimant carries the legal burden of proof for his claim whilst the respondents carry the legal burden of proving those things which they assert.
- 27 The standard of proof required to discharge the respective burdens of proof is the balance of probabilities. This standard was explained by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 as follows:
- That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not [374].*
- 28 Accordingly, where in these reasons I say that 'I am satisfied' of a fact or matter or otherwise make a finding as to a fact or matter, I am saying 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

Determination of Issues

Termination

- 29 The claimants allege that on 28 April 2015 Mr Liaros informed them that the first respondent had been unsuccessful in obtaining a new Commonwealth contract and that they would not have jobs as of 30 June 2015.
- 30 Mr Liaros denies that he told the claimants their jobs would end on 30 June 2015 and that was because the first respondent had ongoing obligations to the Commonwealth until 30 September 2015. Ms Adlam, who was in attendance at the meeting held on 28 April 2015, supports Mr Liaros' version of events.
- 31 In resolving that issue I accept the claimants' evidence that they were told that their jobs were to cease on 30 June 2015. Each claimant gave credible evidence on the issue. They stood firm when challenged asserting an accurate recollection of what they were told. They stridently rejected the respondents' version of events. In the end result they, in each instance, impressed as witnesses of truth and I believe them. Their evidence is consistent with their subsequent actions and that of Mr Liaros in immediately attempting to find alternate employment. In light of that, it is clear that any ongoing commitment that the first respondent had to the Commonwealth did not include the claimants.
- 32 I am satisfied that on 28 April 2015 the first respondent gave each claimant notice of termination of employment. Such notice was in each case accepted. I am further satisfied that the claimants' employment was terminated because the first respondent did not have work for them beyond 30 June 2015. In the circumstances, I find that each claimant was the subject of a genuine redundancy (see s 389(1)(a) of the FW Act).
- 33 During the period of notices of termination for reasons previously indicated Mr Liaros, on behalf of the first respondent, purported to dismiss the claimants. When that occurred the first respondent paid out the claimants' period of notice. Mr Liaros' subsequent attempt to rescind the dismissals was unsuccessful.
- 34 The respondents deny that the claimants were dismissed on 28 April 2015. Rather they contend that the dismissal of Mr Bestwick and Mr Tomlinson occurred on 22 May 2015 and that of Mr Trigg on 25 May 2015. They say that the dismissals in May 2015 occurred for reasons other than redundancy and therefore do not attract the operation of s 119 of the FW Act.
- 35 In determining the issue of when termination of employment occurred I observe that a contract of employment cannot be terminated twice (see *Melbourne Stadium Ltd v Sautner* [2015] FCAFC 20 [112]). Having given the claimants notice of termination of employment on 28 April 2015 the first respondent made an irrevocable decision that the claimants' employment would end on 30 June 2015. It could not thereafter again terminate their employment. All it could do was to bring the employment relationship to an end.
- 36 It is important to recognise the distinction between the termination of a contract of employment and the ending of an employment relationship. Latham CJ in *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435 said:
- An employer terminates the employment of a servant when he dismisses him, though, as I say hereafter such dismissal does not put an end to the contract between the parties [454].*
- 37 The bringing to an end of an employment relationship is different to the bringing to an end to the contract of employment. The acts of Mr Liaros on behalf of the first respondent in May 2015, by which he purported to terminate the claimants' employment only, had the effect of severing the employment relationship which had continued beyond the termination of the claimants' employment that had occurred in April 2015. The termination by the first respondent of the employment relationships during the period of notice did not operate to bring to an end the employment contracts themselves. By making payment to the claimants of the balance of their notice periods, the first respondent waived performance by the claimants of any obligations to perform work during the balance of that period. The purported dismissals of the claimants in May 2015 did not affect the validity and consequences of the terminations that had already occurred on 28 April 2015.
- 38 It follows from what I have said that I find that the claimants' employment was terminated on 28 April 2015 for reason of genuine redundancy and not in the course of the ordinary and customary turnover of labour. This is not a situation where the claimants were employed on terms which contemplate intermittency in employment (see *Shop Distributive and Allied Employees Association v Countdown Stores and others* (1983) 7 IR 273 [277] per Fisher J). The terminations occurred at the first respondent's initiative because the first respondent no longer required the job done by the claimants to be done by anyone (see *Hodgson v Amcor Ltd; Amcor Ltd v Barnes* (2012) 264 FLR 1 [371]). The claimants therefore are, subject to s 120, s 121 and s 123 of the FW Act, entitled to a redundancy payment in accordance with s 119 of the FW Act.

Was the First Respondent Obligated to Make Redundancy Payments?

- 39 Whether the claimants have an entitlement to a redundancy payment pursuant to s 119 of the FW Act is subject to s 121 and s 123 of the FW Act.
- 40 Section 121 of the FW Act provides various exclusions from the obligation to make the redundancy payments otherwise required by s 119 of the FW Act. I observe that the exclusions set out in s 121(1)(b), s 121(2) and s 121(3) of the FW Act do not have application in these matters. The respondents do however rely on the exclusion contained in s 121(1)(a) of the FW Act which provides:

Exclusions from obligation to pay redundancy pay

- (1) *Section 119 does not apply to the termination of an employee's employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):*
- (a) *the employee's period of continuous service with the employer is less than 12 months;*

- 41 As I understand it the respondents submit that at termination each claimant had not performed 12 months of continuous service because, although they had in each instance worked for the first respondent for more than 12 months, each previous period of their employment leading up to their respective last contract were separate periods of employment and therefore did not constitute one continuum. For reasons which I will give later, I reject such contention and find that their employment was continuous service within the meaning of s 22 of the FW Act.
- 42 The respondents also rely on s 123(1)(a) of the FW Act to resist the claims. Section 123(1)(a) provides:

Limits on scope of this Division

Employees not covered by this Division

- (1) *This Division does not apply to any of the following employees:*
- (a) *an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;*

- 43 The respondents contend that the first respondent was not obliged to make redundancy payments because each claimant was employed on a fixed term contract for the duration of a specified period of time and also because their contract of employment was subject to the continuation of an existing contract between the first respondent and the Commonwealth.

Was Each Claimant's Employment Continuous?

- 44 When the claimants' employment was terminated their written contract of employment indicated that their employment was for a 12 month period commencing and ending in August for Mr Trigg and Mr Tomlinson and commencing and ending in September for Mr Bestwick. Each contract does not contain an express provision stating that the claimant's employment or continued employment was subject to the first respondent successfully retaining its Commonwealth contract.
- 45 Notwithstanding that, cl 3(a) of each contract states 'Schedule 2- Job Title and Salary and Allowances shall be reviewed annually'. Schedule 2 entitled Job Title Wages and Allowances sets out inter alia each claimant's gross annual salary, annual leave, annual leave loading, long service leave and superannuation entitlements. It also makes provision for the supply of a motor vehicle and mobile telephone. In paragraph 4 it states that the claimant's 'classification and wage' will be reviewed in each July dependent on the following factors:
1. Government funding arrangements;
 2. Financial predictions for each reporting year budget;
 3. Assessment of the claimant's performance during the term of the staff employment contract; and
 4. The viability of the current project or program.
- 46 The respondents suggest that paragraph 4 of Schedule 2 of the contract of employment makes it clear that each claimant's continued employment was subject to the first respondent successfully retaining its Commonwealth contract.
- 47 The respondents say that notwithstanding Schedule 2 the conditional nature of the claimants' employment was made well known to them when they each commenced. Mr Liaros asserts that upon commencement he clearly explained to each of them that their contract of employment was to be of limited duration because of the inherent uncertainty surrounding the continuation of the Government contract. Given the significance of that, it begs the question as to why such a term was not clearly expressed in each claimant's substantive written contract of employment.
- 48 The claimants deny that Mr Liaros informed them at commencement that because of the inherent uncertainty surrounding the continuation of the Government contract their employment was to be of limited duration. The claimants gave credible and acceptable evidence about the issue and I generally prefer their evidence to that of Mr Liaros. Mr Trigg and Mr Tomlinson were particularly impressive. Given the importance of the moment for him Mr Tomlinson specifically recalls his first conversation with Mr Liaros. He positively asserts that Mr Liaros did not state what he alleges. Similarly, Mr Trigg appears to have a clear recollection of the circumstances of his appointment. He likewise denies such statement. Mr Liaros' evidence concerning what he told the claimants is in each instance nothing more than a bare assertion lacking in particularity. In the circumstances I cannot be satisfied that Mr Liaros made the statements that he asserts.
- 49 The respondents contend that it was expressly agreed that the claimants' contract of employment would commence and end on a specified date. They say that it follows that the duration of the claimants' contracts of employment were, as they were aware, for a specified period of time, as had been agreed.

- 50 The respondents rely on *Crawford v Steadmark Pty Ltd No.2* [2015] FCCA 2697 in which the Federal Circuit Court of Australia said in addressing the question of whether an employee was employed on a contract for a specific period of time:
- The applicant did not deny signing the contract and doing so without duress or coercion. By the terms of the contract the parties jointly signed, they created a particular set of legal rights and responsibilities. One of those was that the legal relationship would cease on 25 May 2014. There is no evidence that there was a commonly shared objective view held by the applicant and the respondent that the contract meant something else than what it stated [78].*
- The applicant's case appeared to be predicated on the proposition that there was a contractual, or other obligation, to renew (or rollover) the contract. No such obligation was established [79].*
- 51 In *Crawford* O'Sullivan J referred to the decision of *Attwood v Wangka Maya Pilbara Aboriginal Language Centre* [2010] FMCA 342 in which Lucev FM reviewed relevant authorities with respect to the issue of whether the applicant had been employed for a specified period. After having reviewed those authorities his Honour concluded that whether or not a contract which is indicated to be for a specific period is in fact for a specified period will be dependent upon its contextual factual circumstances.
- 52 The facts in *Attwood* indicated that the contract was for a specified period. In that regard his Honour observed that:
99. *Ms Haintz's evidence makes it manifest that this was not a contract automatically rolled over or continued as a formality, but one (as with others at Wangka Maya) which had to be assessed on 30 June each year from a funding perspective in order to determine whether it would continue or not.*
100. *The 2007 Employment Agreement also provided that it was renewable, at its conclusion, "dependant on funding and performance". The evidence here shows that performance was reviewed, and that a decision to make an offer which concluded in the 2007 Employment Agreement was a consequence of that review, as reflected in the Staff Appraisal Form.*
101. *The position with respect to review of funding and performance outlined immediately above means that Ms Attwood's contract and employment circumstances were manifestly different to those in D'Lima and Kavanagh, and those cases are therefore distinguishable on their facts. Those cases are further distinguishable by reason of the fact that in Ms Attwood's case the three employment agreements or contracts of employment related to two different positions, and of the two contracts for the Link Up co-ordinator's position the first was not a fixed term contract because it was subject to termination without cause at the conclusion of the three month probationary period.*
- 53 One of the authorities that his Honour referred to in *Attwood* was *Kavanagh v National Tertiary Education Industry Union* (1997) 42 AILR 3 – 574. In that matter the applicant's employment of 17 years was governed by a series of fixed term contracts each consistent with an understanding that renewal of the contract would be automatic and a mere formality. In those circumstances it was found that there was, in substance, a continuing employment relationship and the contract was not for a specified period.
- 54 In these matters each claimant's written employment agreement did not state that whether the contract was renewable at its conclusion was dependant on the first respondent's ability to retain the Commonwealth contract. It is the case however that Schedule 2 to each claimant's contract provided that their 'classification and wage' was to be reviewed in July each year. Such review was subject to various factors including government funding. I observe that such provision does not relate to the continuation of employment but rather remuneration. Further there is no evidence which suggests that there was an annual assessment of the funding situation prior to each new contract being entered into. Rather, the contracts were automatically rolled over or otherwise continued as a formality. In those circumstances the facts in these matters are more in keeping with *Kavanagh* than *Attwood*.
- 55 To support their contention that the contracts entered into by the claimants were for a fixed term, the respondents rely on cl 3(a) of each claimant's final contract read in conjunction with the schedules thereto. In each case cl 3(a) of the contract of employment provided:
- 3. TERM**
- (a) *The duration of this Agreement shall relate to the contract of employment of the employee mentioned in Schedule 1 "Parties" of this agreement. The term of this Agreement shall be 1 year and will expire on Schedule 2 – Job Title and Salary and Allowances shall be reviewed annually.*
- 56 The words 'shall relate to the contract of employment' in cl 3(a) of the contract of employment makes it clear that the agreement is distinct from the contract of employment to which it relates. The former expression relates to the period during which the terms of the agreement will apply, whilst the latter denotes the relationship which applies. Perhaps most importantly the final sentence is inconsistent with the employment relationship itself, subsisting only for the period of a year.
- 57 The conclusion that the employment relationships did not end on the expiry date of the contract is also evidenced by the fact that each subsequent year's contract of employment was not usually signed on the day of commencement, but rather much later. It is the case that the claimants continued to work for the first respondent in the period between the expiration of the contract and the new contract being signed which was sometimes several months. There was no break or interruption to their employment as would be expected in the event of separate and distinct engagements.
- 58 Further, the other terms of the written contract in each instance are inconsistent with the employment being of only one year's duration.

59 For example, cl 5.1(c) of the contract provides for periods of notice, depending upon the number of years of service, which would be redundant if the employment came to an end at the conclusion of the one-year term. Similarly, cl 7.1(c) of the contract requires annual leave to be taken within one year of it falling due and cl 7.4 of the contract provides for long service leave. Clause 14 of the contract provides for redundancy payments dependant on the number of years of service. Further the first sentence of Schedule 2 to the contract appears to be internally inconsistent in that cl 4 of the contract makes it clear that classifications and wages are to be reviewed annually, which would be wholly otiose if the employment was to last only one year.

Were the claimants employed for a specified period or season?

60 In order for s 123 of the FW Act to operate with respect to the claimants it will be necessary to find that in each case that the claimant was employed for a specified period of time, for a specified task, or for the duration of a specified season.

61 The Industrial Court of Australia considered the meaning of the expression 'employed for a specified period of time' in *Phillip Martin Andersen v Umbakumba Community Council* [1995] IRCA 165, von Doussa J said:

In the expression, "specified" is the past participle of the verb "to specify". The ordinary meaning in the English language of "to specify" is to mention, speak of, or name (something) definitely or explicitly; to set down or state categorically or particularly; to relate in detail: Shorter Oxford English Dictionary, 3rd Edition. In the context of Art. 2, para. 2(a) of the Termination of Employment Convention "specified" identifies a period of time or a task the scope and parameters of which are stated definitely. A "specified period of time" is a period of time that has certainty about it.

A contract of employment for a specified period of time would be one where the time of commencement and the time of completion are unambiguously identified by a term of the contract, either by the contract stating definite dates, or by stating the time or criterion by which one or other end of the period of time is fixed, and by stating the duration of the contract of employment. As the period of time is defined in this way, it is apt to refer to a contract of employment for a specified period of time as a contract of employment for a fixed term, although this is not the description used in the Regulation.

A contract of employment to run throughout a nominated number of days, weeks, or years would be a contract of employment for a specified period of time. If the terms of the contract of employment, instead of identifying in this manner the period of time during which it is to run, provides that it is to run until some future event, the timing of the happening of which is uncertain when the contract is made, the contract will be for an indeterminate period of time.

62 At the end of his judgment his Honour said:

Since preparing these reasons, I have read the decision of Northrop J in another matter in the Darwin Registry, Cooper v Darwin Rugby League Inc (unreported, Industrial Relations Court, 20 September 1994). His Honour there concluded that a contract of employment to run for 3 years but subject to the right of either party to terminate the contract on giving one months notice was not a contract of employment for a specified period of time within the meaning of reg 30B(1)(a).

63 The decisions of von Doussa and Northrop JJ are authority for the proposition that a contract terminable on notice is not a contract of employment for a specified period of time. In that regard the respondents submit that the applicability of the decision of von Doussa J in *Andersen* is drawn into question by what was said at paragraph 1532 of the explanatory memorandum for the Fair Work Bill 2009 which states:

...paragraph 386(2)(a) reflects the common law position that termination in these circumstances would not be a dismissal. The fact that an employment contract may allow for earlier termination would not alter the application of this provision as the employment has terminated at the end of the period, task or season. However, if a person engaged on this sort of contract is terminated prior to the end time specified in the contract, they may seek an unfair dismissal remedy if they satisfy the other requirements.

64 Relevantly, s 386 of the FW Act provides:

386 Meaning of dismissed

(1) A person has been dismissed if:

- (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
- (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

(2) However, a person has not been dismissed if:

- (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
- (b) the person was an employee:
 - (i) to whom a training arrangement applied; and
 - (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

and the employment has terminated at the end of the training arrangement; or

- (c) *the person was demoted in employment but:*
- (i) *the demotion does not involve a significant reduction in his or her remuneration or duties; and*
- (ii) *he or she remains employed with the employer that effected the demotion.*
- (3) *Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.*

65 I observe, however that what paragraph 1532 of the explanatory memorandum attributes to s 386(2)(a) of the FW Act is not consistent with what it says. The language of s 386(2)(a) of the FW Act is unambiguous and it is unnecessary to resort to extrinsic material such as the explanatory memorandum. The introduction of s 386(2)(a) of the FW Act has not affected what was said in *Andersen*. No valid reason has been advanced as to why *Andersen* should not be followed.

66 Whether or not a contract of employment is for a specified period of time is a mixed question of fact and law which can only be determined having regard to its particular factual circumstance. The written contract of employment, as alleged by the respondents, were not contracts for a specified period of time, a specified task, or for the duration of a specified season. The claimants' employment was, in each instance, open ended and was not subject to parameters conclusively set. Even if it could be said that the contracts were to run until a future event, that is until such time as the first respondent's contract with the Commonwealth ended, then it remains the case that the timing of the happening of such event, which was uncertain at the time the contract was made, rendered the contract, because of uncertainty, to be one for an indeterminate period of time.

67 Further and in any event, the contracts that the claimants entered into were not for a specified period of time because the employer-employee relationships they governed were terminable on notice (see cl 5.1(c) of the contract).

68 I conclude that s 123(1) of the FW Act does not assist the respondents in resisting the claims.

Conclusion

69 I find that the first respondent failed to pay each claimant a redundancy entitlement. Such payment was required s 119 of the FW Act. The first respondent's failure in that regard constitutes a breach of a National Employment Standard and is in contravention of s 44 of the FW Act.

Section 120 of the FW Act

70 In their statement of defence at paragraph 7.2, the respondents plead:

...should the Court find that the Claimant was entitled to any redundancy pay, then the Respondents state that the Respondents obtained acceptable alternative employment for the Claimant and as a result thereof, the Claimant is not entitled to redundancy payment. The Respondents would then apply that the matter be postponed pending the Respondents' application to the Fair Work Commission in terms of section 120 of the Fair Work Act.

71 Section 120 of the FW Act provides:

Variation of redundancy pay for other employment or incapacity to pay

- (1) *This section applies if:*
- (a) *an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and*
- (b) *the employer:*
- (i) *obtains other acceptable employment for the employee; or*
- (ii) *cannot pay the amount.*
- (2) *On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.*
- (3) *The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.*

72 The precondition required for the application of s 120 of the FW Act is the existence of a liability to make a redundancy payment. In *Lee Crane Hire Pty Ltd* [2015] FWC 4727 Commissioner Spencer held:

...that an entitlement to redundancy pay must exist, in order for the Commission to consider varying that redundancy pay entitlement. Where there is no entitlement under s 119 there can be no order to reduce the "entitlement" pursuant to s 120 [27].

73 Given my finding that each claimant has, pursuant to s 119 of the FW Act an entitlement to a redundancy payment, it will be incumbent that the respondents demonstrate that the first respondent is likely to succeed with respect to an application made pursuant to s 120(1)(b)(i) of the FW Act.

74 The respondents assert that they 'obtained' acceptable employment for the claimants. In that regard they suggest that the uncontested evidence of Mr Warren Cluff, chief operations officer of the first respondent, and Ms Adlam, indicate the lengths to which the respondents went in order to obtain alternate employment for the claimants. They particularly rely on Ms Adlam evidence in that regard. Ms Adlam testified that on 6 May 2015 she attended a meeting held between Mr Liaros and Mr Rod McShannon (Mr McShannon), senior manager of 'BUSY At Work'. At that meeting, Mr Liaros discussed in detail the claimants' salary conditions (12% superannuation, 5 weeks of annual leave and 17% leave loading). She said that Mr Liaros requested Mr McShannon to make an offer to him to secure all three claimants as employees. Mr McShannon expressed his reservations with regard to employing all three claimants as a team and felt that their conditions of employment were too generous. Notwithstanding that they were able to convince Mr McShannon to take the claimants

on as a team given that they had built a strong relationship with employers in the south west region. Mr McShannon was also informed that the first respondent's 'market share and high KPI's' were as a result of the expertise of the claimants.

