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INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2017] WASCA 25

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA -v- YOON [2017] WASCA 25
CORAM	**:**	BUSS J MURPHY J KENNETH MARTIN J
HEARD	**:**	20 JULY 2016
DELIVERED	**:**	9 FEBRUARY 2017
FILE NO/S	**:**	IAC 4 of 2015
BETWEEN	**:**	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Appellant AND JUNGHEE YOON Respondent
ON APPEAL FROM:		
Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	J H SMITH (ACTING PRESIDENT) A R BEECH (CHIEF COMMISSIONER) S J KENNER (COMMISSIONER)
Citation	**:**	[2015] WAIRC 00918
File No	**:**	FBA 7 of 2015

Catchwords:

Employment law - Long service leave - Whether entitlement under both the employee's Industrial Agreement and the *Long Service Leave Act 1958* (WA) or whether one or the other applies

Statutory construction - Proper construction of the *Long Service Leave Act* - Meaning of 'employee' - Operation of s 4(3) of the *Long Service Leave Act* - Whether person is, by virtue of industrial agreement or other instrument, 'entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under' the *Long Service Leave Act* - Manner and time at which comparison between entitlement under industrial agreement or other instrument, and entitlement under *Long Service Leave Act*, to be undertaken - Whether comparison to be made prospectively by reference only to the terms of the respective instruments or whether comparison to be undertaken from time to time over the course of the employee's working life having regard to the individual's particular circumstances

Legislation:

Long Service Leave Act 1958 (WA)

Result:

Appeal allowed

Category: A

Representation:

Counsel:

Appellant	:	Mr G Tannin SC & Ms L Pilot
Respondent	:	Mr C Fogliani

Solicitors:

Appellant	:	State Solicitor's Office
Respondent	:	W G McNally Jones Staff Lawyers

Case(s) referred to in judgment(s):

Bull v Attorney-General (NSW) [1913] HCA 60; (1913) 17 CLR 370

City of Kwinana v Lamont [2014] WASCA 112; (2014) 201 LGERA 334

Collins v Charles Marshall Proprietary Limited [1955] HCA 44; (1955) 92 CLR 529

Director General of Department of Transport v McKenzie [2016] WASCA 147

IW v City of Perth [1997] HCA 30; (1997) 191 CLR 1

Kennedy v Board of Fire Commissioners [1967] AR 455

Khoury v Government Insurance Office (NSW) [1984] HCA 55; (1984) 165 CLR 622

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2016] HCA 50

New South Wales Nurses' Association v Ramsay Health Care Australia Pty Ltd [2009] FMCA 579; (2009) 185 IR 1

Nilsen Development Laboratories Proprietary Limited v The Federal Commissioner of Taxation of the Commonwealth of Australia [1981] HCA 6; (1981) 144 CLR 616

Public Transport Authority of Western Australia v Yoon [2015] WAIRC 00918

Re Municipal Officers (New South Wales Electricity Undertakings) Long Service Leave Award, 1970 (1973) 148 CAR 917

The Queen v Hamilton Knight; Ex parte The Commonwealth Steamship Owners Association [1952] HCA 38; (1952) 86 CLR 283

Victims Compensation Fund Corporation v Brown [2003] HCA 54; (2003) 77 ALJR 1797

Yoon v Public Transport Authority of Western Australia [2015] WAIRC 00411

BUSS & MURPHY JJ:

Introduction

1 This appeal concerns the proper construction of s 4(3) of the *Long Service Leave Act 1958* (WA) (LSL Act). It is an appeal from a decision of the Full Bench of the Western Australian Industrial Relations Commission: ***Public Transport Authority of Western Australia v Yoon***[1] (Full Bench decision).

2 The point of construction arises in a dispute between the respondent (Ms Yoon) and the appellant (the Authority). In summary, Ms Yoon commenced employment with the Authority on 28 May 2007. She worked for the Authority until 26 July 2014, when she resigned. The terms of her employment were contained in an industrial agreement entitled 'Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011' (Agreement). The Agreement contained certain entitlements in relation to long service leave, including, under cl 6.6.5, certain entitlements with respect to pro-rata long service leave.