- 75 The claimants say that it was their own endeavours rather than that of the respondents that led to 'BUSY At Work' employing them. They say that rather than assisting them in their endeavours to find alternate acceptable employment, that the respondents worked against their interests by disclosing to prospective employers including 'BUSY At Work' their then current terms and conditions of employment.
- 76 The question to be determined is whether, on the available evidence, it is possible to conclude that the respondents obtained acceptable employment for the claimants. The meaning of 'obtain' was discussed by the Full Bench of the Australian Industrial Relations Commission in *Australian Clothing Trades Award 1982(1)* (1990) 140 IR 123 in which it said:

...the intention is not to impose an absolute test on the employer's ability to "obtain" alternative employment but rather it refers to action which causes acceptable alternative employment to become available to the redundant employee. The employer must be a strong, moving force towards the creation of the available opportunity (128).

- 77 In *Maritime Union of Australia v FBIS International Protective Services Australia Pty Ltd* [2014] FWCFB 6737 the Full Bench of the Fair Work Commission made it clear:

...the limited actions of the Respondent, which did no more than establish contact between its employees and ACG, with the effect that employees were able to participate in the recruitment processes of ACG falls well short of action which "causes acceptable alternative employment to become available to the redundant employee" and the Respondent was not a "strong, moving force towards the creation of the available opportunity" [54].

- 78 The Full Court of the Federal Court of Australia went further when it said in *FBIS International Protective Services (Aust) Pty Ltd v Maritime Union of Australia* [2015] FCAFC 90 [22] that an employer must show that it 'procured' the offers of employment and that it is not sufficient to just facilitate the opportunity for the employees to apply for employment.

- 79 In the Shorter Oxford English Dictionary 'procure' is defined to mean:

*... to bring about, cause, effect, produce; and
... to prevail upon, induce and persuade (a person) to do something.*

- 80 The evidence of the claimants on the issue is consistent. They assert that their own endeavours and negotiations resulted in them securing alternative acceptable employment. They say that the respondents had little to do with their gaining alternate employment. The claimant's evidence, which is accepted, indicates that they undertook various initiatives and met with prospective employers including 'BUSY At Work' in order to secure alternate acceptable employment.
- 81 Although the respondents contend that it was the joint efforts of Ms Adlam and Mr Liaros that 'convinced' 'BUSY At Work' to offer the claimants employment, there is little or no evidence to support that. No one from 'BUSY At Work' was called to give evidence as to why it employed the claimants. The respondents could have called a representative of 'BUSY At Work' to testify about the issue, but did not do so. In the circumstances, 'BUSY At Work's' reasons for employing the claimants is unknown. The respondents' impressions and conclusions as to why 'BUSY At Work' employed the claimants are nothing more than self-serving conjecture.
- 82 The respondents' contentions that it obtained acceptable employment are not maintainable. It follows that the claims should not be adjourned in order to facilitate the respondents making an s 120 of the FW Act application.

Mr Tomlinson's Claim Under Section 323 of the FW Act

- 83 Clause 14 of Mr Tomlinson's written contract of employment stated that he was entitled to a redundancy payment of three weeks' wages per year of service.

- 84 Section 323 of the FW Act provides that:

(1) *An employer must pay an employee amounts payable to the employee in relation to the performance of work:*
 (a) *in full (except as provided by section 324); and*
 (b) *in money by one, or a combination, of the methods referred to in subsection (2); and*
 (c) *at least monthly.*

- 85 On termination Mr Tomlinson had completed more than nine years, but less than 10 years, of continuous employment with the first respondent. Consequently, he was in accordance with cl 14 of his contract entitled to a redundancy payment of three weeks' wages for each year of service, totalling 27 weeks' redundancy pay. That was payable before the end of July 2015.

- 86 The Industrial Magistrates Court has jurisdiction to order payment of Mr Tomlinson's contractual redundancy amount if it is satisfied that s 323 of the FW Act has been contravened because:

(a) it is an amount required to be paid in full and no later than one month after becoming due (s 323(1) of the FW Act); and
 (b) the section is a civil remedy provision.

- 87 I am satisfied that the redundancy payment due to Mr Tomlinson, pursuant to cl 14 of his contract of employment, should have been paid in full by the end of July 2015, but was not paid. It follows there has been a contravention of s 323 of the FW Act.

Accessorial Liability

- 88 The claimants assert that Mr Liaros was 'involved' in the first respondent's contravention of s 44 and s 323 of the FW Act because he was 'knowingly concerned' in the first respondent's admitted failure to pay the claimants their redundancy entitlements and accordingly is, pursuant to s 550 of the FW Act, taken to have contravened s 44 and s 323 of the FW Act.
- 89 Mr Liaros submits that in order for the court to find that he was an accessory the claimants must prove the following:
1. that he knew that his actions on 28 April 2015 constituted a dismissal for the purposes of s 119(1)(a) of the FW Act;
 2. that he knew the claimants were employed on 'outer limit contracts', that is, that the contracts contained 'no fault' notice periods; and
 3. that he knew that in the calculation of each claimant's period of employment that their employment was continuous.
- 90 To be an accessory, Mr Liaros had to have actual knowledge of the essential elements constituting the contraventions (see *York v Lucas* (1985) 158 CLK 661). He submits that neither he nor the first respondent intentionally participated in the contravention of the FW Act.
- 91 In *CFMEU v Director Fair Work Building Industry Inspectorate* (2012) 209 FCR 448 the Federal Court said:
- The relevant principle to be derived from Giogianni; Yorke v Lucas... is that the putative accessory must intentionally participate in the contravention and to form the requisite intent he must have knowledge of the essential matters which go to make up the contravention, whether or not he knows that those matters amount to a contravention [38].*
- 92 With respect to this issue the evidentiary material before me permits the following findings:
1. Mr Liaros is the chief executive officer of the first respondent (see paragraph 10 of the statement of defence and paragraph 2 of Mr Liaros' witness statement dated 4 November 2016).
 2. Mr Liaros made the decision to terminate the claimants' employment (see claimants' witness statements, paragraphs 6 – 10 in each instance).
 3. Mr Liaros knew, given that the contracts of employment were rolled over without formality that, in substance, the claimants' contract of employment constituted a continuing employment relationship and not for a specified period. The ongoing nature of employment was manifest from the provisions of contracts, including that it contained a no fault notice period.
 4. Mr Liaros knew, given the length of each claimant's employment and the informality of the roll-over of each contract of employment that their employment was in actuality continuous notwithstanding the notional commencement and end dates of their contracts of employment.
 5. Mr Liaros made the decision to terminate the claimants' employment because the first respondent had not been successful in obtaining an ongoing contract with the Commonwealth (see Mr Liaros' witness statement at paragraph 5.1 in conjunction with the claimant's witness statements at paragraphs 7 – 10).
 6. Mr Liaros told the claimants that the lack of funding was the reason for the termination of their employment (see claimants witness statements at paragraph 7).
 7. Mr Liaros knew that a redundancy situation arose if the first respondent no longer required the claimants' positions (see annexure SL14 to Mr Liaros' witness statement dated 4 November 2016).
 8. Mr Liaros knew that the claimants were entitled to redundancy payments if they were made redundant (see annexure SL14 of Mr Liaros' witness statement dated 4 November 2016).
 9. Mr Liaros made the decision not to pay the claimants redundancy payments (see annexure SL16 and SL14 of Mr Liaros' witness statement dated 4 November 2016).
- 93 To be knowingly concerned in the contravention, Mr Liaros must have engaged in conduct which implicates or involves him in the contravention so that there is a practical connection between the person and the contravention (per White J in *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 [178]).
- 94 I am satisfied for the reasons stated above that Mr Liaros knew that the first respondent was obliged to make the redundancy payments to the claimants but decided on behalf of the first respondent not to make such payments. Mr Liaros had the actual knowledge of the essential elements constituting the contraventions. He was knowingly concerned and therefore involved in the contraventions.
- 95 I find that Mr Liaros was engaged in conduct which resulted in the contravention of s 44 and s 323 of the FW Act and is therefore taken by s 550 of the FW Act to have contravened the FW Act.

Orders

- 96 I will now hear the parties as to the orders to be made.

G. CICCHINI

INDUSTRIAL MAGISTRATE

2017 WAIRC 00016

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2017 WAIRC 00016
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 21 DECEMBER 2016
DELIVERED : THURSDAY, 12 JANUARY 2017
FILE NO. : M 117 OF 2015
BETWEEN : MARTIN VENIER

CLAIMANT

AND

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

RESPONDENT

Catchwords : Application to dismiss claim following the determination of a preliminary issue - Whether any real issue remains to be tried.

Legislation : Industrial Magistrates Courts (General Jurisdiction) Regulations 2005
Fair Work Act 2009
Long Service Leave Act 1958
Corporations Act 2001

Result : Claim dismissed

Representation:

Claimant : Ms J. Knoth instructed by MDC Legal for the claimant.
Respondent : Mr A. K. Sharpe instructed by K & L Gates for the respondent.

REASONS FOR DECISION

- 1 On 11 August 2015 the claimant commenced this proceeding in which he claims that the respondent has, by failing to pay him \$81,086.74 for 23.01 weeks long service leave accrued pursuant to s 8 of the *Long Service Act 1958* (LSL Act), contravened s 44 of the *Fair Work Act 2009* (FW Act). He asserts that he has completed 26.64 years of service with 'Baker Hughes'.
- 2 On 31 August 2015 the respondent lodged its response denying the claim. It contends that the claimant is not entitled to what he seeks because he has failed to meet the qualifying criteria for long service leave. It says that it employed the claimant for less than the seven years required to enliven such entitlement.
- 3 On 7 January 2016 the following consent order was made:

The Court determine the following preliminary issue, in accordance with Regulation 7(1) of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA):

"Is the applicant'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 calculation long service leave entitlements under section 8(1) of the Long Service Leave Act 1958."
- 4 On 16 March 2016 I conducted a hearing in respect of the preliminary issue and on 13 April 2016, delivered my reasons for concluding that the answer to the preliminary question was 'yes'.
- 5 The respondent appealed the decision to the Full Bench of the Western Australia Industrial Relations Commission (Full Bench) on 26 April 2016. The appeal was heard on 7 June 2016. Written submissions were provided to the Full Bench on 8 July 2016 and 12 August 2016.
- 6 On 26 October 2016 the Full Bench delivered its reasons (Full Bench Decision) for upholding the appeal. It remitted the matter to me for further hearing and determination according to law.
- 7 On 14 December 2016 the respondent applied to dismiss the claim. The respondent's application is made pursuant to regulation 7(1)(j) of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (the IMC(GJ) Regulations) which provides:
 7. ***Court's powers to control and manage cases***
 - (1) *A Court may do all or any of the following for the purposes of controlling and managing cases and trials*

...

(j) *give judgment against a claim after a decision is made on a separate trial of a preliminary issue;*

...

8 The application is opposed.

Determination

9 In the Full Bench Decision Smith AP, with whom Scott CC agreed, said:

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'*

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.*

11 It is clear that the majority of the Full Bench concluded that in answering the preliminary question posed, I should have answered 'no' instead of 'yes'.

12 Having considered that issue, the majority of the Full Bench went on to consider the question of 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.

13 In that regard, the majority of the Full Bench said:

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.*

14 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 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 the acts of the parent company. 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 the second company, the second company did so as agent of the former employer. Whether or not such a relationship of agency can be found to exist depends upon the facts of each particular case.

15 In this matter it is not suggested that the claimant was moved in his employment between subsidiaries in Australia in order to avoid payment of long service leave. Rather, the pleadings indicate that the claimant's work history was that he worked in the United Kingdom from 1988 until 2005 at which time he relocated to China where he worked until 2008. He then commenced employment with the respondent in Australia on 30 July 2008.

16 Those pleaded facts do not provide any basis for the lifting of the corporate veil.

17 I observe, however, that even if the pleaded facts permitted the consideration of the lifting of the corporate veil, that the proper respondent would not be the named respondent, but rather Baker Hughes Incorporated.

18 The claimant resists the application on the basis that s 8(1) of the LSL Act requires a factual enquiry in deciding the issue of whether or not the corporate relationships described by s 50 of the *Corporations Act 2001* are in the abstract, descriptions of circumstances in which multiple entities are 'one and the same'. It is suggested that the factual enquiry required by s 8(1) of the LSL Act must be undertaken once the evidence is known and, in this case, there was not sufficient 'known as a result of pleadings to complete the enquiry'. In that regard, the claimant relies heavily on what was said by Matthews C in the Full Bench Decision.

19 I am of the view that the learned Commissioner's observances are of little assistance to the claimant because the parties agreed that the resolution of the preliminary question would be determinative with respect to the issue of whether the claimant qualified for long service leave (see transcript 16 March 2016 per Mr Sharpe at page 3 and Mr Cox at page 4).

20 In the end result, the issue was determined by the Full Bench.

21 The claimant's claim is based on his contention that he worked with the respondent and its related bodies corporate for a combined term of more than seven years. Section 8(1) of the LSL Act read with s 8(3) of the LSL Act establishes that an employee is entitled to long service leave for continuous employment with one and the same employer of at least seven years.

22 The parties agree that the claimant commenced employment with the respondent on 30 July 2008 and that his employment was terminated on 16 July 2015, which was a period of less than seven years. Therefore, unless the claimant succeeded on the preliminary issue, he would not be entitled to any long service leave under s 8 of the LSL Act and his claim cannot succeed.

23 Given that the Full Bench has determined the preliminary issue against the claimant, he cannot possibly succeed in his claim because his pleadings do not disclose any alternate cause of action.

- 24 The resolution of the preliminary issue has effectively undermined his claim.
- 25 Relevantly, reg 5 of the IMC(GJ) Regulations provides:
5. *Court's duties in dealing with cases*
 - (1) *A Court is to ensure that cases are dealt with justly.*
 - (2) *Ensuring that cases are dealt with justly includes ensuring –*
 - (a) *that cases are dealt with efficiently, economically and expeditiously;*
 - (b) *so far as is practicable, that the parties are on an equal footing; and*
 - (c) *that a Court's judicial and administrative resources are used as efficiently as possible.*
- 26 The respondent submits that the resolution of the difficult legal question posed and determined as a preliminary issue leaves the claimant without a cause of action and that this court's judicial and administrative resources would be wasted if the claim were allowed to proceed further. I agree with that submission.
- 27 It follows that in order to give effect to reg 5 of the IMC(GJ) Regulations the claim should be dismissed.

G. CICCHINI

INDUSTRIAL MAGISTRATE

PRISONS ACT 1981—APPEAL—Matters pertaining to—

2016 WAIRC 00971

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 23 MARCH 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MR AMARIJT HANSRA

APPLICANT

-v-

MR JAMES MCMAHON DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER
COMMISSIONER T EMMANUEL

DATE

WEDNESDAY, 28 DECEMBER 2016

FILE NO/S

APPL 17 OF 2016

CITATION NO.

2016 WAIRC 00971

Result

Appeal dismissed

Order

WHEREAS this is an appeal pursuant to s 106(2) of the *Prisons Act 1981* against a decision to take removal action; and
WHEREAS on 28 September 2016, the WAIRC issued an Order ([2016] WAIRC 00780) to stay this appeal until the appellant's application for judicial review in the Supreme Court of Western Australia was determined; and
WHEREAS on 22 December 2016, the appellant filed a *Form 14 – Notice of withdrawal or discontinuance* in respect of this appeal.

NOW THEREFORE, the WAIRC, pursuant to the powers conferred on it by the *Prisons Act 1981* and the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.]

For and On behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 00021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00021
CORAM : CHIEF COMMISSIONER P E SCOTT
HEARD : TUESDAY, 12 JULY 2016
 MONDAY, 14 NOVEMBER 2016
 TUESDAY, 15 NOVEMBER 2016
 WEDNESDAY, 16 NOVEMBER 2016
 THURSDAY, 17 NOVEMBER 2016
 FRIDAY, 18 NOVEMBER 2016
 WEDNESDAY, 21 DECEMBER 2016

DELIVERED : FRIDAY, 13 JANUARY 2017

FILE NO. : U 67 OF 2016
BETWEEN : JENNIFER ANDERSON
 Applicant
 AND
 DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Industrial law (WA) - Termination of employment - Unfair dismissal - Teacher - Substandard performance - Performance issues - Performance assessment process - Australian Professional Standards for Teachers - Improvement Action Plan - Transfer for second assessment

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

Result : Application dismissed

Representation:

Applicant : Miss J Anderson
Respondent : Mr N van Hattem (of counsel) and Ms A Gifford

Reasons for Decision

- 1 Miss Anderson was dismissed from her employment as a teacher on the basis that the respondent found that her performance was substandard. She says that:
 - (a) Her performance was not substandard; and
 - (b) She was subject to both substantive and procedural unfairness in the way she was directed to work and the way she was assessed.

Background

The AITSL Standards

- 2 The Australian Institute for Teaching and School Leadership (AITSL) Standards apply to teachers in all States across Australia. They are used by the teacher registration authorities, including the Teachers Registration Board of Western Australia. A teacher must be registered with the Board in order to practice in Western Australia. To maintain their registration, a teacher must be able to meet the 'Proficient level' for each focus area for all seven Standards within three years of graduation. There are seven such standards setting out the requirements on teachers at four levels: Graduate, Proficient, Highly Accomplished and Lead. Each Standard contains a number of 'focus areas'.
- 3 Line managers who are appropriately qualified may determine if a teacher is Proficient across those 37 focus areas within the seven Standards.
- 4 There are also assessors independent of the individual schools, who assess a teacher's skills and performance according to the Standards. The process for such an assessment includes that an accredited AITSL assessor external to the school, visits the school, observes the teacher's teaching, examines the teacher's planning, preparation and assessment documentation, and consults with the teacher's line manager. Either immediately prior to this assessment process or during it, an Improvement Action Plan (IAP) is put in place. This involves the identification of the performance issues and of resources and supports, feedback and mentoring to assist the teacher to achieve the required level of performance. As the AITSL assessor undertakes a number of assessments over a period of months, the supports and other mechanisms in the IAP ought to be bearing fruit in that the assessor may be able to see an improvement in the performance.

- 5 After the final assessment, an investigator will examine the situation and report to the decision-maker about the teacher's level of proficiency.

Miss Anderson's employment history

- 6 Miss Anderson was employed as a primary school teacher for approximately 27 years since 1989. The history of difficulties associated with her employment include that she was dismissed by the respondent in 1995 on the basis that she was, in the terms used in the appropriate regulations of the time, an inefficient teacher. She challenged that decision in the Industrial Relations Court of Australia (WI 1446 of 1995). In his reasons for decision, Ritter JR accepted that Miss Anderson was an inefficient teacher at the time but found that the processes applied by the employer directly contributed to her inefficiency by undermining her status and capacity, and her self-confidence was dented by the process. He found that she had the potential to be an efficient teacher and that in the circumstances, her termination of employment had been harsh, unjust and unreasonable (*Anderson v Minister for Education* [1996] IRCA 324, 181 – 182). He ordered that she be reinstated.
- 7 Miss Anderson recommenced her employment in the second semester of 1996. After placements in a number of schools, in 1998, Miss Anderson was transferred to Hampton Park Primary School.
- 8 In 2000, the school's then principal, Ms Price, raised a number of performance issues with Miss Anderson. For various reasons, a decision was taken not to proceed with the formal process in respect of Miss Anderson's performance.
- 9 Miss Anderson says that there were no real problems with her performance brought to her attention between 2001 and 2011.

Recent performance issues and processes

- 10 Mr Paul Neates was the school principal of Hampton Park Primary School from 2002.
- 11 Mr Ross Tyler and Ms Valerie Madigan were deputy principals and Miss Anderson's line managers at Hampton Park Primary School from 2001 to 2011, and from 2001 to 2009, respectively. They each retired at the end of those periods.
- 12 Mr Glen Purdy and Ms Janet de Jonk became deputy principals in 2011.
- 13 In 2011, Hampton Park Primary School became an Independent Public School. According to Mr Neates, this meant that the school became more accountable and there were greater systems for collecting and analysing student data. Mr Neates says that with the additional information, he became more aware of issues with Miss Anderson's performance. He says he tried to arrange more support for her, through a mentor, Mrs Kylie Jones. However, according to him, Miss Anderson ended their mentoring arrangement because she asserted that Ms Jones was aligned to Mr Purdy. Miss Anderson's performance was then assessed and managed within the school.
- 14 Mr Purdy gave evidence that a number of issues arose regarding Miss Anderson's performance which caused concern. Mr Purdy and Ms de Jonk, as line managers, communicated those concerns to Miss Anderson and observed a number of her classes. Feedback was provided to her including in writing. She responded in writing setting out her own views.
- 15 At the end of 2012, a decision had been made to place Miss Anderson in the role of specialist history teacher for 2013, delivering the new primary school history curriculum across all year groups and teaching some science, art and writing as relief teacher, relieving other teachers undertaking their duties other than teaching (DOTT) time.
- 16 In August 2013, an Employee Development Plan (EDP) was established for Miss Anderson, setting out the particular issues to be addressed and the plan to support her to address them. Meetings were held to deal with issues that arose.
- 17 Miss Anderson's responses to correspondence and meetings were lengthy and detailed. In them, she provided her perspective on matters where she contested the comments made by her line managers and raised concerns of her own about a range of matters including workload.
- 18 It appears from the evidence that initially Miss Anderson did not actively engage in the EDP, however the union encouraged her to do so.
- 19 In November 2013, Miss Anderson attended a meeting with Mr Purdy to discuss classroom management strategies. Mr Brian Toop attended as Miss Anderson's support person. The minutes of the meeting indicate that Miss Anderson was dismissive of strategies to assist her, responded in an aggressive manner, would not focus on the purpose of the meeting but kept wanting to focus on her concerns. Mr Purdy indicated that he would end the meeting if she continued to speak to him in an aggressive tone or could not remain on task. He did call the meeting to a close but advised her that despite her behaviour at the meeting, he would be available to discuss the issue of classroom observances, would continue to support her for the remainder of the EDP and would ensure he had a support person at any future meetings. Mr Toop agreed with the contents of these minutes and signed them (Respondent's volume 1, 123).
- 20 A number of complaints were received from parents in 2013 about Miss Anderson's teaching and classroom management.
- 21 At the end of 2013, Mr Neates wrote to Miss Anderson saying he was of the view that her performance was substandard. She responded. Mr Neates considered her response, however, he maintained his view and the matter was referred to the Director General.

The first substandard performance investigation

- 22 In early 2014, Ms Sara Young was appointed to investigate and report on whether Miss Anderson's performance was substandard. The allegation was that Miss Anderson's performance was substandard by reference to the AITSL *Standard 1 – Know students and how they learn; Standard 4 – Create and maintain supportive and safe learning environments; and Standard 5 – Assess, provide feedback and report on student learning.*

- 23 Ms Young found that there had been a performance management process and noted areas of deficiencies in Miss Anderson's performance in respect of the AITSL Standards.
- 24 Ms Young noted Miss Anderson's concerns about the fact that she was required to deliver the new history curriculum across the school but had not worked as a specialist teacher prior to 2013. She also noted Miss Anderson's concern that she did not have a dedicated history classroom and that this may have created difficulties for her. Further, Miss Anderson had complained of an excessive workload. She also provided a letter of support from Mr Norman Paini, Head of Department – Society and Environment at Morley Senior High School and leader of the Morley Network group 'History and Beyond'. Mr Paini commended Miss Anderson's 'professionalism and the diligent way that she has trialled and implemented the Western Australian curriculum across all years at Hampton Park Primary School'.
- 25 Ms Young noted Mr Paini's comments but placed little weight on them due to what she described as his limited exposure to Miss Anderson's teaching and the potentially selective information available to him. She found that Miss Anderson's performance as a specialist primary school history teacher was substandard as alleged in respect of AITSL Standards 1, 4 and 5, noting concerns about a range of issues in Miss Anderson's performance. She said:

These concerns are certainly sufficient to result in a reasonable apprehension about Miss Anderson's performance meeting the requirements of satisfactory performance for a primary school classroom teacher.

Outline of evidence of Ms Sara Young
Respondent's documents, volume 2, page 14 – 15

- 26 However, she also noted Miss Anderson's concerns regarding her particular circumstances of being employed as a specialist history teacher when this had not previously been her role and that Mr Neates had already expressed his view of her performance. Mr Purdy and Ms de Jonk had been directly involved in Miss Anderson's EDP.

Therefore I recommend that Miss Anderson be placed in an "ordinary" primary school classroom teacher's role and be given an opportunity to demonstrate that she is able to attain and sustain a satisfactory standard of performance against the three AITSL standards identified by Mr Neates. Such period would need to allow Miss Anderson the opportunity to demonstrate her performance against the assessment standard and should include an investigative process such that findings about Miss Anderson's performance would be made at the conclusion of this opportunity.

Outline of evidence of Ms Sara Young
Respondent's documents, volume 2, page 15

- 27 Ms Young said that Miss Anderson ought to be placed in an ordinary teaching role to ensure that the process was not only fair but was seen to be fair, and that she be placed in another school for that period. This recommendation was accepted and Miss Anderson moved to West Balcatta Primary School where she was to be given 'one further opportunity' as a mainstream year 3 classroom teacher. She was to receive ongoing support and there would be an assessment by an AITSL assessor.
- 28 In semester 1 2015, Miss Anderson commenced at the West Balcatta Primary School. On 17 February 2015, Ms Renata Owen was appointed as the investigator and Ms Anna Alford was appointed as the AITSL assessor.
- 29 Ms Annalyn Navarrete was the deputy principal and Miss Anderson's line manager. Ms Hilary Jasper was Miss Anderson's mentor.
- 30 An IAP was developed for Miss Anderson which set out the relevant standards, the focus areas, the descriptors of satisfactory performance at Proficient level, the types of strategies to be used, and the support to be provided.
- 31 Between February and June 2015, the school received five complaints in writing from parents regarding Miss Anderson's teaching and assessments. The evidence indicates that it is unusual for parents to make written complaints.
- 32 Ms Navarrete had other concerns including about Miss Anderson's approach to the NAPLAN testing.
- 33 Ms Alford undertook observations of Miss Anderson's teaching on 27 March 2015 and prepared an initial assessment dated 30 March 2015 in which she found that Miss Anderson's performance was not at Proficient level in any of the seven Standards, not merely those in which she was alleged to be substandard. On 29 May 2015, she undertook an interim assessment. Again she found Miss Anderson was not proficient in any of the Standards. Her final assessment, following a school visit on 26 June 2015, resulted in an assessment that Miss Anderson was not proficient in any of the Standards.
- 34 Ms Owen, as the investigator, reported to Mr Clifford Gillam, the Executive Director Workforce for the Department of Education, on the matter and advised that Miss Anderson's performance was substandard against the AITSL Standards. On 10 December 2015, Mr Gillam wrote to Miss Anderson to inform her that he had reached a preliminary view that her performance was substandard and invited her to respond to that preliminary view. She provided her response on 18 January 2016. On 23 March 2016, Mr Gillam wrote to Miss Anderson confirming his findings and the decision to terminate her employment.

The alleged unfairness

- 35 In addition to challenging the respondent's conclusion that her performance as a teacher is substandard, Miss Anderson raised issues in respect of substantive and procedural unfairness, that:

- (1) She was required to undertake work as a history specialist when she was not adequately trained or resourced;
- (2) As a history teacher, there were practical impediments to her performance because she was not allocated a classroom, and therefore she was required to carry extensive amounts of material from room to room including up and down stairs;

- (3) There were inappropriate or unfair criteria in the assessment of her performance in that she was assessed against all AITSL Standards, not just against those in which she was allegedly substandard;
- (4) Moving her to a different school, to West Balcatta Primary School, and assessing her as a classroom teacher, was unfair, firstly given that she had spent the immediately preceding period as a history specialist, and secondly that she had not received the same professional development as the teachers at the new school, and therefore was disadvantaged.

The law

- 36 Miss Anderson's claim is referred to the Commission under s 29(1)(b)(i) of the *Industrial Relations Act 1979*, relying on the Commission's powers set out in s 23A of the Act that her dismissal was harsh, oppressive or unfair.
- 37 The law regarding this claim is set out by Brinsden J in *Miles & Others t/a The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 385. The question for the Commission is whether the employer's legal right to terminate the contract of employment 'has been exercised so harshly or oppressively against the employee as to be an abuse of that right'.
- 38 The failure to provide a fair process may 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 automatically have that result (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891 at 899 per Nicholson J). The distinction between substantive and procedural unfairness is not always useful. Rather, the test set out in *Undercliffe* is to be applied (see *Garbett v Midland Brick Company Pty Ltd* [2003] WASC 36; (2003) 83 WAIG 393 at [72] per Heenan J).

Assessment of the evidence

- 39 I have no hesitation in preferring the evidence of other witnesses where it conflicts with Miss Anderson's evidence. On a number of occasions, she was evasive, she equivocated to the point of significantly undermining her own evidence, many of her explanations were not plausible and she was inconsistent. An example of this is whether she was required to be at the school 15 minutes before her DOTT time and she finally conceded, after attempting to divert from the issue, that she planned to be there by 8.30 am but sometimes was a few minutes late due to traffic (ts 109, 202).
- 40 Miss Anderson also relied heavily on using her own professional judgement, even when it contradicted the professional judgement of others where they had expertise and she did not. For example, where Miss Anderson had been required to wear a device which would assist students with hearing disabilities to hear, it was alleged that she rarely did. It was her evidence that based on her own observations the particular student, L, could hear reasonably well. However, he had been properly assessed by the medical profession and a recommendation made that this device be used to ensure that he was able to hear properly.
- 41 In another instance, Ms de Jonk had given Miss Anderson a directive to not spend time calling the roll each lesson. However, she continued to do it till the end of the year because '[a]s a professional it was my choice at the beginning of the lesson' and she disagreed with the directive (ts 123). This issue had an impact on her time management. While it might be argued that it assisted Miss Anderson to become familiar with her students, it was not successful, as I will explain later.
- 42 On the other hand, I found Mr Purdy to be a very impressive witness. The way he described the requirements for teachers to plan, assess and manage their students made those things very clear.
- 43 Ms de Jonk was very clear and was unshaken in her evidence. She gave examples of why Miss Anderson was not actually doing as she was required, of her own approach to dealing with Miss Anderson's performance and of the assistance provided to Miss Anderson.
- 44 Mr Neates was a credible witness. I found him to be genuine in his concerns and desires to assist Miss Anderson in her performance as a teacher, and his evidence is supported by other evidence.
- 45 I found Ms Navarrete to be very objective, and she believed at the outset of their involvement that Miss Anderson had the potential to be a proficient teacher.
- 46 It is also critically important to note that Miss Anderson did not challenge the Outlines of Evidence and attached documents of Ms Alford, the AITSL assessor, Ms Porter, who gave evidence about the AITSL Standards, or Sara Young, the investigator. In those circumstances, I am obliged to accept that evidence unless it can be demonstrated that there is good reason not to do so. Their evidence was confirmed by other evidence called by the respondent. Therefore, given my conclusions about the unreliability of Miss Anderson's evidence, I accept their evidence where it conflicts with Miss Anderson's evidence.

Was Miss Anderson a Proficient teacher?

- 47 As I noted earlier, the evidence of Ms Alford that Miss Anderson was not a Proficient teacher was not challenged. In the circumstances, I accept that evidence. However, it is also important to note that it is supported and confirmed by a great deal of other evidence covering a range of issues over the whole period from 2011.
- 48 Mr Gillam's decision appears to be based on Ms Owen's investigation report. This report traversed the history of Miss Anderson's employment, from the material covered in Ms Young's report up to the completion of the report by Ms Alford.
- 49 In the circumstances, it is not my intention to try to address each Standard or focus area where Miss Anderson's performance was found to be substandard as alleged. Rather, I intend to deal with the evidence of a number of important and central issues which demonstrate the types of problems with Miss Anderson's performance. These are far from exhaustive.

A lack of organisation and planning

- 50 In her first observation on 27 March 2015, Ms Alford noted that Miss Anderson was highly disorganised and gave an example. This lack of organisation was noted again in the final report.
- 51 Ms Jasper gave evidence of Miss Anderson's classroom being disorganised and the NAPLAN testing starting late on each of the days (see Ms Jasper's notes for 11 to 14 May 2015, respondent's volume 2, 175). There was a good deal of other evidence of Miss Anderson's lack of organisation.
- 52 Ms Navarrete also noted that on two occasions Miss Anderson submitted documentation required of her during the Improvement Action Plan late, and on the third occasion, did not submit it at all (ts 393).
- 53 During the course of the hearing of this matter, Miss Anderson clearly demonstrated a lack of planning and organisation. For example, at the end of the third day of the hearing, when there was a discussion about whether any of the respondent's witnesses were needed for cross-examination by Miss Anderson, she indicated that she did not know who Ms Christine Porter, one of the respondent's proposed witnesses, was. The respondent had filed and provided to Miss Anderson a detailed outline of Ms Porter's evidence on 24 October 2016, some weeks before the hearing. By the third day of the hearing, on 16 November 2016, it was apparent that Miss Anderson had not read Ms Porter's evidence in preparation for the hearing (ts 189).
- 54 Further, almost all of the documents which needed to be referred to during the course of the hearing were available within the documents filed by the parties ahead of the hearing. Miss Anderson's way of dealing with those documents was to file two bundles of documents, not paginated or organised in a systematic way, and then referring to them each individually by date. Most generously, the respondent's counsel offered to take the documents away, paginate them and in this way assist in the identification of the documents.
- 55 Also, rather than refer to the documents which had already been filed and which all parties had copies of, Miss Anderson then produced photocopies of those documents she wished to refer to for herself, the Commission, the respondent and the witnesses. She also appeared not to have prepared the questions she wanted to put to the witnesses.

Differentiation of students

- 56 The expectation of teachers is that they will identify students according to their levels of ability and other impediments to their learning, and set their teaching and learning exercises to meet the needs of all of the students by differentiating the activities and assessments for them both in clusters of students but also as individuals.
- 57 The evidence is clear that Miss Anderson did not understand or implement teaching which differentiated between students or catered for the different levels of ability except in the most basic way. Miss Anderson's differentiation largely focussed on students with individual education plans (IEPs). Then she divided them into the three broad groups of ability.
- 58 Ms Alford noted that Miss Anderson did not make an effort to differentiate the lessons to students of different abilities. Open-ended activities did not meet that test.
- 59 Ms Navarrete said that although Miss Anderson had identified the students' results from 2014 and divided them according to their reading or spelling age, it did not necessarily show their abilities. Identifying the students in this way does not necessarily lead to a conclusion that they were then taught in a way that met the educational needs and challenges for them as individuals. She also provided for activities aimed at different groups within the class, but there was no demonstration of differentiation for individuals. Also, there was no demonstration of which students were in the different ability groups, what objectives or learning outcomes were set for each ability group, or the difference in assessment or success criteria. Ms Navarrete would have expected to see separate sets of objectives, learning activities and success criteria but they were not obvious.
- 60 Ms Navarrete also said that even if the planning documents suggested differentiation, there were discrepancies between what was in the planning document and what actually happened in the class she observed.
- 61 I gained a clear impression that it was only in the course of the hearing that Miss Anderson came to understand what the requirement to differentiate meant, but then reverted to her previous stand of having actually differentiated when in fact she only did so at the most basic level.
- 62 Although Miss Anderson claims to have not received examples of differentiation until quite late in the process of assessment, it is clear that this information had already been made available some months before that.

Failure to know her students

- 63 Miss Anderson mistook some students for others during lessons and in assessments of their work at a time when she ought to have been familiar with them. In June 2013, in front of other students, she mistakenly identified a particular student by saying 'you're the one who has a reading disability'. In fact, he did not have a reading disability, and students heard the comment and later commented on or questioned his 'disability'. Miss Anderson acknowledged the incident but claimed to have to learn 350 students' names because she was working as a specialist teacher and so taught them for only one hour per week. However, she had already taught many of them as their classroom teacher in earlier years. Also, by the time this incident occurred, she had been teaching the student for many weeks.
- 64 It took Miss Anderson some time to acknowledge in the hearing that she may have made an error in speaking to the child in front of the class and that she had learnt from it (ts 122 – 128).
- 65 There was another occasion in September 2013, where Miss Anderson identified a student, A, by the wrong name and Miss Anderson's assessments of the student were less than what was expected based on the student's previous assessments. When this matter was raised with Miss Anderson, she said:

[A] is such a quiet and well behaved student I don't often hear her comment or give her opinion in discussions. With a more determined effort to speak up in class it will be possible to see more of [A]'s personality and the lovely student "she really is".

Respondent's volume 1, 215

- 66 In cross-examination, Miss Anderson said 'if she was a bit more talkative in class' the student would have been more easily identifiable. She said getting to know someone is a two-way street; it is up to them too, the student was 'very quiet' (ts 131). Yet this was in September 2013, after she had been teaching this student for some time. Further, she placed the blame on the student for being quiet as being the reason why she was unable to identify who the student was.
- 67 Also, although this was a time when Miss Anderson was teaching this student as a specialist history teacher, Mr Neates' email to Miss Anderson indicates that the previous year, Miss Anderson had been involved in year level activities which would have brought her into contact with A (Respondent's volume 1, 212).

Use of the FM device

- 68 I noted earlier, in relation to why I chose to prefer the evidence of others where it conflicted with Miss Anderson's evidence and the issue of her reliance on her professional judgment, an issue regarding a student with a hearing disability.
- 69 In 2010, Miss Anderson was teaching a primary school class which included a student, L, who had a hearing disability. He was to be assisted to hear by his teachers wearing a lapel microphone and monitor referred to in the documents as 'a FM device'.
- 70 On 11 November 2010, Miss Anderson had an appointment to meet a visiting teacher of the deaf, Sara. Following the meeting, Sara became upset at Miss Anderson's responses to her regarding L's placement in the classroom and Miss Anderson not wearing the FM device. Ms de Jonk spoke to both Miss Anderson and Sara about the incident. Sara's comments contained in an incident report prepared by Ms de Jonk include that Miss Anderson allegedly made the following statements:

[L] is not my number 1 priority I have many children who need my time.

I have other children whose parents say need to be in the front row so he is in the second row.

If you want to take some of the children out and teach them I will have more time to teach [L] and use the FM

I am too stressed and busy managing behaviour, speaking to parents, managing horrible children and writing reports to trial the FM microphone and didn't have time to turn it on and set it up to use in the room.

You can't make me use this thing and if you do I will go on stress leave and it will be your fault.

This is not a chalk and talk classroom and so the microphone won't work.

I am not prepared to use the FM 100% of the time.

Jennifer advised the [visiting teacher] that time was up and walked out to go back to class.

Respondent's volume 1, 74

- 71 Miss Anderson provided a response in writing, setting out her version of events. It paints the content of the conversation in a different context, however, it seems to me to be a demonstration that Sara's complaint was valid, that Miss Anderson appeared either disinterested or callous in respect of this student's needs, assumed that she knew best as to what was appropriate for this student and that her priorities were elsewhere than in assisting this student.
- 72 Miss Anderson's comments included that she had observed L interact in a variety of settings and, in her opinion, he did not fit into that category of student who was disadvantaged by her not using the FM device. She made up her mind about his needs, contrary to the assessments that had been made by others, notably the medical profession, regarding his needs.
- 73 In May 2013, the issue of the use of the FM device arose again in respect of another student (ts 109).
- 74 In cross-examination, Miss Anderson said, in effect, that with all she had to do in setting up the class, and as a history specialist without a dedicated classroom, her priority was not for her to wear the FM device. She said she did wear it on a few occasions, that the student had asked her more than once to wear it, and that 'I don't understand why you're making such an issue out of this' (ts 110).
- 75 Miss Anderson also claimed that because she did not have her own classroom, she was too busy moving from room to room, packing up and then setting up in a new classroom, thereby making use of the device a low priority. I will comment later on this issue of not having her own classroom and its effect. In any event, the complaint about her not using the device first arose in 2010 when she was a classroom teacher with her own classroom. Therefore, her explanation of having to move from room to room as she did in 2013 lacks validity.
- 76 On 20 May 2013, Mr Purdy met Miss Anderson to discuss her use of the FM device. In his subsequent letter, Mr Purdy noted that Miss Anderson acknowledged that she 'need[ed] to be more vigilant in attending to the wearing of the FM device.' He reminded her of the requirement to create 'an inclusive learning environment', and said that:
- FM devices **must** be used in all classrooms that have students that require the devices.
 - Your planning needs to ensure you are aware of, and are accommodating all students who require learning adjustments. Discussions with the class teachers will assist you with this.
 - Consequencing students for inappropriate behaviour must be in accordance with the school engagement policy at all times.

Respondent's volume 1, 73

- 77 The evidence suggests strongly that other teachers had no difficulty in wearing the device.

Failure to teach science and a lack of proper assessments

- 78 Mr Neates became concerned that in 2011, Miss Anderson gave all of her students a C for science.
- 79 Both Ms de Jonk and Mr Neates say that Miss Anderson conceded to them that she had not taught science that semester.
- 80 However, in her email of 14 December 2011 (Respondent's volume 1, 170), Miss Anderson, amongst other things, said that the students 'considered the tensile, absorbency and thermal qualities of wool' as part of an integrated theme for Art, Science, Technology and Enterprise when they learned the skill of weaving, casting off and sewing in making beanies and scarves.
- 81 I have no hesitation in accepting the evidence of Ms de Jonk, who made notes of a meeting at which Miss Anderson conceded that although she had intended to teach science that semester, she 'didn't get it done' (see Respondent's volume 1, 143).
- 82 I also accept Mr Neates' evidence that Miss Anderson implied to him in a meeting with himself and Ms de Jonk that she did not teach science at all.
- 83 I find Miss Anderson's comments both in the email of 14 December 2011 and her evidence before the Commission to be a creation after the fact, to try to overcome the omission in teaching and the admission of it.

The timeline grading

- 84 Miss Anderson taught one of her history classes using a timeline which was put up on the board. The students were required to do two things: to copy the timeline and then to come up with some interesting facts. There was a concern that Miss Anderson marked two students' almost identical pieces of copying quite differently.
- 85 Miss Anderson initially said that she marked the two separate pieces of work, one being a timeline and the other being for the students to identify some interesting facts, as part of the same total assessment and therefore two students whose timeline activity was almost identical received different marks because of their other assessable piece.
- 86 However, the evidence demonstrates quite clearly that the students were separately marked for each activity. Therefore, there is no explanation as to why Miss Anderson marked the two timelines so differently other than that she marked them on the basis of their handwriting. This was simply an exercise in copying from the board and not an assessment of their learning in history. Ultimately, she conceded that the two items were separately graded (ts 233).