[1] ***Public Transport Authority of Western Australia v Yoon*** [2015] WAIRC 00918.

3 When Ms Yoon left her employment, she was not eligible for the pro-rata entitlements under cl 6.6.5 of the Agreement. She nevertheless contended that she had the benefit of a pro-rata entitlement to long service leave under the LSL Act.

4 Under s 8 of the LSL Act, an 'employee' has an entitlement to long service leave on certain terms. This includes, in broad terms, an entitlement to a payment in lieu of pro-rata long service leave upon termination (in certain circumstances) after 7 years. An 'employee' is defined in s 4(1)(a) to include, subject to subsection (3), a person employed by an employer. Thus, Ms Yoon, as a person employed by the Authority, would be an 'employee', subject, relevantly, to the operation of s 4(3) of the LSL Act.

5 Section 4(3), in broad terms and relevantly, removes from the class of 'employee' for the purposes of the LSL Act, persons who, by virtue of an industrial agreement, are entitled to, or eligible to become entitled to, 'long service leave at least equivalent to the entitlement to long service leave under [the LSL] Act'. Ms Yoon contended that, under the Agreement, she had no long service leave entitlement in relation to pro-rata leave when she resigned and, accordingly, her entitlement was not 'at least equivalent to the entitlement to long service leave under [the LSL] Act' within the meaning of s 4(3) of the LSL Act. She thereby qualified as an 'employee' under the LSL Act, and hence had an entitlement to the pro-rata leave payment provided for in s 8 of the LSL Act. The Authority contended that, on the proper construction of s 4(3) of the LSL Act, Ms Yoon had no entitlement.

6 The dispute was first determined by Industrial Magistrate G Cicchini on 28 May 2015 (magistrate's decision).[2] The Full Bench of the Western Australian Industrial Relations Commission dismissed an appeal by the Authority. The Authority now appeals the Full Bench decision. There is one ground of appeal, to the effect that the Full Bench erred in its interpretation of s 4(3) of the LSL Act. Ms Yoon adopted and relied on the reasons of the Full Bench as being the correct interpretation of s 4(3) of the LSL Act.

Section 4(3) of the LSL Act and the issues in the appeal

7 Section 4(3) of the LSL Act provides:

> Where a person is, by virtue of -
>
> (a) an award or industrial agreement;
>
> (b) an employer-employee agreement under Part VID of the *Industrial Relations Act 1979* or other agreement between the person and his employer; or
>
> (c) an enactment of the State, the Commonwealth or of another State or Territory,
>
> entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under this Act, that person is not within the definition of 'employee' in subsection (1).

8 The issues raised by the parties in this appeal in relation to the proper construction of s 4(3) of the LSL Act, are, in essence, as follows.

9 The first issue involves a consideration of the nature of, and circumstances in which, the comparison is to be undertaken for the purposes of s 4(3) between a person's long service leave entitlement under an award, industrial agreement, other agreement, or Commonwealth, State or Territory enactment (collectively 'other instrument') on the one hand, and under the LSL Act on the other hand. The question is whether the comparison in relation to a person's entitlement is to be undertaken prospectively, by reference to the terms of the two competing instruments (ie, the other instrument and the LSL Act) at the time that each potentially applies to the person's employment, or whether it is to be undertaken retrospectively as the person's individual circumstances change from time to time over the course of their employment. The Authority contends for the former approach,[3] and Ms Yoon contends for the latter. Ms Yoon contends that the language of s 4(3) 'necessitates a focus on the individual circumstances of the person making the claim'.[4]