Classroom management

- 87 One of the issues where Miss Anderson is said to have a substandard performance is in classroom behaviour management.
- 88 Ms Alford described the students as being disengaged and that Miss Anderson did not use appropriate classroom management strategies. She gave examples of her concerns.
- 89 Ms Navarrete's observations of Miss Anderson's classroom management were detailed in her extensive records provided to Ms Owen. Her many concerns include that the classroom had 'tended to be quite hectic, loud and rowdy ... students were off-task'. Miss Anderson made all the students work at the same pace so those who worked fast had to wait for others. This was as opposed to Ms Navarrete's classroom where students' individual needs were catered for, including by having additional challenging and extending activities for those who could.
- 90 Miss Anderson relied on evidence from Ms Karen Hearty, Ms Robin Quinn, Mr Brian Toop, Ms Ljiljana Mijatovic and Mr Ross Tyler to support her claim that her classroom management was satisfactory.
- 91 Ms Hearty is a school chaplain. She is not a teacher, nor does it appear that, in spite of other qualifications, she is qualified to speak about the requirements on a teacher in respect of classroom behaviour management. She may be able to observe whether students were working quietly or whether there were disruptions, but she is unable to go beyond that.
- 92 Ms Quinn was, until 2009, a pre-primary school teacher. She worked at Hampton Park Primary School for 20 years (ts 238). She would take a shortcut through Miss Anderson's classroom and would often speak to some of the students, particularly as many of them had been in her classes previously. Her evidence in relation to Miss Anderson's behaviour management is of limited value given that it related to a period which finished five to six years before Miss Anderson's dismissal.
- 93 Mr Toop commented that Miss Anderson's classes, from his observations in walking past them, were quiet. However, he says that some teachers teach very successfully by having their classrooms quiet while others are successful with what he called a rowdy one, and 'where groups are everywhere and everything's all over the place' (ts 281). Taken objectively, Mr Toop's evidence says nothing of substance about whether Miss Anderson applied appropriate classroom behaviour management skills. From his limited observation, her class was quiet.
- 94 Ms Mijatovic worked as a teacher at Hampton Park Primary School for 26 or 27 years until her retirement in 2012. Her comment about Miss Anderson's classroom was that the children listened and were well behaved (ts 293).
- 95 Miss Anderson says in her closing statement that Mr Tyler commented satisfactorily on her classroom management and referred to page 306 of the transcript. However, Mr Tyler made no such comment.
- 96 These witnesses' evidence about Miss Anderson's classroom behaviour management are of limited, if any, value, particularly given the detailed observations and assessments, with specific examples of problems, which are contained in the evidence of observations by her line managers and assessors, who gave both the specific detail and were qualified to assess what they observed.
- 97 In any event, as Mr Toop explained, successful behaviour or classroom management does not rely on whether students are working quietly or the room is rowdy. It is far more than that. It includes whether students' inappropriate, albeit quiet, behaviour is tolerated or ignored, or corrected. It includes whether students are behaving in a manner that enables them and others to learn, and reflects whether they are engaged in learning.

Listening to and assessing students' reading

- 98 Miss Anderson's responses to criticism of her performance included that she complied with requirements 'within reason'.
- 99 The expectation of teachers at West Balcatta Primary School included that the teacher listen to each student read once per week. Miss Anderson said that she did this 'within reason', and that she endeavoured to do so. Other evidence included that she had the parent helpers in her classroom listen to and perform some type of assessment of the students' reading.
- 100 Ms Alford's report included that 'Miss Anderson admitted to only having listened to ten students this year because she doesn't have time to listen to them' (Respondent's volume 2, 68).
- 101 Miss Anderson denied having said this to Ms Alford. Miss Anderson says she may not have listened to each student read each week but she used a variety of sources to form her assessments of each of them, albeit that she did not keep formal records of each occasion.
- 102 Ms Navarrete says this was not adequate. Ms Navarrete says that in her own teaching practice, she listens to every student in her class read at least once per week, and those with special needs at least twice per week. She also makes anecdotal records every week. She says that at the end of the year, for each student, she had 40 assessments because she had listened to each of them and made anecdotal records every week. She says that was the standard for West Balcatta (ts 416).
- 103 Having listened to Miss Anderson as she gave her evidence, and particularly with her reference to having listened to the students read in accordance with the requirements on her 'within reason', and that she endeavoured to do so, leads me to conclude that it is more likely than not that Miss Anderson did say to Ms Alford that she listened to only 10 students that semester.

Other concerns

- 104 Ms Alford also observed that Miss Anderson's lessons had no substance to them. She could not identify any relevant teaching strategies in her lessons and she did not set learning goals for her students. This was echoed in the evidence of other witnesses.

Conclusions regarding whether Miss Anderson was a Proficient teacher

- 105 Having taken account of all of the evidence, I have no reservations in finding that Miss Anderson's performance was not Proficient for a teacher of her qualifications and experience. She did not meet the Standards as alleged. Further, she did not meet any of the Standards for a Proficient teacher.
- 106 The question then arises as to whether or not there is some basis for overturning the decision to dismiss due to issues of procedural fairness.

Unfairness in the process

- 107 I have set out earlier the claims Miss Anderson makes in respect of the assessment process being unfair.

The history specialist role

- 108 Miss Anderson says that she was not provided with the necessary resources and supports to undertake the additional requirements of the history teacher role. Additional DOTT time of 1 hour and 20 minutes per week was provided to her in 2013, and she did not have to attend all school assemblies. However, she says this was inadequate, given the additional research, preparation, marking and organisational matters required of her.
- 109 Miss Anderson said it was significant that the history teacher role required her to teach 350 students. The initial impression created by Miss Anderson's submission regarding her timetable was not the reality. The timetable for 2013 contained, amongst other things, 13 history lessons. However, of these, a number were repeated to other classes. Two were for Year 1, four were for Years 2/3, one was for Years 3/4, three were Years 4/5 and three were Years 6/7. Therefore, in effect, she was not preparing for 13 lessons but for five lessons, some repeated up to four times. A normal classroom teacher would need to prepare for all classes throughout the week, with some exceptions. A normal classroom teacher may not be assessing the work of 350 students, but of the same much smaller group of students for many varied pieces of work.
- 110 All teachers do not remain teaching the one year throughout their careers, or even for many years, although some might. A normal classroom teacher may be allocated a different year group than previously and will need to learn the curriculum and undertake the necessary research. I recognise that Miss Anderson was required to deal with and develop a new curriculum. All teachers have to adjust to new or altered curriculum requirements and to new teaching and assessment methods. However, the assistance she received, the additional DOTT time and assembly time, and her participation in the network of history teachers means that this complaint is not valid. There were both benefits and challenges in taking on the new role.
- 111 While there might have been challenges to Miss Anderson taking on the history teaching role, it ought to have been within the capacity of a Proficient teacher to do so in the circumstances that applied to Miss Anderson.
- 112 Although Miss Anderson complains that she did not elect to be a history specialist and that it was imposed on her, I find that she was not unhappy to do so. Also, following discussions with Miss Anderson and Ms Helen Olivieri from the State School Teachers' Union, Mr Neates had reason to believe that Miss Anderson would be happy with this role if he had been able to provide her with her own classroom (ts 380). However, this had not been possible at the time.
- 113 Mr Neates gave examples of other specialist teachers at the school who moved from room to room 'and they did it exceedingly well' (ts 381).

114 Miss Anderson did not have her own dedicated classroom and had to move from room to room. It appears that she had wanted to conduct all of her lessons in the library or the computer laboratory. This had not been feasible. After some equivocation, she finally conceded that she was not able to conduct **all** of her lessons in the library or the computer laboratory, however, had she made arrangements, she could have taught at least some of those lessons in either location. Her lack of organisation would have been an impediment to her, but that was a matter of her own making.

115 I am not persuaded, firstly, that there was any substantive unfairness in Miss Anderson undertaking the history specialist teacher role. Secondly, if there were any aspects of unfairness in this, they were taken into account in Miss Anderson being given additional DOTT time and assembly time, and later, an opportunity, with additional support, to perform a classroom teacher role, yet she failed to perform that role as a Proficient teacher.

Assessment against all Standards

116 It is true that Miss Anderson was assessed against all of the Standards when the allegation against her was that she failed to meet three of them. In *Jean Stewart v Director General, Department of Education* [2016] WAIRC 00822; (2016) 96 WAIG 1419, this same issue arose. In my reasons for decision in that matter, I noted:

180 The evidence of both Ms Porter and Ms Fielder is that the Standards are interrelated and do not stand alone. They each gave examples. They said that for a proper assessment to be done, the performance needs to be assessed against all Standards. Ms Porter says that '[i]t would be artificial to assess the Standards in isolation'. That 'is why the TRBWA and the Department require teachers to be at the Proficient level across all seven Standards, and an assessor will appraise across all seven Standards, with a focus on the identified Standards of concern' (Exhibit R6, [34]). I accept the evidence that it is necessary to assess against all Standards for a proper and thorough assessment of performance to be made because the performance against each of the Standards cannot be done in isolation.

181 As it happened, Ms Stewart was unsatisfactory in respect of all Standards.

182 In terms of the decision to terminate, Ms Butler explained in her report to Mr Gillam, and commented that the assessment ought to be in respect of only the two Standards where allegations of substandard performance had been made (Exhibit R11, [36]; ts 338).

183 Mr Gillam's evidence makes it quite clear that he made his decision based only on the allegations in respect of two particular Standards. He said that had Ms Stewart's performance been satisfactory in respect of those two Standards but unsatisfactory in the other Standards, he would have not made a decision to dismiss but the matter would then have raised questions about her performance in respect of other Standards.

...

187 ... I find that, as a teacher, she was required to be proficient against all Standards, and should have been able to demonstrate that proficiency on any day. To meet the Standards both individually and collectively, she needed to be able to do all things required by the Standards at the same time. Performance of one Standard supported performance of others ...

Stewart v Director General, Department of Education
[2016] WAIRC 00822; (2016) 96 WAIG 1419

117 In this case, Ms Porter gave unchallenged evidence of the interrelationship of all of the Standards. Ms Alford gave evidence about her assessments and it is clear that they could not be dealt with without some overlapping. Mr Gillam gave evidence that his decision to terminate was not based on Miss Anderson's failure to meet the AITSL Standards other than those against which the allegation of her lack of proficiency was made, that is, AITSL Standards 1, 4 and 5. He said that what mattered was that Miss Anderson had not met the three AITSL Standards against which it was alleged that she was not Proficient. Therefore, as with the matter in *Stewart*, I find that this complaint is not valid.

Transfer and reversion to classroom teacher role

118 Miss Anderson moved to West Balcatta Primary School having had a two year gap since her last classroom teaching role and she then undertook a classroom teacher role in a new school. Her complaint in her claim is that in addition to the two year gap, she had not had the same professional development as other teachers at that new school. However, there was no evidence of the professional development she says she missed out on.

119 The issues regarding her performance relate to poor organisation of classes; poor capacity and practice in knowing her students and differentiating her teaching beyond the basic level; problems caused by her failure to be familiar with her students and becoming confused about who they were; her poor assessment practices, and many similar matters. These are skills in which she ought to have been competent by this time in her career. They are the same problems she exhibited as a classroom teacher and as a history specialist teacher at Hampton Park Primary School where she taught for many years.

120 Therefore, I find that there is no validity in Miss Anderson's complaints regarding the transfer.

Related issues

121 While they are not part of her formal grounds in the application, Miss Anderson raised some related issues.

Workload

122 Miss Anderson complains that during the final assessment period, her workload was greater because she had to prepare programming materials ahead of time to present them to the assessor. She asserts that many teachers 'post-program'. I take this to mean that they do the recording of their teaching program after they have actually delivered the lesson.

123 Mr Toop's opinion was that Miss Anderson being required to hand in lesson plans before the lesson was onerous and was treating her like a first year teacher.

124 I find that it is quite reasonable, as well as professional, for a teacher who is being assessed, to be required to prepare their program documentation before they actually deliver the lesson. I am not satisfied that this was an unfair or unreasonable burden on Miss Anderson or that it adversely affected her performance during this assessment period.

125 I am of the opinion that two issues contributed to her workload. The first was her lack of organisation. The second was that she spent an inordinate and unjustifiable amount of time composing responses justifying and defending herself against valid concerns.

Assistance and support

126 The evidence is quite clear that there were many occasions upon which both colleagues and line managers offered or actually gave assistance to Miss Anderson in overcoming the difficulties that she was experiencing in her performance. However, she either dismissed many of those suggestions and recommendations on the basis that they did not meet her own professional judgment, or she simply did not follow up on offers of assistance.

127 I note that the support items in the 2015 IAP set out that Miss Anderson was to 'seek and act upon' a variety of resources including staff. The inference I draw from this is that the onus was on Miss Anderson to seek and act on available resources to enable her to achieve satisfactory performance at the Proficient level for each focus area of each Standard – that is, it was up to her, yet she also received a good deal of support and assistance.

128 Ms Navarrete thought Miss Anderson had the potential to be a Proficient teacher, saying there were support mechanisms and people in place who were supportive and very experienced teachers. Miss Anderson received all sorts of support in terms of lesson planning, programming, assessments and feedback. However, Ms Navarrete did not think these supports were necessarily acted upon. Miss Anderson either did not use them or did not follow up when offers were made to her. This is confirmed by the evidence of Ms Jasper.

Conclusion

129 I conclude that the respondent's dismissal of Miss Anderson on the basis that she was not a Proficient teacher was valid. The processes adopted in the assessments of her performance and in the decision to dismiss have not been demonstrated to have been unfair.

130 The application will be dismissed.

2017 WAIRC 00022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JENNIFER ANDERSON

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT

DATE

FRIDAY, 13 JANUARY 2017

FILE NO/S

U 67 OF 2016

CITATION NO.

2017 WAIRC 00022

Result

Application dismissed

Representation

Applicant

Miss J Anderson

Respondent

Mr N van Hattem, of counsel and Ms A Gifford

Order

HAVING heard Miss J Anderson, the applicant and Mr N van Hattem, of counsel and Ms A Gifford on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2017 WAIRC 00006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00006
CORAM : COMMISSIONER D J MATTHEWS
HEARD : WEDNESDAY, 21 DECEMBER 2016
 THURSDAY, 22 DECEMBER 2016
DELIVERED : THURSDAY, 5 JANUARY 2017
FILE NO. : B 138 OF 2016
BETWEEN : ANDREW CRAWFORD
 Claimant
 AND
 SPOTLESS MANAGEMENT SERVICES PTY LTD
 Respondent

CatchWords : Claim for redundancy payment - Claim disputed - Respondent cites ordinary and customary turnover of labour exception - Held claimant's termination due to ordinary and customary turnover of labour - Claim dismissed
Legislation : *Industrial Relations Act 1979* (WA)
Result : Claim dismissed
Representation:
Claimant : In person
Respondent : Ms H Millar (of Counsel)
Solicitors:
Respondent : Herbert Smith Freehills

Case(s) referred to in reasons:

Compass Group (Australia) Pty Ltd v National Union of Workers (2015) 253 IR 32

Termination, Change and Redundancy Case (1984) 8 IR 34 and (1984) 9 IR 115

The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. v Dancroft Holdings Pty Ltd t/as Concept Contract Interiors (1994) 74 WAIG 1885

Case(s) also cited:

National Union of Workers v Compass Group (Australia) Pty Ltd [2015] FWC 6055

Reasons for Decision

- 1 This matter was heard at the same time as B 142 of 2016 and B 159 of 2016.
- 2 The claimant gave evidence on his own behalf and the respondent called Peter Noel Woods, its commercial manager for laundries in Western Australia, and Matthew Potter, its national human resources manager.
- 3 It is not in dispute that the claimant's employment ended on 30 June 2016.
- 4 The claimant refers to clause 14 of his contract of employment (Exhibit 1) and says that his employment was "terminated due to redundancy" and that he is entitled to the sum provided for in that clause.
- 5 The respondent points to the exception in clause 14 being that the sum provided for in the clause is not payable where the redundancy is due to "the ordinary and customary turnover of labour."
- 6 It is not in dispute that the claimant's employment was terminated because the respondent no longer required the claimant's job to be done by anyone. That is, it is not in dispute that the claimant was made redundant.
- 7 The claimant was employed as a "Facilities Manager" from 10 April 2007 under Exhibit 1.
- 8 It is not in dispute that the core of his work over the period of his employment related to the discharge of the respondent's obligations under the "Contract for the Supply of Services for Western Property – Service Arrangers" between the Western Australian Government and the respondent (Exhibit 4) which commenced on 19 December 2001 and was variously extended and renewed (documents relating thereto being tendered as a bundle as Exhibit 5).
- 9 It is not in dispute that Exhibit 1 did not make specific reference to Exhibit 4 or the materials in Exhibit 5 and that at times during his employment the claimant did some work not related to Exhibit 4, as extended and renewed by the documents comprising Exhibit 5.

- 10 It is further not in dispute that the contractual relationship between the Western Australian Government and the respondent that commenced with Exhibit 4, and was extended and renewed by the materials in Exhibit 5, came to an end on 30 June 2016. The respondent tendered for a contract that would have continued the relationship beyond 30 June 2016 but was unsuccessful.
- 11 It was also not in dispute, or to the extent it was the evidence makes it overwhelmingly clear, that the claimant's employment came to an end because of the respondent's failure to win the new contract.
- 12 The end of the contractual relationship between the Western Australian Government and the respondent that commenced with Exhibit 4 and the end of the claimant's employment with the respondent occurred on the same day.
- 13 Exhibit 2 was a letter dated 30 September 2015 which offered the claimant a "retention award" of \$4,000 if he remained in employment until the obligations created by Exhibit 4 and the materials in Exhibit 5 were completed. The clear implication arising from Exhibit 2 is that there was a chance the respondent would not win the new contract and that, if it did not, this would potentially lead to the claimant's employment ending (hence the monetary encouragement to the claimant to not "jump ship" against the background of this risk).
- 14 Exhibit 3 was a letter dated 19 April 2016 which informed the claimant that the respondent had not been successful in winning the new contract and that, as a result, the claimant's employment would end on the date the current contract came to an end, 30 June 2016, unless the claimant was redeployed.
- 15 I have no hesitation in finding that the claimant's employment ended because of the ending of the contractual relationship between the respondent and the Western Australian Government that had commenced with Exhibit 4 and which had continued, in the ways evidenced by the materials in Exhibit 5, until 30 June 2016.
- 16 I make this finding even though I accept that the claimant's contract makes no reference to the contractual relationship and that the claimant, at various times over the years, did work unrelated to that contractual relationship. The evidence is that, despite that work, the employment ended as a result of the ending of the contractual relationship.
- 17 The only question I need to decide is whether the loss of employment resulting from the loss of the contractual relationship was due to "the ordinary and customary turnover of labour".
- 18 It was not disputed that the term "ordinary and customary turnover of labour" in clause 14 of Exhibit 1 comes from what is known as the *Termination, Change and Redundancy Test Case* (1984) 8 IR 34 and (1984) 9 IR 115 and that its meaning may be derived from the meaning of the term intended by the Full Bench in that case.
- 19 Accordingly, the respondent submits I am determinatively assisted by the decision of the Full Bench of the Fair Work Commission in *Compass Group (Australia) Pty Ltd v National Union of Workers* (2015) 253 IR 32.
- 20 I am, of course, not bound by the decision but I have read it and am persuaded by the reasoning therein. Relevantly, having considered the history set out in the case and the reasoning contained therein, I accept, and I here note that the second headnote in the reported decision accurately sets out the *ratio decidendi* of the decision, that "there is no basis for excluding dismissals arising from loss of contracts from the concept of ordinary and customary turnover of labour where this is a normal feature of the business."
- 21 Whether the ending of an employee's employment is a normal feature of the business in any given case is a matter of fact.
- 22 In this case the evidence, which was not seriously challenged, established that the business of the respondent is primarily the tendering for service contracts in a competitive market and, where successful, the discharge of the obligations imposed by the contract for its duration. The evidence was that the respondent recruits to fulfil its obligations where it wins such contracts and it terminates the employment of those it has recruited when the contractual relationship ends, if redeployment is not possible. This was shown by Exhibit 9, a table containing unchallenged figures demonstrating that when contracts end a high percentage of the employees associated with those contracts have their employment terminated.
- 23 Although the claimant was not employed on a contract which expressed that his employment was "tied" to the contractual relationship evidenced by Exhibit 4 and the materials in Exhibit 5, I have found as a fact that his employment was closely linked to that contractual relationship and that the ending of that employment was directly and wholly related to the end of the contractual relationship. I find also that this was a common incident within the respondent's business.
- 24 I also accept the evidence that the respondent does not make redundancy payments in the circumstances that applied to the claimant.
- 25 I find that what happened to the claimant was, viewed in the context of the respondent's usual business practices, normal. I accept that for most, if not all, private sector employees their employment depends on their employer winning contracts. Even a local corner store must, by way of acceptance of its offers, win enough contracts to stay in business and employ people. The distinguishing and determinative factor in this case is that it is the respondent's business to win and service contracts and that its employment of employees is, in the main, related specifically to the discharge of its responsibilities under those contracts. That is, the bulk of its workforce is recruited when it wins contracts (and only when it wins them) and let go, without redundancy payments, when it loses them. For these reasons it is able to point to an "ordinary and customary" turnover of labour. What is "normal" for it will not be normal for most businesses.
- 26 The claimant's circumstances in this case was within an ordinary and customary turnover of labour.
- 27 I have considered whether it makes any difference that the claimant was in a management position. There is no evidence that persons in a position such as that the claimant held are not within a class of employees for whom it is normal within the respondent's business for their employment to end upon the loss of a contract without a redundancy payment. Mr Potter was not cross-examined on this issue.

28 I have also considered the decision of the Full Bench of the Western Australian Industrial Relations Commission in *The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. v Dancroft Holdings Pty Ltd t/as Concept Contract Interiors* (1994) 74 WAIG 1885. I distinguish that decision for the reasons submitted by counsel for the respondent, that is that the case was one relating to redundancies caused by a downsizing occasioned by economic factors and not a true ordinary and customary turnover of labour situation.

29 The claim is dismissed.

2017 WAIRC 00005

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION		
PARTIES	ANDREW CRAWFORD		CLAIMANT
	-v-		
	SPOTLESS MANAGEMENT SERVICES PTY LTD		RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS		
DATE	THURSDAY, 5 JANUARY 2017		
FILE NO/S	B 138 OF 2016		
CITATION NO.	2017 WAIRC 00005		

Result	Claim dismissed
Representation	
Claimant	In person
Respondent	Ms H Millar (of Counsel)

Order

HAVING heard the claimant on his own behalf and Ms H Millar, of Counsel, for the respondent on 21 and 22 December 2016; and

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

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

The claim be dismissed.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2016 WAIRC 00974

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
CITATION	:	2016 WAIRC 00974
CORAM	:	COMMISSIONER D J MATTHEWS
HEARD	:	WEDNESDAY, 9 NOVEMBER 2016
DELIVERED	:	FRIDAY, 30 DECEMBER 2016
FILE NO.	:	B 96 OF 2016
BETWEEN	:	RAELENE DENTON
		Claimant
		AND
		TORQUE PRODUCTIONS PTY LTD
		Respondent

CatchWords	:	Claim for payment of commission while employed - Contractual terms in relation to commission not disputed - Payment ordered - Claim for monies owed due to variation of contract - Variation of contract due to agreed cessation of employment - Claim disputed - Claimant's evidence preferred - Payment ordered in line with variation of contract
Legislation	:	<i>Industrial Relations Act 1979</i>
Result	:	Claims allowed; payment ordered
Representation:		
Claimant	:	In person
Respondent	:	Mr A Pitt (Director)

Reasons for Decision

- 1 The determination of this claim requires decision in relation to two matters as follows:
 - (1) whether the claimant, pursuant to her contract of employment, became entitled to commission payments of \$4,502.83 for August 2015, the last month of her employment with the respondent; and
 - (2) whether the claimant's contract of employment was varied on 2 September 2015 by insertion into it of a term that she would be paid by the respondent a sum representing a percentage of payments made to the respondent by clients of the respondent after that date and despite the claimant's employment ending.
- 2 The claimant commenced work with the respondent pursuant to a written contract of employment, an unsigned copy of which became Exhibit 1 in these proceedings, on or around 7 July 2014.
- 3 The claimant was employed, according to the contract, for "approx. 30 hours a week" as the "Senior Sales and Business Development Person" and was to be paid a retainer of \$39,000 and commission for "sales that you convert/achieve by way of an agreed maximum or a maximum of 5-10% of the total pre-tax sale."
- 4 The work in relation to which the claims relate involved selling segments on a television programme produced by the respondent named "The West Real Estate Programme".
- 5 Matter (1) above may be easily disposed of.
- 6 It was not disputed in these proceedings that during her employment the claimant was paid a commission of 10% on all sales for "The West Real Estate Programme" and I find that, insofar as the contract of employment contemplated that there would be agreement in relation to the commission rate, the agreed percentage was 10%.
- 7 Exhibit 2 in these proceedings was a bundle of the claimant's pay slips and "Commission Summary Statements" for the period July 2014 to July 2015 inclusive. The exhibit supported that the claimant was paid commission of 10% for all sales with which she was associated for "The West Real Estate Programme" (bar one or two irrelevant exceptions).
- 8 Exhibit 3 in these proceedings was a bundle of the claimant's bank statements covering the period 17 July 2014 to 31 December 2015 which showed that the claimant had received payments consistent with the information in Exhibit 2 but no other commission payments.
- 9 It was also not disputed that the claimant received no commission payments relating to the "The West Real Estate Programme" for charges rendered to clients in the month of August 2015, the last month of her employment.
- 10 Exhibit 6 in these proceedings was a document prepared by the claimant in or around August 2015 titled "Commission Summary August" which was in the same format as sheets the claimant had prepared for each of the months of her employment and which had resulted in payments, for the amounts nominated, being made to her. As mentioned examples of such documents which had resulted in payments formed part of Exhibit 2.
- 11 Exhibit 6 indicates that an amount of \$4,802.83 became due to her by way of commission for August 2015 in relation to "The West Real Estate Programme".
- 12 The claimant explained at the hearing that she was aware that one client had paid \$3,000 rather than the \$6,000 referred to in Exhibit 6 and she said this meant she was only entitled to \$300 and not the \$600 referred to in the exhibit. This reduced her claim from \$4,802.83 to \$4,502.83.
- 13 I note that Exhibit 6 also shows amounts under the heading "JTF". "JTF" stands for "Just the Facts" and was a separate endeavour of the respondent in relation to which the claimant says she received payment and therefore makes no claim.
- 14 In circumstances where:
 - (1) it was not disputed, and I find, that the claimant was paid a commission rate of 10% on virtually all sales for "The West Real Estate Programme" throughout her employment;
 - (2) it was not disputed that Exhibit 6 sets out accurate figures for charges made to clients of the respondent by the respondent for segments on "The West Real Estate Programme" (as slightly amended by the claimant as set out above);
 - (3) it was not disputed that Exhibit 6 was submitted during the course of the claimant's employment in exactly the same way as previous claims for commission had been submitted; and

- (4) it was not disputed that the amount of \$4,502.83 was not paid to the claimant,
I am satisfied that the claimant had a contractual entitlement to the benefit of that sum and that benefit has not been allowed to her by the respondent
- 15 Accordingly, I will be ordering that the respondent pay to the claimant the sum of \$4,502.83, less tax.
- 16 Matter (2) may not be so easily disposed of. This is because while many issues relating to this matter were not in dispute, there was a stark clash in the evidence in relation to the crucial point.
- 17 Firstly, I will deal with what was relevantly not in dispute.
- 18 By September 2015 it was agreed that the claimant's employment with the respondent would be coming to an end. It was agreed that this was at the initiative of the respondent and that it was for financial reasons.
- 19 It was not in dispute that the parties decided to sit down and discuss the terms upon which the claimant's employment would come to end, an exercise which in my view was very sensible.
- 20 It was not in dispute that the discussion occurred on 2 September 2015 and involved the claimant, Mr Troy McGuinness, the respondent's Sales Director and the person to whom the claimant reported from day to day, and Mr Aaron Pitt, a director of and the controlling mind of the respondent.
- 21 It was not in dispute that after the discussion a "Deed of Release" was signed by the claimant and Mr Pitt which varied the contract of employment insofar as it regulated various matters relating to the ending of the claimant's employment. The claimant's employment ended by her resignation on 11 September 2015.
- 22 The deed became Exhibit 4 in these proceedings, although I note that Mr Pitt questioned whether some of the pages were originals or copies (even though ultimately he did not dispute the authenticity and accuracy of the content whether all of the pages were original or not) and there was discussion about whether or not there were before me some of the attachments to the deed as signed on the day.
- 23 It was not in dispute that all those present signed a sheet of paper, which was attached to the deed (and the original of which formed part of Exhibit 4), that comprised a table giving figures for "Revenue" and "Commissions Owed" for the months September to December 2015.
- 24 The totals on that page are figures of \$207,935.00 for "Revenue" and \$13,915.30 for "Commissions Owed". The totals include amounts for the JTF work which are not part of the present claim.
- 25 It was not in dispute that one of the matters discussed at the meeting was what payment, if any, the claimant would receive by way of commission for payments made by clients after her employment ended.
- 26 The claimant wished to discuss the matter of money which, had she remained in employment, she might have expected to receive for work already done. That is, the claimant wanted to discuss the revenue likely to be received by the respondent in the months September to December 2015 from clients and whether, given that had she remained in employment these would have resulted in commission payments to her, she would be paid any of those amounts despite her employment ending.
- 27 It was also not in dispute that, as part of that discussion, commission summary sheets in the usual style were provided by the claimant for the months September to December 2015. Those sheets relevantly listed clients which had booked segments on "The West Real Estate Programme" in those months, the expected payment for those segments and, at 10%, the commission payments the claimant would receive if she had remained in employment.
- 28 It is not in dispute that the contents of those sheets were discussed and notes made on them to reflect amendments to the percentages claimed, although there is dispute about the proper characterisation of those amendments, as I will come to in a moment.
- 29 The original sheets provided by the claimant at the meeting were not produced nor were the sheets as amended at the meeting. What was produced, and which became, as a bundle, Exhibit 5 in these proceedings, were four pages that the claimant said, while produced later, reflected the amendments made at the meeting on 2 September 2015.
- 30 This is, however, as far as the undisputed matters go.
- 31 There was dispute about what had actually been agreed at the meeting on 2 September 2015 in relation to the issue of the payment of commissions to the claimant for the months September to December 2015.
- 32 The claimant gave evidence that each of the items on each of the sheets comprising Exhibit 5 was discussed and agreement was reached on the amount that would be paid to her against each item, assuming that the client made the expected payments to the respondent.
- 33 The claimant gave evidence that if she had remained in employment she would have received commission of 10% for all payments made in relation to the items on the sheets but that at the meeting on 2 September 2015, and as part of the variations to her contract relating to the cessation of her employment, she agreed to lesser percentages in relation to some of the clients.
- 34 The claimant gave evidence that she went into the meeting with a version of the sheets which became Exhibit 5 showing that she would have been entitled to a commission payment of 10% for all the expected payments listed on the sheet but that she was prepared to alter the 10% to a lower figure for some clients as part of the negotiations and that this occurred.
- 35 Her evidence was that while "causation", for want of a better word, was not a relevant factor during the course of her employment, and she was right about this given the uncontroverted evidence that she received a 10% commission regardless of the "source" of the work during her employment, she was prepared to discuss causation and to make changes to the usual 10% arrangement on the basis of causation to ensure, as part of negotiating the end to her employment, that she received some commission on payments made by clients after she left the respondent's employment.

- 36 The claimant says the agreements reached during the negotiations on 2 September 2015 are captured by the sheets in the bundle which became Exhibit 5 in these proceedings.
- 37 As I have already noted above, the pages comprising this bundle were not those which were before the parties on 2 September 2015. The pages which became Exhibit 5 were produced after the meeting but, the claimant testified, they reflect what the claimant and respondent agreed at the meeting.
- 38 For example, for the page in Exhibit 5 entitled "Commission Summary September", the first entry relates to "Platinum Realty Group". The entry records that the commission payable to the claimant in relation to their payment to the respondent when made will be "0%". The claimant says that at the meeting on 2 September 2015 she agreed that this was work that had come to the respondent solely through Mr Pitt and not her and that the parties agreed that, accordingly, she would receive no commission in relation to it.
- 39 The claimant gave evidence that each of the following entries, which records one of 0%, 5% or 10% against each client's name, records the commission it was agreed at the meeting she would be paid and that agreement reflected an agreed position in relation to the proper percentage for her role in generating the expected revenue.
- 40 The claimant gave evidence that the table attached to the deed, the last page of Exhibit 4, was signed by those present at the meeting to record their agreement in relation to the amount of commission which was to be paid to her for the period September to December 2015, subject to the clients making the expected payments.
- 41 To be clear, the claimant says that each item in Exhibit 5 was discussed, agreement was reached on the commission payable, the amounts were totalled up and the table, the original of which was attached to Exhibit 4, was produced and signed to record the total that would be paid.
- 42 The claimant said that the total given in the last page of Exhibit 4, being \$13,915.30, may be checked against the amounts in the tables comprising Exhibit 5 for "The West Real Estate Programme" and the "JTF" clients which total \$13,915.30. I repeat that the information in the tables for the "JTF" endeavour is not relevant, leaving a claim for \$11,381.10 for the "The West Real Estate Programme" clients.
- 43 The claimant says that is how the figure in the last page of Exhibit 4 was arrived at. All of the figures in the sheets comprising Exhibit 5 for "The West Real Estate Programme" and "JTF", as amended following discussion and agreement, were totalled and the figure of \$13,915.30 was arrived at and included in the last page of Exhibit 4 and the parties present at the meeting signed that page to indicate agreement to payment of that figure, subject to the expected payments being made by clients. The claimant was paid the "JTF" commissions leaving an amount of \$11,381.10 for "The West Real Estate Programme" clients unpaid.
- 44 The claimant gave evidence that it was only upon the basis of that agreement, that is the agreement that she was to be paid the sum in the table attached to Exhibit 4, that she was prepared to, and did, sign the deed under which she promised to resign (clause 2.2) and bring no claims against the respondent or its officers, employees and agents (clause 3.1).
- 45 Mr Pitt has an entirely different recollection of the key matters in issue.
- 46 Mr Pitt agrees that the issue of commission payments on monies expected to be received by the respondent in the period September to December 2015 was discussed at the meeting on 2 September 2015.
- 47 However, he says, and the respondent's case is, that no agreement of the type described by the claimant was reached on 2 September 2015.
- 48 Mr Pitt gave evidence that all that occurred at the meeting on 2 September 2015 was that the claimant and respondent agreed on the maximum commissions that might be paid.
- 49 Mr Pitt says there were discussions about each of "The West Real Estate Programme" clients in the sheets which now form Exhibit 5 and that the outcome of the discussions was the claimant reduced her claim in relation to certain clients, to the percentage amounts recorded in Exhibit 5, and that it was not an outcome of the meeting that the respondent agreed to pay those amounts.
- 50 What was agreed at the meeting, Mr Pitt says, is that he would, after the meeting, investigate each item in relation to which a claim was made and decide, after those investigations, whether the claimant's efforts in bringing the payments in warranted payment of the new commission amounts nominated at the meeting or not.
- 51 That is, Mr Pitt's evidence is that at the meeting the claimant reduced the ambit of her claim and he learned from her why she thought she was entitled to commission payments comprising the new ambit but that no agreement that she would be paid any amounts was reached.
- 52 Mr Pitt placed great reliance upon Item 6 in the schedule to Exhibit 4 which says, under the heading "Settlement Sum", "...you will be paid 10% commission on new clients signed up by you where the account has been paid in full by the clients".
- 53 Mr Pitt gave evidence that he applied this in telling the claimant at the meeting that he would be investigating whether "The West Real Estate Programme" clients in Exhibit 5 were new or not.
- 54 Mr Pitt's evidence at the hearing was that his subsequent conduct in relation to this matter has been guided by his determination of whether a nominated client was "new" or not and he says that, as far as he is concerned, he has acted entirely consistently with the deed, a document the claimant signed.
- 55 Mr Pitt gave evidence that the table that was attached to Exhibit 4 was only signed by those present to indicate "receipt" of the claim made by the claimant and did not indicate agreement to payment of the amount contained in it.

- 56 Mr Pitt gave evidence that after the meeting he investigated each of the items in Exhibit 5 and turned his mind to whether “The West Real Estate Programme” clients were “new clients signed up by [the claimant]” or not.
- 57 In relation to most clients itemised in Exhibit 5 Mr Pitt gave evidence that he decided they were not new clients signed up by the claimant.
- 58 Mr Pitt gave evidence about each of the clients itemised in Exhibit 5 and explained why he had come to the conclusion about them that he had.
- 59 In the main the explanations were that the client had given business to the respondent because of a relationship between Mr Pitt and someone at the client that pre-existed the claimant’s employment or because they had been clients in one way or another before the claimant commenced employment or because revenue had come in from the client because of work he did, and not the claimant, even if that work occurred during the claimant’s period of employment.
- 60 There was at least one client of the “The West Real Estate Programme”, CDK Stone, that Mr Pitt admitted had been signed up the claimant and was a “new” client. However, he admitted that he made no commission payment to the claimant in relation to the income the respondent received from CDK Stone. In relation to a few other “The West Real Estate Programme” clients he thought he may have agreed they were new clients but he made no commission payments for those either.
- 61 Mr Pitt gave evidence that he ultimately decided not to make payments in relation to CDK Stone and the other possibly “new” clients because, upon reflection, he came to the conclusion that the claimant had probably been overpaid during her employment, in the sense that she had underperformed, and was not deserving of any further money from the respondent.
- 62 Mr Pitt gave evidence, not disputed by the claimant, that at a meeting at a café about six weeks after the 2 September 2015 meeting he informed the claimant that no further payments were going to be made to her.
- 63 The present claim was brought to the Western Australian Industrial Relations Commission subsequently.
- 64 Before determining the conflict in the evidence I note that the claim is not for the all of the various amounts entered in the tables in Exhibit 5 and as totalled in the table attached to Exhibit 4.
- 65 The claimant claims a lesser amount, being \$9,954.60, because the “JTF” payments were made and because, according to her research, not all the expected payments were made by “The West Real Estate Programme” clients. The respondent does not dispute the revised figure although, of course, it disputes that the claimant is entitled to any payment at all.
- 66 There is a clear conflict in the evidence given in these proceedings. However, I do not consider resolution of that conflict to be a difficult task having considered the evidence and the way the parties presented in these proceedings.
- 67 The claimant’s version of events is that an agreement was reached on 2 September 2015 by which the respondent got something it wanted, her quiet departure from her employment, and she got something she wanted, a promise from the respondent to pay her certain monies after her employment ended.
- 68 The claimant’s version makes sense and has a ring of truth about it.
- 69 It is not disputed that as at 2 September 2015 the claimant knew her employment was coming to an end and she accepted this was because of the financial position of the respondent. It was plain from the evidence that the claimant was not told at the time that her employment was coming to an end that this was due to misconduct or poor performance.
- 70 I accept that on 2 September 2015 the claimant entered a discussion in which she was intending to negotiate the terms of the ending of her employment in circumstances where neither she nor the respondent, to her knowledge, wanted that employment to end and it was understood that outcome was as result of the financial position of the company.
- 71 It was not a situation where the claimant entered the meeting with an understanding that the respondent had good grounds to dismiss her for misconduct or poor performance.
- 72 The claimant clearly entered the meeting contemplating a negotiation.
- 73 It is plain that as part of that negotiation the claimant was prepared to resign, and thereby forego any rights that might emerge from her termination, and was also prepared to promise not to make any claims against the respondent, its employees and agents.
- 74 Given the above it makes sense that, as part of that negotiation, the claimant would wish to achieve something for herself.
- 75 I have no hesitation in accepting her evidence that, as part of the agreement to end her employment, the claimant entered the meeting seeking, for her part, an agreement in relation to commissions to be paid to her after her employment ended. This makes sense.
- 76 I accept also that as part of those negotiations the claimant was prepared to be flexible in relation to the matter. Again, given that I accept that the claimant considered she was entering a negotiation, this makes sense.
- 77 It was not in dispute that the usual practice during the claimant’s employment was that she was paid 10% commission on sales regardless of the “source” of those sales and it makes sense that this would be the claimant’s “opening gambit” on 2 September 2015.
- 78 It also makes sense, however, given the claimant was conducting a negotiation on 2 September 2015, that she was prepared to take a “client by client” approach to commissions and to discuss with Mr Pitt whether there were circumstances, such as the “source” of the client and the proper assessment of her role in bringing in fresh revenue from a client, which meant that payment of less than 10% was a fair thing as part of the deal that would secure her quiet departure from employment.