10 The latter approach may be illustrated as follows. Under the LSL Act, an employee after 10 years continuous service has an entitlement to $8^{2/3}$ weeks long service leave and, after 7 years, but less than 10 years, an entitlement to a payment in lieu of pro-rata long service leave in the event of the termination of the person's employment in certain circumstances. Suppose that under the other instrument, an employee has an entitlement to 15 weeks long service leave after 10 years, but has no pro-rata entitlement to a payment in lieu in the meantime. On the latter approach, no prospective comparison is done and s 4(3) involves a 'wait and see' approach. If the person in fact completes 7 years of continuous service and their employment is then terminated, the relevant comparison is undertaken at that stage. Because, at that time, the other instrument made no provision for payment in lieu, the person would be an 'employee' within the meaning of the LSL Act, and would be entitled to the benefit of payment in lieu of pro-rata long service leave as provided for under s 8(3) of the LSL Act. On the other hand, if the person in fact stayed and completed 10 years of continuous service, the comparison would be made at that point. At that time, as their greater entitlement would be under the other instrument (15 weeks as opposed to $8^{2/3}$ weeks after 10 years), they would not then be an 'employee' for the purposes of the LSL Act, and they could claim under the other instrument.

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[2] ***Yoon v Public Transport Authority of Western Australia*** [2015] WAIRC 00411.

[3] Presumably, on the Authority's approach, the comparative exercise would need to be re-done if the other instrument were subsequently materially amended.

[4] Ms Yoon's written submissions, par 19.

11 The second issue is partly related to the first, but is more concerned with the manner of comparison under s 4(3). The Authority contends that the prospective comparison applied under s 4(3) of the LSL Act is to be undertaken in a 'global' way, by considering and weighing the various aspects of the entitlement to long service leave under the respective instruments. On this approach, s 4(3) calls for an assessment of the pros and cons of the scheme under each instrument, and an objective determination as to whether overall, the other instrument provides for an entitlement 'at least equivalent' to the entitlement to long service leave under the LSL Act. Ms Yoon says that this approach is 'absurd and unworkable'. She submitted, in effect, that, by way of illustration, the magistrate correctly observed that any objective comparison of the terms of the Agreement and the terms of the LSL Act 'would be difficult if not impossible to achieve'.[5]

12 In response, the Authority says that Ms Yoon's construction produces its own complexity, if not unworkability, in the application of the LSL Act. The Authority refers to the following example. Each of the LSL Act and the Agreement provides for an additional period of leave at intervals after the 10-year benchmark. In the case of the LSL Act, it is a further $4^{1/3}$ weeks at (in effect) 15 years. In the case of the Agreement, it is a further 13 weeks at (in effect) 17 years. The Authority says that on Ms Yoon's construction, an employee could be given $4^{1/3}$ weeks leave under the LSL Act at the 15-year service mark, and a further 13 weeks under the Agreement at the 17-year service mark. Ms Yoon's response to this is discussed later in these reasons. The Authority further says that it would be impossible for an employer to make proper provision for long service liabilities if an employee could, in effect, move in and out of different long service leave schemes over the course of their employment.