- 79 It makes sense given the length of the meeting on 2 September 2015, a period of several hours, that such a negotiation was done and concluded.
- 80 It also makes sense, in the relevant context, that the last page of Exhibit 4 would include the total amount agreed to be paid and that it was signed and attached to the deed, and the deed signed, to capture the entire agreement reached by the parties.
- 81 The claimant was giving up her employment and her ability to bring any claims in relation to it and it would make sense that she would want something in return and not resign until she had achieved something in return.
- 82 It would not make sense for the claimant to give up what she did by signing the deed without having achieved anything for herself.
- 83 So the claimant's version stands out as that which makes sense and is reasonable. I believe it to be the truth because of this and also because of the way the claimant presented when giving her evidence.
- 84 Having watched the claimant give her evidence I was impressed by her intelligent and calm demeanour. The claimant remained firm in relation to the key elements of her version although she made appropriate concessions when required. In giving her evidence both in chief and under cross-examination she was candid and forthright. She presented as being completely unencumbered by considerations of whether any answer she gave would affect her case and I put this down to her certainty about the truth of the key elements of her case.
- 85 The claimant, also impressively, was unruffled by having to address Mr Pitt's version of events and the questioning this produced.
- 86 Mr Pitt cross-examined the claimant on the basis that it was necessary for her to demonstrate that she had earned the commissions she was seeking.
- 87 From the claimant's point of view this was completely irrelevant as, of course, her case was that those discussions had been had and settled on 2 September 2015. However, rather than stymieing the process by repeatedly returning to this position, as many self-represented litigants may have done, the claimant calmly dealt with the issues as raised by Mr Pitt.
- 88 With the claimant's version being inherently probable and the claimant presenting as an intelligent and credible witness I have no hesitation at all in accepting it be true.
- 89 Mr Pitt's version is not believable.
- 90 Mr Pitt would have me believe that in relation to the issue of commissions all that was negotiated before the claimant compromised her position in the several ways she did by signing the deed was that the claimant agreed to set limits on her claims and left it to Mr Pitt to decide whether those upper limits or some other amount, which could be zero, would be paid.
- 91 It is not believable that an intelligent person, as the claimant presented to be, would agree to such an arrangement, during what was clearly a negotiation where both parties were seeking outcomes, when it gave the claimant nothing and the respondent not only a quiet end to the claimant's employment but total discretion in relation to the key matter for the claimant.
- 92 It is not believable that the parties would have gone to the trouble of producing the table that was attached to Exhibit 4 simply to record the upper limits of the claimant's possible payments and sign it to confirm that this had been discussed.
- 93 It is not believable that Mr Pitt insisted on "investigating" the claims after the meeting. This issue is a significant weakness in Mr Pitt's version because his evidence did not tell me much at all about the investigations he conducted after 2 September 2015 and the new and important information those investigations brought to light. For the most part the information which was said to have resulted from Mr Pitt's investigations would have clearly been known to him at the time of the meeting on 2 September 2015.
- 94 I find that what happened was that Mr Pitt communicated his point of view to the claimant in relation to each client listed at the meeting on 2 September 2015 without there being a need for him to investigate anything, that he made the points to the claimant at the meeting in much the same way he did in his evidence, and that he was able to talk the claimant down from the 10% claimed in many instances.
- 95 Sometimes Mr Pitt was successful in getting the claimant to agree to no commission, in other cases he obtained agreement to 5%. Mr Pitt's knowledge of his business and its clients operated at the meeting to have the claimant reduce her claim from a higher to a much lower amount, being the \$13,915.30 in Exhibit 4. That is where the issue ended.
- 96 The various percentage amounts were as reflected by the sheets comprising Exhibit 5 and these were then totalled and included in the table which is the last page of Exhibit 4. The signing of Exhibit 4 reflected agreement and not acknowledgment of receipt.
- 97 Mr Pitt pointed to Item 6 in the schedule to Exhibit 4 and its reference to "new" clients as being the reason why he needed to investigate matters and as being a complete answer to the claim. Insofar as Mr Pitt points to Item 6, I find whatever the sentence was intended to mean by the author (which would appear to have been some advisers to the respondent who were not present at the meeting), the parties negotiated something different on 2 September 2015 and came to agreement in relation to it.
- 98 I should indicate that I do not mean by my reasons for decision, and I do not find, that Mr Pitt was dishonest in giving his evidence before me.
- 99 I consider there is a different explanation for his evidence and that explanation gives additional insight into why I believe the claimant's evidence in preference to that of Mr Pitt.
- 100 Mr Pitt gave evidence that he employed the claimant without a formal process being followed after he met her because he was "impressed with her as a person" (t82).

- 101 He said that during the course of her employment his view about her being a good person never changed.
- 102 However, Mr Pitt said that during the claimant's employment he began to have concerns about her ability to earn revenue for the respondent.
- 103 Mr Pitt gave evidence that he made up his mind to dismiss the claimant and invited her to his apartment to give her the bad news. However, he did not dismiss the claimant. Mr Pitt gave this evidence:
- "...Rae without offending you, you were invited to my apartment to be dismissed. I backed out of it." (t109)
- 104 Asked "why?", Mr Pitt gave the following evidence:
- "Because I - as I said, I felt very sorry for you, that I thought Troy wasn't giving you the opportunity to succeed. You were invited to my house to be let go politely, in the nicest way."
- 105 Mr Pitt then gave evidence that he found the claimant to be a likeable person and that she was "a very hard person to be negative to" (t110).
- 106 Mr Pitt said several times throughout the hearing that he was uncomfortable with the confrontational position he now found himself in with the claimant.
- 107 Ultimately when Mr Pitt did decide that the claimant's employment was to end he relied upon general financial considerations rather than relying upon, as he evidently thought he could, the claimant's alleged poor performance.
- 108 It is clear to me that Mr Pitt was not "hard-nosed" in relation to his dealings with the claimant. He admitted as much in relation to hiring her without a formal process, in backing out of dismissing her when he had made his mind up to do so and had invited her to the meeting at which it was to occur, and in "sugar-coating" the reasons for her employment eventually ending.
- 109 Given that Mr Pitt found the claimant likeable and evidently felt bad when he eventually did communicate to her that her employment was ending, it is entirely believable that Mr Pitt negotiated in the way the claimant says he did on 2 September 2015 and concluded a fair agreement with the claimant pursuant to which she would go on receiving commission payments despite her employment ending.
- 110 Mr Pitt's conduct at the meeting, as I have found it, is entirely consistent with his own evidence about his view of the claimant and his past dealings with her.
- 111 It is clear to me that subsequent to the meeting and the agreement Mr Pitt had a closer look at the financial position of the respondent and was not pleased.
- 112 It may also be the case that, despite Mr Pitt denying it, he spoke with business persons who he looked up to as mentors (t90 and 94) and came to the conclusion that he had made a bad deal with the claimant on 2 September 2015, either outright or in the context of the financial position of the respondent.
- 113 In any event, after the meeting on 2 September 2015 Mr Pitt clearly did change his mind.
- 114 So much is clear, even on Mr Pitt's version, because he admitted that CSK Stone (and perhaps some others) were new clients and that the claimant was entitled to commission at the meeting on 2 September 2015 but at the subsequent meeting, the one at the café, he told the claimant she would not be receiving even these amount because "...I had subsidised her income over the time of her employment, and as I looked back at the figures she was overpaid." (t89)
- 115 If there had not been some alteration in Mr Pitt's position after the 2 September 2015 meeting he would not have done this. I consider there was in fact a change in Mr Pitt's position not only in relation to CSK Stone but in relation to everything agreed at the meeting on 2 September 2015.
- 116 The story which makes sense, and is supported by all of the evidence, is that Mr Pitt made an agreement on 2 September 2015, in accordance with his practice of being accommodating toward a person he liked and felt sorry for, and then, repenting at leisure, decided to not honour it.
- 117 I find, however, that Mr Pitt, by the time he came to give evidence, was largely unaware of the mental processes that led to him to give the evidence he did.
- 118 I find it likely that so disappointed was Mr Pitt in the deal he had done on 2 September 2015, after reviewing the respondent's financial position and with the words of his mentors ringing in his ears, that he has truly come to believe that there is no way he could have agreed to it.
- 119 But agree to it he did.
- 120 I have no doubt that the claimant and Mr Pitt on behalf of the respondent, by agreement, varied the terms of the claimant's contract of employment and that it became a term of her employment that she would be paid the amount of \$13,915.30, subject to the full amounts expected to be paid by clients actually being paid to the respondent.
- 121 As in relation to "The West Real Estate Programme" clients, the subject of the claim, amounts that would generate only \$9,954.60 in commission were paid I find that the claimant became entitled to payments under her contract of employment, as varied on 2 September 2015, in that amount.
- 122 Before completing these reasons for decision I should comment about the failure of both parties to call Troy McGuinness as a witness.

- 123 Mr McGuinness was the other person at the meeting on 2 September 2015 and it goes without saying that it would have been relevant to hear his evidence about what occurred.
- 124 In terms of what might emerge from him not being called as a witness I do not have solid evidence upon which I could come to a conclusion about whose camp Mr McGuinness is now in but there was the suggestion that Mr Pitt and Mr McGuinness are now in dispute.
- 125 I am content to proceed on the basis that Mr McGuinness was probably in the claimant's camp and that, to avoid an inference being drawn that his evidence would not have assisted the claimant, it was incumbent upon her to call him or adequately explain why she did not do so.
- 126 In relation to this, the claimant said that she had contacted Mr McGuinness and that he had agreed to appear as a witness but about a week before the hearing date had contacted her and told her that he would be in Brisbane on business on that date.
- 127 The claimant told me she did not "feel comfortable" summoning Mr McGuinness to appear but, making the kind of appropriate admission that showed her to be a frank person, said she probably should have done it.
- 128 The claimant sought an adjournment of the proceedings to enable her to compel Mr McGuinness' appearance.
- 129 Mr Pitt opposed the application and I did not grant it.
- 130 In the course of his submissions on the application Mr Pitt told me that he knew Mr McGuinness to, in fact, be in Perth and he said "the reason Troy is not here at the moment is because he decided he didn't want to go through the headache" (t125).
- 131 Taking all that was said to me at face value, and I have no reason not to, the claimant made reasonable efforts, given that she is a self-represented person, to have Mr McGuinness attend and gave a reasonable explanation for not calling him.
- 132 Although I might have taken a different view if the claimant had been represented by counsel, given that the claimant represented herself it would be unfair to her in all of the circumstances to draw an inference that Mr McGuinness' evidence would not have assisted her.
- 133 I consider the matter to be a neutral one in relation to my decision making.
- 134 I have found that the claimant was not allowed benefits to which she was entitled under her contract of employment, as varied on 2 September 2015, for the reasons above and will be making orders that the respondent pay to her forthwith the following amounts:
- (1) \$4,502.83 (less tax) being for commission payable in August 2015; and
 - (2) \$9,954.60 (less tax) pursuant to the variations to her contract agreed on 2 September 2015.

2017 WAIRC 00003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RAELENE DENTON

CLAIMANT

-v-

TORQUE PRODUCTIONS PTY LTD

RESPONDENT**CORAM**

COMMISSIONER D J MATTHEWS

DATE

WEDNESDAY, 4 JANUARY 2017

FILE NO/S

B 96 OF 2016

CITATION NO.

2017 WAIRC 00003

Result

Claims allowed; payment ordered

Representation**Claimant**

In person

Respondent

Mr A Pitt (Director)

Order

HAVING heard Mrs R Denton on her own behalf and Mr A Pitt for the respondent on 9 November 2016; and

HAVING given Reasons for Decision in which I determined to allow the claimant's claims;

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

THAT the respondent forthwith pays to the claimant:

1. \$4,502.83 (less tax) being for commission payable in August 2015; and
2. \$9,954.60 (less tax) pursuant to the variations to her contract agreed on 2 September 2015.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2017 WAIRC 00007

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00007
CORAM : COMMISSIONER D J MATTHEWS
HEARD : WEDNESDAY, 21 DECEMBER 2016
 THURSDAY, 22 DECEMBER 2016
DELIVERED : THURSDAY, 5 JANUARY 2017
FILE NO. : B 142 OF 2016
BETWEEN : DEAN WOODCOCK
 Claimant
 AND
 SPOTLESS MANAGEMENT SERVICES PTY LTD
 Respondent

CatchWords : Claim for redundancy payment - Claim disputed - Respondent cites ordinary and customary turnover of labour exception - Held claimant's termination due to ordinary and customary turnover of labour - Claim dismissed

Legislation : *Industrial Relations Act 1979* (WA)

Result : Claim dismissed

Representation:

Claimant : In person

Respondent : Ms H Millar (of Counsel)

Solicitors:

Respondent : Herbert Smith Freehills

Case(s) referred to in reasons:

Compass Group (Australia) Pty Ltd v National Union of Workers (2015) 253 IR 32

Termination, Change and Redundancy Case (1984) 8 IR 34 and (1984) 9 IR 115

The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. v Dancroft Holdings Pty Ltd t/as Concept Contract Interiors (1994) 74 WAIG 1885

Case(s) also cited:

National Union of Workers v Compass Group (Australia) Pty Ltd [2015] FWC 6055

Reasons for Decision

- 1 This matter was heard at the same time as B 138 of 2016 and B 159 of 2016.
- 2 The claimant gave evidence on his own behalf and the respondent called Peter Noel Woods, its commercial manager for laundries in Western Australia, and Matthew Potter, its national human resources manager.
- 3 It is not in dispute that the claimant's employment ended on 30 June 2016.
- 4 The claimant refers to clause 14 of his contract of employment (Exhibit 1) and says that his employment was "terminated due to redundancy" and that he is entitled to the sum provided for in that clause.
- 5 The respondent points to the exception in clause 14 being that the sum provided for in the clause is not payable where the redundancy is due to "the ordinary and customary turnover of labour."
- 6 It is not in dispute that the claimant's employment was terminated because the respondent no longer required the claimant's job to be done by anyone. That is, it is not in dispute that the claimant was made redundant.

- 7 The claimant was employed as a “Facilities Manager” from 8 October 2007 under Exhibit 1.
- 8 It is not in dispute that the core of his work over the period of his employment related to the discharge of the respondent’s obligations under the “Contract for the Supply of Services for Western Property – Service Arrangers” between the Western Australian Government and the respondent (Exhibit 4) which commenced on 19 December 2001 and was variously extended and renewed (documents relating thereto being tendered as a bundle as Exhibit 5).
- 9 It is not in dispute that Exhibit 1 did not make specific reference to Exhibit 4 or the materials in Exhibit 5 and the claimant says that at times during his employment he believed he did some work not related to Exhibit 4, as extended and renewed by the documents comprising Exhibit 5.
- 10 It is not in dispute that the contractual relationship between the Western Australian Government and the respondent that commenced with Exhibit 4, and was extended and renewed by the materials in Exhibit 5, came to an end on 30 June 2016. The respondent tendered for a contract that would have continued the relationship beyond 30 June 2016 but was unsuccessful.
- 11 It was also not in dispute, or to the extent it was the evidence makes it overwhelmingly clear, that the claimant’s employment came to an end because of the respondent’s failure to win the new contract.
- 12 The end of the contractual relationship between the Western Australian Government and the respondent that commenced with Exhibit 4 and the end of the claimant’s employment with the respondent occurred on the same day.
- 13 Exhibit 2 was a letter dated 30 September 2015 which offered the claimant a “retention award” of \$4,000 if he remained in employment until the obligations created by Exhibit 4 and the materials in Exhibit 5 were completed. The clear implication arising from Exhibit 2 is that there was a chance the respondent would not win the new contract and that, if it did not, this would potentially lead to the claimant’s employment ending (hence the monetary encouragement to the claimant to not “jump ship” against the background of this risk).
- 14 Exhibit 3 was a letter dated 19 April 2016 which informed the claimant that the respondent had not been successful in winning the new contract and that, as a result, the claimant’s employment would end on the date the current contract came to an end, 30 June 2016, unless the claimant was redeployed.
- 15 I have no hesitation in finding that the claimant’s employment ended because of the ending of the contractual relationship between the respondent and the Western Australian Government that had commenced with Exhibit 4 and which had continued, in the ways evidenced by the materials in Exhibit 5, until 30 June 2016.
- 16 I make this finding even though I accept that the claimant’s contract makes no reference to the contractual relationship and that the claimant may have, at various times over the years, done work unrelated to that contractual relationship. The evidence is that, despite any such work, the employment ended as a result of the ending of the contractual relationship.
- 17 The only question I need to decide is whether the loss of employment resulting from the loss of the contractual relationship was due to “the ordinary and customary turnover of labour”.
- 18 It was not disputed that the term “ordinary and customary turnover of labour” in clause 14 of Exhibit 1 comes from what is known as the *Termination, Change and Redundancy Test Case* (1984) 8 IR 34 and (1984) 9 IR 115 and that its meaning may be derived from the meaning of the term intended by the Full Bench in that case.
- 19 Accordingly, the respondent submits I am determinatively assisted by the decision of the Full Bench of the Fair Work Commission in *Compass Group (Australia) Pty Ltd v National Union of Workers* (2015) 253 IR 32.
- 20 I am, of course, not bound by the decision but I have read it and am persuaded by the reasoning therein. Relevantly, having considered the history set out in the case and the reasoning contained therein, I accept, and I here note that the second headnote in the reported decision accurately sets out the *ratio decidendi* of the decision, that “there is no basis for excluding dismissals arising from loss of contracts from the concept of ordinary and customary turnover of labour where this is a normal feature of the business.”
- 21 Whether the ending of an employee’s employment is a normal feature of the business in any given case is a matter of fact.
- 22 In this case the evidence, which was not seriously challenged, established that the business of the respondent is primarily the tendering for service contracts in a competitive market and, where successful, the discharge of the obligations imposed by the contract for its duration. The evidence was that the respondent recruits to fulfil its obligations where it wins such contracts and it terminates the employment of those it has recruited when the contractual relationship ends, if redeployment is not possible. This was shown by Exhibit 9, a table containing unchallenged figures demonstrating that when contracts end a high percentage of the employees associated with those contracts have their employment terminated.
- 23 Although the claimant was not employed on a contract which expressed that his employment was “tied” to the contractual relationship evidenced by Exhibit 4 and the materials in Exhibit 5, I have found as a fact that his employment was closely linked to that contractual relationship and that the ending of that employment was directly and wholly related to the end of the contractual relationship. I find also that this was a common incident within the respondent’s business.
- 24 I also accept the evidence that the respondent does not make redundancy payments in the circumstances that applied to the claimant.
- 25 I find that what happened to the claimant was, viewed in the context of the respondent’s usual business practices, normal. I accept that for most, if not all, private sector employees their employment depends on their employer winning contracts. Even a local corner store must, by way of acceptance of its offers, win enough contracts to stay in business and employ people. The distinguishing and determinative factor in this case is that it is the respondent’s business to win and service contracts and that its employment of employees is, in the main, related specifically to the discharge of its responsibilities under those contracts. That is, the bulk of its workforce is recruited when it wins contracts (and only when it wins them)

and let go, without redundancy payments, when it loses them. For these reasons it is able to point to an “ordinary and customary” turnover of labour. What is “normal” for it will not be normal for most businesses.

- 26 The claimant’s circumstances in this case was within an ordinary and customary turnover of labour.
- 27 I have considered whether it makes any difference that the claimant was in a management position. There is no evidence that persons in a position such as that the claimant held are not within a class of employees for whom it is normal within the respondent’s business for their employment to end upon the loss of a contract without a redundancy payment. Mr Potter was not cross-examined on this issue.
- 28 I have also considered the decision of the Full Bench of the Western Australian Industrial Relations Commission in *The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. v Dancroft Holdings Pty Ltd t/as Concept Contract Interiors* (1994) 74 WAIG 1885. I distinguish that decision for the reasons submitted by counsel for the respondent, that is that the case was one relating to redundancies caused by a downsizing occasioned by economic factors and not a true ordinary and customary turnover of labour situation.
- 29 The claim is dismissed.

2017 WAIRC 00008

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DEAN WOODCOCK

CLAIMANT

-v-

SPOTLESS MANAGEMENT SERVICES PTY LTD

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE THURSDAY, 5 JANUARY 2017
FILE NO/S B 142 OF 2016
CITATION NO. 2017 WAIRC 00008

Result Claim dismissed
Representation
Claimant In person
Respondent Ms H Millar (of Counsel)

Order

HAVING heard the claimant on his own behalf and Ms H Millar, of Counsel, for the respondent on 21 and 22 December 2016; and

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

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

The claim be dismissed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Charlotte Jolley	Mr Robert Ascott	B 94/2016	Commissioner D J Matthews	Discontinued
Edgar Vicente Gonzalez	Rocky Bay Inc ABN 66 026 387 386	U 90/2016	Commissioner D J Matthews	Discontinued
Ryan Musiello	Racing and Wagering Western Australia	U 38/2016	Commissioner T Emmanuel	Discontinued
Yasir Abed Mohammed	Bahri Sevinc, Alaska Transport Services	B 44/2016	Commissioner D J Matthews	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00018

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MR LESLIE MAGYAR

APPLICANT

-v-

DEPARTMENT OF EDUCATION

RESPONDENT**CORAM**

COMMISSIONER T EMMANUEL

DATE

THURSDAY, 12 JANUARY 2017

FILE NO/S

APPL 66 OF 2016

CITATION NO.

2017 WAIRC 00018

Result

Order issued

Order

HAVING heard the applicant on his own behalf and Ms R Hartley (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it 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 7 February 2017.
2. THAT the applicant file and serve outlines of evidence by 28 February 2017.
3. THAT the respondent file and serve outlines of evidence by 21 March 2017.
4. THAT the applicant file and serve an outline of written submissions by 11 April 2017.
5. THAT the respondent file and serve an outline of written submissions by 2 May 2017.
6. THAT this matter be listed for hearing not before 9 May 2017.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2017 WAIRC 00002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ALAN JAMES EPIS

APPLICANT

-v-

CHIEF EXECUTIVE OFFICER CITY OF BUNBURY

RESPONDENT**CORAM**

CHIEF COMMISSIONER P E SCOTT

DATE

TUESDAY, 3 JANUARY 2017

FILE NO/S

B 222 OF 2016

CITATION NO.

2017 WAIRC 00002

Result

Order issued

Representation**Applicant**

Mr K Trainer as agent

Respondent

Ms B MacMillan

Order

WHEREAS this is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*, by which the applicant refers to the Commission a claim that he has been denied a benefit, not being a benefit arising under an award or order, to which he is entitled under his contract of employment; and

WHEREAS the applicant seeks that the Commission:

1. Order that the time for the respondent to file a response to the Form 3 be shortened to close of business Wednesday 4 January 2017,
2. Expedite the progress of the matter, and
3. permit the service of the application by email; and

WHEREAS the Commission has made enquiries of the parties as to the circumstances of the matter and considered the matter, and has decided to grant the applicant's requests set out above.

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

1. THAT the parties may serve documents by email.
2. THAT the applicant serve the respondent with the Form 3 as a matter of urgency.
3. THAT the respondent file with the Commission and serve on the applicant's agent, its response to the claim no later than 5 pm on Wednesday, 4 January 2017.
4. THAT the parties make themselves available for a conference to be convened by the Commission pursuant to s 32 of the *Industrial Relations Act 1979* on Thursday, 5 January 2017 in the afternoon or Friday, 6 January 2017 in the morning.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2016 WAIRC 00940

**DISPUTE RE ALLEGED BREACH OF CLAUSE 10(1)(F) OF THE WESTERN AUSTRALIAN FIRE SERVICE
ENTERPRISE BARGAINING AGREEMENT 2014**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE UNITED FIREFIGHTERS UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH APPLICANT
	-v-
	THE DEPARTMENT OF FIRE AND EMERGENCY SERVICES RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 20 DECEMBER 2016
FILE NO/S	C 11 OF 2016
CITATION NO.	2016 WAIRC 00940

Result	Order issued
Representation	
Applicant	Ms L Anderson, Mr T Nolan and Mr K Jolly
Respondent	Mr D Spivey and Mr B Stringer

Order

WHEREAS this is an application pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) in relation to the agreed competencies required to be met for the appointment of Superintendents; and

WHEREAS on 20 July, 6 October, 29 November and 19 December 2016, the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS no agreement has been reached to settle the matter; and

WHEREAS at the conference on 19 December 2016, the applicant sought orders pursuant to s 44(6)(ba); and

WHEREAS given that:

- (a) the parties have been in dispute regarding the matter for a number of years;
- (b) appointments are being made while the dispute remains unresolved that is adding to the disputation; and

- (c) the applicant is contemplating placing bans on officers accepting directions from Superintendents whose appointments are controversial due to their competencies;

I am satisfied that such orders will prevent the deterioration of industrial relations in respect of this matter until conciliation or arbitration resolves the matter; and

NOW THEREFORE, I, pursuant to the powers conferred on me under s 44(6)(ba) of the Act, hereby order:

1. THAT prior to any appointment to any Superintendent position, whether the appointment be an acting or a permanent appointment, and whether the appointment be from external to, or internal within, the Department of Fire and Emergency Services, the respondent must notify the applicant of its intention to appoint.
2. THAT by Friday 13 January 2017, the parties are to provide to each other, and to the Commission:
 - (a) a list of no less than three names of persons (“experts”) who they believe are able to advise on the requirements necessary for a candidate to meet the appropriate competencies for the Superintendent position. The list should contain sufficient biographical details for the other party to make an informed assessment of that expert’s suitability; and
 - (b) the draft terms of reference for the expert’s appointment.
3. THAT by Friday 20 January 2017, the parties are to meet to discuss the selection of the expert or the expert panel.
4. THAT in around five weeks’ time, a report back conference will be listed.
5. THAT either party may request a conference with 24 hours’ notice.
6. THAT there be liberty to apply.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2016 WAIRC 00951

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

IAN GLEN OF MANDURAH PAINTERS AND DECORATORS

APPLICANT

-and-

THE MASTER PAINTERS, DECORATORS AND SIGNWRITERS ASSOCIATION OF
WESTERN AUSTRALIA (UNION OF EMPLOYERS)

RESPONDENT

CORAM

THE HONOURABLE J H SMITH, ACTING PRESIDENT

DATE

WEDNESDAY, 21 DECEMBER 2016

FILE NO/S

PRES 3 OF 2016

CITATION NO.

2016 WAIRC 00951

Result

Interim order made

Appearances

Applicant

Ms R Cutler, as agent

Respondent

Ms R Cutler, as agent

Order

WHEREAS pursuant to r 8.3 of the rules of the respondent the terms of each of the current voting members of the executive committee expire on 31 December 2016;

AND WHEREAS pursuant to a request for conduct of elections to be conducted in accordance with s 69 of the *Industrial Relations Act 1979 (WA)* (the IR Act) nominations for offices of the executive committee were due to be received by and filed with the Western Australian Electoral Commission (the WAEC) by 12 noon on Friday, 25 November 2016;

AND WHEREAS due to an administration error the nominations were not filed by 25 November 2016;

AND WHEREAS the WAEC has advised the respondent that there is insufficient time to call elections before its Christmas closure on 21 December 2016, nor could the WAEC indicate when it could conduct elections in the New Year;

AND WHEREAS I am satisfied that it is appropriate to make an interim order to constitute an interim executive committee on and from 1 January 2017 for a period of three months;

NOW THEREFORE, as Acting President, pursuant to the powers conferred under the IR Act, by consent, I hereby order:

1. An interim executive committee is established on and from 1 January 2017 constituted as follows:
 - (a) Ian Glen (president)
 - (b) Gary Cox (vice president)
 - (c) Alan Walters (executive committee member)
 - (d) Graham Williams (executive committee member)
 - (e) Jack Mast (executive committee member)
 - (f) Neville Eastabrook (executive committee member)
 - (g) Matt Redman (executive committee member)
 - (h) David Gorton (executive committee member)
 - (i) Matt Webb (executive committee member).
2. Whilst this order remains in force the interim executive committee:
 - (a) is to take steps to ensure the election to fill the positions of president, vice president and seven executive committee members as soon as possible;
 - (b) shall exercise all the powers, functions and duties of the of the executive committee and each of the office holders shall have the authority to exercise all of the powers, duties and functions of the office held by them, pursuant to the rules of the respondent.
3. Unless this order is revoked or varied, this order will cease to have effect on 31 March 2017, or when the results of the election of the positions of president, vice president and committee members are declared, whichever occurs first.
4. There be liberty to the parties to apply to vary the terms of this order.

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2016 WAIRC 00949

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GEOFF KELLY OF KELLY'S HOT WATER, GAS & AIR

APPLICANT

-and-

THE MASTER PLUMBERS AND GASFITTERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)

RESPONDENT

CORAM THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE WEDNESDAY, 21 DECEMBER 2016
FILE NO/S PRES 4 OF 2016
CITATION NO. 2016 WAIRC 00949

Result Interim order made
Appearances
Applicant Ms R Cutler, as agent
Respondent Ms R Cutler, as agent

Order

WHEREAS pursuant to r 8.3 of the rules of the respondent the terms of each of the current voting members of the executive committee expire on 31 December 2016;

AND WHEREAS pursuant to a request for conduct of elections to be conducted in accordance with s 69 of the *Industrial Relations Act 1979* (WA) (the IR Act) nominations for offices of the executive committee were due to be received by and filed with the Western Australian Electoral Commission (the WAEC) by 12 noon on Friday, 25 November 2016;

AND WHEREAS at the close of nominations at 12 noon on Friday, 25 November 2016 only two nominations were received for the vacancies;

AND WHEREAS in accordance with r 10.2(f) of the rules of the respondent candidates Peter Robert Dawe and Mark Sadler were each elected unopposed to the position of executive committee member with a term to commence on 1 January 2017 and to expire on 31 December 2017;

AND WHEREAS by an administrative error no nominations were received for the remaining:

- (a) position of president;
- (b) position of vice president; and
- (c) eight positions of executive committee member.

AND WHEREAS the WAEC has advised the respondent that there is insufficient time to call elections before its Christmas closure on 21 December 2016, nor could the WAEC indicate when it could conduct elections in the New Year;

AND WHEREAS from 1 January 2017 the executive committee will not be capable of constituting a quorum;

AND WHEREAS I am satisfied that it is appropriate to make an interim order to constitute an interim executive committee on and from 1 January 2017 for a period of three months;

NOW THEREFORE, as Acting President, pursuant to the powers conferred under the IR Act, by consent, I hereby order:

1. An interim executive committee is established on and from 1 January 2017 constituted as follows:
 - (a) Geoff Kelly (president)
 - (b) Ron Grant (vice president)
 - (c) Bill Busby (executive committee member)
 - (d) Michael Harley (executive committee member)
 - (e) Paul O'Leary (executive committee member)
 - (f) Matt Johnson (executive committee member)
 - (g) Paul Manifis (executive committee member)
 - (h) Derek Rowe (executive committee member)
 - (i) Steve Swan (executive committee member)
 - (j) Max Jones (executive committee member).
2. Peter Robert Dawe and Mark Sadler are also to each hold office as an interim committee member whilst this order remains in force.
3. Whilst this order remains in force the interim executive committee:
 - (a) is to take steps to ensure the election to fill the positions of president, vice president and eight executive committee members as soon as possible;
 - (b) shall exercise all the powers, functions and duties of the of the executive committee and each of the office holders shall have the authority to exercise all of the powers, duties and functions of the office held by them, pursuant to the rules of the respondent.
4. Unless this order is revoked or varied, this order will cease to have effect on 31 March 2017, or when the results of the election of the positions of president, vice president and committee members are declared, whichever occurs first.
5. There be liberty to the parties to apply to vary the terms of this order.

[L.S.]

(Sgd.) J H SMITH,
Acting President.

2016 WAIRC 00947

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRADLY GANDY (AWU ASSISTANT SECRETARY)

APPLICANT

-and-

THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS

RESPONDENT

CORAM

THE HONOURABLE J H SMITH, ACTING PRESIDENT

DATE

WEDNESDAY, 21 DECEMBER 2016

FILE NO/S

PRES 5 OF 2016

CITATION NO.

2016 WAIRC 00947

Result	Interim order made
Appearances	
Applicant	Mr C F Young, as agent
Respondent	Mr M Zoetbrood

Order

WHEREAS The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (the AWUWA) was registered on 14 December 2016 as a new organisation following an order made by the Full Bench on 14 December 2016 authorising its registration: [2016] WAIRC 00932;

AND WHEREAS r 30(1) of the rules of the AWUWA requires nominations for elections for offices of the executive to be invited in January 2017;

AND WHEREAS the Western Australian Branch of the Australian Workers' Union (the AWU Branch) is the counterpart federal body of the AWUWA;

AND WHEREAS the AWUWA filed on 16 December 2016 an application for a declaration pursuant to s 71 of the *Industrial Relations Act 1979* (WA) (the IR Act) which if granted by the Full Bench will entitle it to a certificate which will exempt it from compliance with the provisions of the IR Act relating to elections and deem the persons holding a corresponding office in the AWU Branch to hold a corresponding office in the AWUWA;

AND WHEREAS the AWUWA (which includes all registered organisations named the AWUWA through various amalgamations) have held a s 71 certificate since 1981;

AND WHEREAS pursuant to r 61(6) of the rules of the AWU Branch, nominations for elections must be invited for offices of all branch offices in January 2017;

AND WHEREAS the Commission has been informed that nominations for offices of the AWU Branch will open on 11 January 2017 and the roll of electors is to be closed on 4 January 2017;

AND WHEREAS I am satisfied that it is unlikely that the Full Bench is able to hear and determine the s 71 application until sometime late in January 2017 and that it would be oppressive if an interim order is not made under s 66 of the IR Act to disallow r 30(1) by waiving compliance with r 30(1) of the rules of the AWUWA. In my opinion, not to make such an order:

- (a) would impose a financial burden on the AWUWA by requiring an election to proceed shortly after the appointment of a transitional executive; and
- (b) could lead to different persons holding corresponding offices of the AWUWA and the state branch of the AWU.

NOW THEREFORE, as Acting President, pursuant to the powers conferred under the IR Act, by consent, I hereby order:

1. The observance of the requirement in r 30(1) to hold elections in January 2017 is waived.
2. Whilst this order remains in force the transitional executive constituted in r 51 of the rules shall have the authority to exercise all of the powers, duties and functions of the executive and shall have the authority to exercise all of the powers, duties and functions of the office held by each of them.
3. Unless this order is revoked or varied, this order ceases to have effect on 30 June 2017.
4. There be liberty to the parties to apply to vary the terms of this order.

[L.S.]

(Sgd.) J H SMITH,
Acting President.

2016 WAIRC 00952

DISPUTE RE FIXED TERM CONTRACTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL, HOUSING AUTHORITY

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER T EMMANUEL

DATE

WEDNESDAY, 21 DECEMBER 2016

FILE NO

PSACR 25 OF 2015

CITATION NO.

2016 WAIRC 00952

Result Order issued

Order

HAVING heard Ms C Allen (of counsel) and Mr M Shipman (of counsel) on behalf of the applicant and Mr R Andretich (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 by 14 February 2017.
2. THAT the respondent file and serve outlines of evidence by 7 March 2017.
3. THAT the applicant file and serve an outline of written submissions by 15 May 2017.
4. THAT the respondent file and serve an outline of written submissions by 29 May 2017.
5. THAT this matter be listed for a three-day hearing not before 12 June 2017.
6. THAT discovery be informal.
7. THAT the parties have liberty to apply at short notice

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

[L.S.]

2016 WAIRC 00968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BARRY LANDWEHR

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT

DATE WEDNESDAY, 28 DECEMBER 2016

FILE NO. U 93 OF 2016

CITATION NO. 2016 WAIRC 00968

Result Directions amended

Direction

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

WHEREAS on 21 October 2016, the Commission issued Directions to program the matter through to hearing ([2016] WAIRC 00840; (2016) 96 WAIG 1564); and

WHEREAS on 29 November 2016, the Commission amended those Directions to extend time to file witness statements ([2016] WAIRC 00898); and

WHEREAS on 22 December 2016, the parties requested that the Directions be amended to extend time for filing outlines of submissions; and

WHEREAS the Commission is of the opinion that the proposed amendment is expedient for the expeditious and just hearing and determination of the matter.

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

THAT Direction 6 and Direction 7 of the Directions that issued on 21 October 2016 ([2016] WAIRC 00840; (2016) 96 WAIG 1564) be deleted and replaced by the following Directions:

- “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, 20 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, 27 January 2017.”

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2016 WAIRC 00898

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BARRY LANDWEHR **APPLICANT**

-v- **RESPONDENT**

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

CORAM CHIEF COMMISSIONER P E SCOTT

DATE TUESDAY, 29 NOVEMBER 2016

FILE NO. U 93 OF 2016

CITATION NO. 2016 WAIRC 00898

Result Direction amended

Direction

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

WHEREAS on 21 October 2016, the Commission issued Directions ([2016] WAIRC 00840; (2016) 96 WAIG 1564) to program the matter through to hearing; and

WHEREAS on 29 November 2016, the applicant advised the Commission that the parties are preparing a statement of agreed facts and need more time to finish that process; and

WHEREAS the Commission is of the opinion that it is appropriate for the expeditious and just hearing and determination of the matter for the parties to have more time to prepare a statement of agreed facts.

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

THAT Direction 2 of the Directions that issued on 21 October 2016 ([2016] WAIRC 00840; (2016) 96 WAIG 1564) be deleted and replaced by the following Direction:

“2. THAT the parties are to file any statement of agreed facts by no later than Friday, 2 December 2016.”

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2017 WAIRC 00019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MS FONG YEE PANG **APPLICANT**

-v- **RESPONDENT**

MR THOMAS RODERICK LANE

CORAM CHIEF COMMISSIONER P E SCOTT

DATE THURSDAY, 12 JANUARY 2017

FILE NO/S U 193 OF 2016

CITATION NO. 2017 WAIRC 00019

Result Respondent's name amended

Order

WHEREAS this is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* filed on Friday, 25 November 2016; and

WHEREAS on Wednesday, 21 December 2016, the respondent filed a *Form 5 – Notice of answer and counter-proposal* which identified the respondent as ‘Chartwells Chartered Accountants’; and

WHEREAS at a conference convened on Thursday, 12 January 2017, the parties agreed that the respondent is a sole trader, trading under the name identified in the respondent’s *Form 5*; and

WHEREAS the Commission is satisfied that both parties consent and is of the opinion that it is appropriate that the respondent's name be amended.

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

THAT the name of the respondent in this application be amended to "Mr Thomas Roderick Lane trading as Chartwells Chartered Accountants".

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Community Legal Centres Association (WA) Inc Employment Agreement 2016 AG 43/2016	5/01/2017	Western Australian Municipal Administrative, Clerical and Services Union of Employees	Community Legal Centre Associations WA	Commissioner D J Matthews	Agreement Registered
Department of Corrective Services Prison Officers' Industrial Agreement 2016 AG 46/2016	29/12/2016	The minister for Corrective Services	Western Australian Prison Officers' Union of Workers	Commissioner D J Matthews	Agreement registered
Public Transport Authority Salaried Officers Industrial Agreement 2016 PSAAG 4/2016	20/12/2016	The Public Transport Authority of Western Australia	Western Australian Municipal, Administrative, Clerical and Services Union of Employees and The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees	Commissioner D J Matthews	Agreement Registered
Riverlands Montessori School (Enterprise Bargaining) Staff Agreement 2016 AG 37/2016	1/01/2015	The Independent Education Union of Western Australia, Union of Employees Riverlands Montessori School United Voice WA	(Not applicable)	Commissioner T Emmanuel	Agreement registered
WA Health System - Medical Practitioners - AMA Industrial Agreement 2016 PSAAG 5/2016	(Not applicable)	The Health Service Providers established pursuant to section 32(1)(b) of the Health Services Act 2016 Director General of Department of Health Mental Health Commission	The Australian Medical Association (Western Australia) Incorporated	Commissioner T Emmanuel	Agreement registered

NOTICES—Union Matters—

2017 WAIRC 00011

NOTICE

FBM No. 3 of 2016

NOTICE is given of an application by the Association of Independent Schools of Western Australia (Inc) to the Full Bench of the Western Australian Industrial Relations Commission for an alteration to its Rule 5 - Membership.

The proposed alteration seeks to alter the wording of sub rule 5.2.2. The proposed alteration is highlighted in the **bold and underlined** text below. In 5.2.2 below reference to "Year 1" is deleted and "Pre Primary" is inserted in its place:

RULE 5 - MEMBERSHIP

- 5.1 The Association shall have two categories of Member, namely
- (a) Independent School
 - (b) Affiliated Organisation
- 5.2 For admission as an Independent School Member, the School must
- 5.2.1 be registered under section 160 of the School Education Act,
 - 5.2.2 provide full-time tuition with adequate staff, equipment and resources to students up to at least the completion of the first year of primary education (~~Year 1~~ **Pre Primary**),
 - 5.2.3 have educational and philosophical aims consistent with the objectives of the Association.
- 5.3 For admission as an Affiliated Organisation Member, the organisation must
- 5.3.1 have Advanced Determination pursuant to section 157 of the School Education Act 1999, or
 - 5.3.2 provide education services which support the delivery of educational programs in Independent Schools,
- and, in both cases, have educational and philosophical aims consistent with the objectives of the Association.
- 5.4 Subject to meeting the criteria in Clause 5.2 or 5.3, the Board may admit as a Member the school or organisation in the applicable category of membership.
- 5.5 An Independent School Member is entitled to one vote at all meetings and elections of the Association. Provided an Independent School Member has been continuously financial during the twelve (12) months immediately preceding a nomination, an Independent School Member shall also be entitled to nominate any of its Governors or Principal as candidates for election to office on the Board and Committees of the Association and Governors or Principal or school staff as candidates for election to office on the Committees of the Association.
- 5.6 An Affiliated Organisation Member may not vote at any meeting or in any election of the Association and no person representing an Affiliated Organisation shall be eligible to be elected to office on the Board or Committees of the Association.
- 5.7 A Member's membership of the Association shall terminate if:-
- 5.7.1 the Member ceases to satisfy any of the criteria of an Independent School Member in Clause 5.2 or an Affiliated Organisation Member in Clause 5.3; or
 - 5.7.2 the Member brings the Association into disrepute, in the opinion of the Board, reasonably exercised, or
 - 5.7.3 the Member's annual subscription remains unpaid after 31 March of the year following that in which it was due.
- 5.8 A Member may end its membership by written note of resignation addressed to the Association. The notice of resignation shall be served on the Association by
- 5.8.1 delivering it personally to the Association's address shown at Clause 3.1; or
 - 5.8.2 sending it by certified mail to the postal address of the Association.
- 5.9 A notice of resignation takes effect on the day on which it is served on the Association or on a later day specified in the notice.
- 5.10 A Member which resigns its membership of the Association shall not be entitled to a refund of its annual subscription or any portion thereof.

The matter has been listed for hearing before the Full Bench at 10:30am on Friday, 10 March 2017 on Level 18, 111 St Georges Terrace, Perth. A copy of the Rules of the organisation and the proposed rule alterations may be inspected in the Registry on Level 17.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the Industrial Relations Commission Regulations 2005.

S. HUTCHINSON
DEPUTY REGISTRAR

9 January 2017

VOCATIONAL EDUCATION AND TRAINING ACT 1996—Appeals dealt with—

2016 WAIRC 00954

APPEAL AGAINST THE DECISION TO TERMINATE TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2016 WAIRC 00954
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	THURSDAY, 3 NOVEMBER 2016
		WRITTEN SUBMISSIONS: MONDAY, 25 JULY 2016; WEDNESDAY, 3 AUGUST 2016; THURSDAY, 1 DECEMBER 2016; MONDAY, 19 DECEMBER 2016
DELIVERED	:	WEDNESDAY, 21 DECEMBER 2016
FILE NO.	:	APA 3 OF 2016
BETWEEN	:	JARROD BELFORD
		Appellant
		AND
		DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT
		Respondent

CatchWords	:	Industrial law (WA) - Vocational education and training - Appeal against the decision of the chief executive to terminate a training contract - Nature of the appeal - Whether the appeal is a rehearing or a hearing de novo - Whether the purpose of training contract was frustrated - Meaning of 'frustrated' - Whether error is required before powers can be exercised
Legislation	:	<i>Vocational Education and Training Act 1996</i> (WA) s 60G(3), s 60G(5) <i>Vocational Education and Training (General) Regulations 2009</i> (WA) reg 51(2), reg 53
Result	:	<i>Appeal upheld</i>
Representation:		
Appellant	:	Mr D Vilensky (of counsel)
Respondent	:	Mr A Mason (of counsel)

Cases referred to in reasons:

Builders Licensing Board v Sperway Constructions (Syd.) Pty Ltd [1976] HCA 62; (1976) 135 CLR 616

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194

The Commonwealth v Baume [1905] HCA 11; (1905) 2 CLR 405

Gugliotta v Director General, Department of Training and Workforce Development [2014] WAIRC 00199; (2014) 94 WAIG 394

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

Re Coldham; Ex parte Brideson (No. 2) [1990] HCA 36; (1990) 70 CLR 267

State Chamber of Commerce and Industry v The Commonwealth of Australia [1987] HCA 38; (1987) 163 CLR 329

Reasons for Decision

Background

- 1 On 5 June 2014, Mr Belford and Swan Transit Services Pty Ltd (**Swan Transit**) entered into a contract for Mr Belford to undertake training and education to achieve the qualification of Automotive Technician (Heavy Vehicle Road Transport) (**Training Contract**).
- 2 The Training Contract was lodged and registered with the Department of Training and Workforce Development (**Department**) under the *Vocational Education and Training Act 1996* (WA) (**VET Act**).
- 3 Swan Transit provides vehicles, mainly buses, which are used for public transport under long term contracts with the Public Transport Authority of Western Australia.
- 4 On Sunday 22 November 2015, Mr Belford went to the casino with Mr Perry, his supervisor at Swan Transit.
- 5 Between 1.00 pm and 9.00 pm Mr Belford consumed around six beers and six spirit mixer drinks. The next day Mr Belford arrived at work at around 5.30 am. He was driven to work by Mr Perry.
- 6 On 23 November 2015 Swan Transit did random Blood Alcohol Content (**BAC**) testing at its Midvale depot.

- 7 Mr Belford was asked to move a bus from the Midvale depot to Swan Transit's Mundaring depot. Whilst Mr Belford was at the Mundaring depot, Mr Perry phoned him to let him know that random BAC testing was taking place at the Midvale depot. Mr Belford returned to the Midvale depot and underwent the BAC testing. Mr Belford tested positive to 0.016 grams of alcohol in his system per 100 ml of blood at 7.14 am. A second test taken at 7.42 am showed that Mr Belford had 0.008 grams of alcohol in his system per 100 ml of blood.
- 8 Mr Belford was aware of Swan Transit's policies and procedures including its Drug and Alcohol Policy (**Policy**).
- 9 On 23 November 2015, Swan Transit gave Mr Belford a letter requesting that he 'show cause' as to why his employment should not be terminated.
- 10 Mr Belford participated in a recorded meeting with Swan Transit on 30 November 2015.
- 11 Mr Belford told Swan Transit that he had been using anabolic steroids during the relevant period. He provided a medical certificate dated 27 November 2015 which indicated that Mr Belford visited the doctor after residual alcohol was detected in his system 10 hours after drinking alcohol. It stated '[i]nvestigations indicate he has possible diabetes. This is known to impact on the metabolism of alcohol and may explain the residual alcohol effect. Further investigations are pending.'
- 12 Swan Transit requested a further blood test from Mr Belford. On 2 December 2015, Mr Belford's doctor advised that Mr Belford 'probably had a temporary diabetic condition attributed to his recent use of anabolic steroids for body building' which 'is known to affect alcohol metabolism and may well be the cause of low residual alcohol levels' detected in Mr Belford's BAC test. Mr Belford's doctor also advised that Mr Belford's blood chemistry had returned to normal as at 2 December 2015 because he was no longer using steroids.
- 13 On 4 December 2015, Swan Transit terminated Mr Belford's employment with immediate effect.
- 14 On 16 December 2015, after Swan Transit consulted with the Department, Mr Belford was reinstated pending the outcome of Swan Transit's application to terminate the Training Contract.
- 15 On 17 December 2015, Swan Transit applied to the Department for approval to terminate the Training Contract (**application for termination**).
- 16 On 18 December 2015, the Department informed Mr Belford about Swan Transit's application for termination. The Department told Mr Belford that he had 10 business days to make any submissions in relation to the application for termination.
- 17 Mr Belford provided submissions to the Department on 3 January 2016.
- 18 In response to Mr Belford's submissions, the Department provided Swan Transit with an opportunity to provide further information about:
 - a. the relevant company policy or procedure relating to the dismissal process of Swan Transit employees; and
 - b. whether other employees have breached the Policy and whether they were dismissed.
- 19 On 9 February 2016, Swan Transit provided a response to the Department.
- 20 On 22 February 2016, the chief executive of the Department approved Swan Transit's application for termination.
- 21 Mr Belford appeals the chief executive's decision to approve the termination of his Training Contract. Mr Belford filed a notice of appeal in the Commission on 4 March 2016.

The law

- 22 Section 60G(3) of the VET Act lists the grounds on which the chief executive must approve a termination application:

...

 - (3) The chief executive must approve the termination of a training contract under subsection (2) if satisfied —
 - (a) the employer has ceased or is about to cease business; or
 - (b) the employer is unable to fulfil the employer's obligations under the contract due to a substantial change of circumstances that has occurred since the contract was entered into; or
 - (c) the apprentice has engaged in serious misconduct; or
 - (d) as to any matter prescribed,
 but otherwise may refuse to approve the termination.
 - (4) A person who is dissatisfied by a decision made by the chief executive under this section may appeal against it to the Western Australian Industrial Relations Commission.
 - (5) On an appeal made under subsection (4) against a decision, the Commission must rehear the matter and may confirm the decision or set it aside and either substitute a decision the chief executive could make or order the chief executive to decide the matter again.
- 23 Regulation 51(2) of the *Vocational Education and Training (General) Regulations 2009* (WA) (**VET Regulations**), provides:
 - (2) For the purposes of section 60G(3) of the Act, the chief executive must approve the termination of a training contract if satisfied the purpose of the contract has been or will be frustrated by the apprentice's acts or omissions.

- 24 Section 60G(3) of the VET Act has not been considered by the Commission. Kenner C considered s 60F of the VET Act in *Gugliotta v Director General, Department of Training and Workforce Development* [2014] WAIRC 00199; (2014) 94 WAIG 394 (*Gugliotta*).
- 25 The Commission has not considered reg 51(2) of the VET Regulations.
- 26 The Full Bench of the Commission has not considered the nature of the rehearing under the VET Act.

The chief executive's decision to approve the termination of the Training Contract

- 27 The chief executive's decision record states that the purpose of the Training Contract is for Mr Belford to achieve a qualification, which in this case is Certificate III in Heavy Commercial Vehicle Mechanical Technology. It goes on to provide '[m]y assessment and consideration has therefore been based on whether or not your acts or omissions have frustrated or will frustrate this purpose.'
- 28 The decision record states:

Based on the information provided, I find the employer has substantiated their claims that you have breached their [Policy]. As a result, and in accordance with the [Policy], you have been stood down from your employment. This precludes you from participating in the on the job training which has frustrated the purpose of the training contract, which is to obtain a qualification in the Certificate III in Heavy Commercial Vehicle Mechanical Technology. For this reason, I am satisfied that the requirements of sub-section 60(G)(3)(d) have been met.

As one of the provisions under subsection 60(G)(3) has already been met for the termination application to be approved, I have not assessed the employer's application against sub-section 60(G)(3)(a), (b) and (c).

Nature of the appeal

- 29 At the hearing, Mr Belford and the Department agreed that the appeal was not a hearing de novo, although Mr Belford's counsel appeared to change his mind about this toward the end of proceedings. The parties filed further written submissions about this issue after the hearing.
- 30 Mr Belford and the Department did not ask to admit further evidence. They conducted the appeal on the basis that it was a rehearing and not a hearing de novo.
- 31 Section 60G(5) of the VET Act provides that the Commission must 'rehear the matter'.
- 32 When determining whether an appeal is a hearing de novo or a rehearing, the following factors can be considered:
- a. whether there is provision for a hearing at first instance;
 - b. whether there is a record of the proceedings;
 - c. whether the authority is bound to apply the rules of evidence;
 - d. whether the issues are non-justiciable; and
 - e. whether the authority is required to give reasons:

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194, 241 (Callinan J) (*Coal and Allied*); *Builders Licensing Board v Sperway Constructions (Syd.) Pty Ltd* [1976] HCA 62; (1976) 135 CLR 616, 621 (Mason J).

- 33 Kenner C observes in *Gugliotta*:

The procedure for applications to the chief executive under Part 7 Div 2 of the VET Act is set out in reg 53 of the [VET] Regulations. Under this provision, the chief executive may inform himself or herself as they see fit. The parties must be given the opportunity to make submissions and provide evidence. A hearing may be permitted but is not required. A party may be represented. The decision and reasons for it are required to be given by the chief executive to the parties [21].

- 34 Kenner C held in *Gugliotta* at [22] that an appeal to the Commission from a decision of the chief executive is a rehearing, not a hearing de novo. Such an appeal would normally be based on the evidence and other materials before the chief executive. However, it seemed to Kenner C that as with appeals by way of rehearing generally, further evidence may be admitted in the appeal. There would however need to be a case made as to why further evidence should be admitted.

Mr Belford's submissions

- 35 Mr Belford says the appeal is a rehearing and not a hearing de novo.
- 36 Mr Belford submits that he 'must demonstrate that the [chief executive] erred in reaching [the chief executive's] decision'.
- 37 Mr Belford says the question of whether I must find error on the part of the chief executive is a 'sterile debate' because the chief executive made an error in arriving at his decision and this appeal is not one where, having found no error, the Commission will reach a different decision.

The Department's submissions

- 38 The Department says the principal task required of an appellate body when undertaking a rehearing is to consider whether there was some error in the original decision: *Coal and Allied* (203-205) (Gleeson CJ, Gaudron & Hayne JJ). Section 60G(5) of the VET Act confers such a task upon the Commission. The Commission may 'confirm' or 'set aside' a decision. Such a decision necessarily requires a conclusion on the part of the Commission that the chief executive was either correct or in error in some material respect: *Gugliotta* [23].

- 39 The Department submits that when conducting a rehearing, a review or appellate body cannot intervene to substitute a decision which is the subject of the rehearing with its own decision simply because it would have exercised the discretion conferred upon the original decision maker in a different manner: *House v The King* [1936] HCA 40; (1936) 55 CLR 499, 504-505 (Dixon, Evatt & McTiernan JJ).
- 40 The Department says that:
- a. the presence of a statutory provision which limits the orders a review body can make to affirming, setting aside or substituting a decision; and
 - b. the absence of words which confer the power to make any order the Commission thinks fit;
- means that the appeal is a rehearing and not an appeal de novo. The effect of this is that the Commission's task is to discern error: *Coal and Allied; Re Coldham; Ex parte Brideson (No. 2)* [1990] HCA 36; (1990) 70 CLR 267 (*Brideson (No. 2)*).
- 41 The Department says that the Commission may only intervene and substitute its decision for that of the chief executive if the chief executive acted upon a wrong principle(s), allowed extraneous or irrelevant matters to guide or affect the decision, mistakes the facts or failed to take into account some material consideration.
- 42 The Department says my task is to discern whether the chief executive's decision is affected by error in some material respect. I am not deciding for myself whether I am satisfied that Mr Belford's acts or omissions frustrated the purpose of the Training Contract. Rather, I must determine whether the chief executive erred in making its decision to approve Swan Transit's application for termination on the basis that Mr Belford's actions or omissions frustrated the purpose of the Training Contract.

Conclusion about the nature of the appeal

- 43 I do not agree with Mr Belford's submission that the question of whether there is error on the part of the chief executive is a 'sterile debate'.
- 44 I agree with the Department's submissions about the nature of the appeal.
- 45 Unlike the statutory provision in *Brideson (No. 2)*, which empowered the review body to 'make such order as it thinks fit', the Commission is limited to confirming, setting aside, or substituting the decision for one the chief executive could make, or ordering the chief executive to decide the matter again.
- 46 Given the wording of s 60G(5) of the VET Act, the process set out in reg 53 of the VET Regulations and that no new evidence was admitted, this appeal is an appeal by way of rehearing: *Coal and Allied*.
- 47 I cannot set aside or substitute the chief executive's decision simply because I would decide the matter differently. I can only exercise my powers if there is error on the part of the chief executive.
- 48 I must determine whether there was error on the part of the chief executive in making his decision to approve Swan Transit's application for termination on the basis that Mr Belford's acts or omissions frustrated the purpose of the Training Contract.

What does 'frustrated' mean?

Mr Belford's submissions

- 49 Mr Belford says the word 'frustrated' has the same meaning as the doctrine of frustration. It occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which is undertaken by the contract. Frustration is concerned with the position of the parties to a contract where, after the formation of the contract and without default of either party, performance of the contract has become impossible or has been radically changed.
- 50 Mr Belford submits that the doctrine of frustration is not relevant to these proceedings because Mr Belford was ready, willing and able to work on 23 November 2015.
- 51 Mr Belford submits that the doctrine of frustration does not apply to his appeal because the impossibility of performance resulted from Swan Transit's conduct in standing Mr Belford down. It was Swan Transit's conduct and not Mr Belford's that prevented Mr Belford from complying with his Training Contract.

The Department's submissions

- 52 The Department says the word 'frustrated' should be given its ordinary meaning and I may refer to the word's dictionary meaning: *State Chamber of Commerce and Industry v The Commonwealth of Australia* [1987] HCA 38; (1987) 163 CLR 329, 348 (Mason CJ, Wilson, Dawson, Toohey & Gaudron JJ). Ordinarily the word 'frustrate' can be understood to mean preventing something from 'progressing', 'succeeding', 'being fulfilled' or 'being achieved': *Oxford English Dictionary (Online ed, 3 August 2016)*.
- 53 The Department says that Mr Belford's proposed construction of the word 'frustrated' is contrary to the ordinary principles of statutory interpretation.
- 54 It argues that Mr Belford's proposed construction is contrary to the express words of reg 51(2) of the VET Regulations. This is because the words contemplate that one of the parties, namely the apprentice, is the cause of the purpose of the training contract being frustrated.
- 55 The Department argues that Mr Belford's proposed construction would render some words in reg 51(2) of the VET Regulations meaningless because it would effectively require the Commission to disregard the words 'by the apprentice's acts or omissions'. That construction is contrary to the ordinary principle of statutory interpretation that all words must, so far as possible, be given some meaning and effect: *The Commonwealth v Baume* [1905] HCA 11; (1905) 2 CLR 405, 414 (Griffith CJ).

56 The Department further argues that Mr Belford's proposed construction would result in an absurd result which is contrary to the intention of the legislative scheme. This is because the effect of Mr Belford's proposed construction is that the employer cannot dismiss Mr Belford for conduct that, if committed by any other employee, would have warranted dismissal. Such a result is contrary to the objects and purposes of the VET Act.

Consideration

57 Mr Belford's proposed construction of 'frustrated' is contrary to the ordinary principles of statutory interpretation.

58 I agree with the Department that the word 'frustrated' must be given its ordinary meaning, which is to prevent something from progressing, succeeding, being fulfilled or being achieved.

What is necessary before I can exercise my powers under s 60G(5)?

Mr Belford's submissions

59 Mr Belford says 'the sole question to be determined in this appeal is whether or not any acts or omissions of [Mr Belford] had the effect of frustrating the [Training Contract] between [Mr Belford] and Swan Transit. If the Commission finds that the conduct of [Mr Belford] did not amount to the frustration of the [Training Contract], [Mr Belford's] appeal must be upheld.'

60 Mr Belford submits the chief executive made an error in approving the application for termination on the basis that the Training Contract 'has been or will be frustrated by the apprentices [sic] acts or omissions'.

61 Mr Belford submits the chief executive's decision was 'manifestly wrong' and it was not open to the chief executive to make such a finding.

62 While Mr Belford does not dispute that the chief executive found that Mr Belford breached the Policy, Mr Belford submits that his breach of the Policy could not have contributed to frustrating the Training Contract.

63 It was not Mr Belford's acts or omissions that frustrated the Training Contract, but Swan Transit's act of standing Mr Belford down.

The Department's submissions

64 The Department argues that the chief executive's decision correctly identifies Mr Belford's acts or omissions, correctly identifies the purpose of the Training Contract and correctly applies the term 'frustration'. Accordingly, the Department says the chief executive did not err in his consideration and application of reg 51(2) of the VET Regulations.

65 The Department submits that the relevant acts committed by Mr Belford which were found to frustrate the purposes of the Training Contract were:

- a. Mr Belford's breach of the Policy by testing positive to a BAC of 0.016 grams per 100 ml and 0.008 grams per 100 ml; and
- b. Mr Belford's admission that he used anabolic steroids and failed to inform Swan Transit of that use before he undertook random BAC testing.

66 The Department says the chief executive accurately found those acts to constitute a failure by Mr Belford to comply with the Policy.

67 The Department submits at [48] of its written submissions filed on 3 August 2016 that the Department found that Swan Transit's act of standing Mr Belford down precluded Mr Belford from participating in training, which frustrated the purpose of the Training Contract. The Department confirmed that submission at the hearing.

Consideration

68 As I state at 47, I cannot uphold Mr Belford's appeal simply because I would decide the matter differently to the chief executive. I may only intervene if I find error on the part of the chief executive.

69 However, if I am wrong about that, based on the information that was in front of the chief executive, I find the purpose of the Training Contract was frustrated because of Swan Transit's act of standing Mr Belford down. As a result, the requirements of s 60G(3)(d) of the VET Act were not met. This is because it was not Mr Belford's acts or omissions that frustrated the Training Contract.

70 In any event, I find error on the part of the chief executive.

71 A finding that Mr Belford breached the Policy does not amount to a finding that Mr Belford's acts or omissions frustrated the purpose of the Training Contract.

72 In my view, it would not have been open to the chief executive to find that Mr Belford's breach of the Policy frustrated the purpose of the Training Contract. Contrary to the Department's submission, the chief executive did not make that finding. Rather, the chief executive found that Mr Belford's breach of the Policy resulted in Mr Belford being stood down.

73 The chief executive found, in my view correctly, that the purpose of the Training Contract was frustrated because of Swan Transit's act of standing Mr Belford down.

74 Having made that finding, it was not open to the chief executive to conclude that he was satisfied that the requirements of s 60G(3)(d) of the VET Act were met. This is because it was not Mr Belford's acts or omissions that frustrated the purpose of the Training Contract. There was therefore error on the part of the chief executive.

- 75 It was open to the chief executive to consider whether Mr Belford engaged in serious misconduct. The decision record shows that the chief executive did not do that.
- 76 No submission was made by the Department that I should find Mr Belford engaged in serious misconduct and I make no such finding.
- 77 Having found error on the part of the chief executive, I am satisfied that the chief executive's decision should be set aside.
- 78 I will set aside the chief executive's decision to approve the termination of the Training Contract and substitute it with my own. I will refuse to approve the termination of the Training Contract.
- 79 An order will issue.

2016 WAIRC 00965

APPEAL AGAINST THE DECISION TO TERMINATE TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JARROD BELFORD

APPELLANT

-v-

DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT

RESPONDENT**CORAM**

COMMISSIONER T EMMANUEL

DATE

THURSDAY, 22 DECEMBER 2016

FILE NO/S

APA 3 OF 2016

CITATION NO.

2016 WAIRC 00965

Result

Appeal upheld

Representation**Applicant**

Mr D Vilensky (of counsel)

Respondent

Mr A Mason (of counsel)

Order

HAVING heard Mr D Vilensky (of counsel) on behalf of the appellant and Mr A Mason (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Vocational Education and Training Act 1996* (WA) hereby orders –

- (1) THAT the decision made by the chief executive on 22 February 2016 to approve the termination of the appellant's training contract be set aside.
- (2) THAT the decision made by the chief executive on 22 February 2016 to approve the termination of the appellant's training contract be substituted with a decision to refuse to approve the termination of the appellant's training contract.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.