The magistrate's decision and the Full Bench decision

13 The learned magistrate's reasons were summarised in the Full Bench decision as follows:[6]

> The Industrial Magistrate found that to ascertain whether the terms of the agreement are at least equivalent to the LSL Act required an analysis of the circumstances of the person applying for long service leave and by having regard to a particular person's entitlement when it was necessary to do so. He found this was necessary as a particular person's entitlement will only crystallise once an applicable milestone is met. In making these findings, the Industrial Magistrate found as follows:
>
> (a) An objective analysis of whether 'on the whole', the terms of the agreement are at least equivalent to the LSL Act, is very difficult, if not impossible to achieve.
>
> (b) The significance of the benefit provided by any particular provision will be dependent upon individual circumstances. For some, it may be more important to reach the subsequent milestone in five years rather than seven years. Others may not want to cash out their long service leave entitlement and therefore such an entitlement is of no particular benefit. For others close to retirement age, reaching the pro-rata qualification will be of more importance than reaching the 10 year milestone which might be unachievable.
>
> (c) Each benefit must be weighed against an employee's personal circumstances. No attempt can be made to weigh up, as a whole, the entitlement under the agreement in comparison to the entitlement under the LSL Act. The only practicable way equivalency can be determined is to weigh the competing applicable benefits relevant to the employee at the time that the milestone giving rise to the benefit is reached. The requirement for equivalency in s 4(3) of the LSL Act is a beneficial provision which imports the setting of minimum standards for each particular benefit.
>
> (d) The entitlement to long service leave is personal and is dependent upon individual circumstances. On the event of a milestone being met or in contemplation of that happening, an assessment has to be made as to whether the particular entitlement to long service leave, under the applicable industrial agreement, is at least equivalent to that provided by the LSL Act. It is only then that consideration must be given to whether a person is an employee for the purposes of the LSL Act or not.
>
> (e) Given that industrial instruments, particularly industrial agreements, may be finite it will be impossible for employers to determine whether a person is an employee for the purposes of the LSL Act until it is necessary to do so. That is, on or about the time that the milestone is met. That process is neither unwieldy nor onerous. Indeed, the employer can only assess each person's entitlement on a case-by-case basis. An analysis or comparison at any other time will be practically impossible.
>
> (f) It follows that if an employer has two employees, one may be an employee within the meaning of the LSL Act and the other may not, dependent upon their circumstances. In the context of the agreement, if a person worked for more than seven years but less than 10 years, that person will be an employee within the meaning of the LSL Act, whereas, if the person worked more than 10 years they will not be an employee within the meaning of the LSL Act.
>
> (g) The submission that the pro-rata provision in s 8(3) of the LSL Act should be read in the context of the less beneficial provisions as to the quantum of leave in s 8(2)(a) of the LSL Act is rejected. The entitlement under s 8(3) of the LSL Act is a discrete benefit contextually different

[5] See Ms Yoon's written submissions, pars 21 - 23.

[6] Full Bench decision [14].

from s 8(2)(a) of the LSL Act. There is no dependency between one provision and the other. Indeed, there is no reason to consider the provisions together.

(h) When the circumstances of Ms Yoon are considered and the terms of the agreement, the pro-rata long service leave entitlement under the agreement is repugnant to, and not at least equivalent to, the entitlement to pro-rata long service leave under the LSL Act. Thus, Ms Yoon was an employee for the purposes of the LSL Act and is eligible to receive a pro-rata long service leave entitlement of 6.17 weeks, valued at $6,108.82.

14 In the Full Bench decision, Smith AP effectively agreed with the reasoning of the industrial magistrate. Her Honour referred to the LSL Act as being beneficial legislation,[7] and said:[8]

> It is apparent from the provisions of the LSL Act that 'long service leave' is comprised of a bundle of entitlements, or put another way as a bundle of rights to long service leave which can accrue in varying circumstances. As such it cannot be said that there is a singular or indivisible entitlement or right to long service leave.
>
> …
>
> Without regard to the circumstances of a person no assessment can be made as to whether a particular person is entitled to, or eligible to become entitled to, long service leave under an industrial instrument that is at least equivalent to the entitlement under the LSL Act.

15 Beech CC said, amongst other things:[9]

> Contrary to the submissions of the [Authority] … [s 4(3)] does not involve an objective comparison to determine whether, on the whole, the agreement is at least equivalent to the LSL Act. The language of s 4(3) of the Act does not require such an approach.
>
> Section 4(3) commences by referring to 'a person'. It concludes by saying that where a person is entitled to, or eligible to become entitled to, long service leave under an award, agreement, [etc] … that is at least equivalent to the entitlement under the LSL Act, it is that person who is not within the definition of 'employee' under the LSL Act. This suggests that the determination to be made is in relation to individual circumstances rather than by comparing the entitlements as a whole.
>
> Section 4(3) also refers to where a person is 'entitled to, or eligible to become entitled to', long service leave under an award [etc] but does not refer [to] an eligibility to become entitled to long service leave under the LSL Act. In relation to the LSL Act, s 4(3) does not use the words 'or eligible to become entitled to'. The comparison required by s 4(3) is not of an entitlement or eligibility to become entitled under an award [etc] and an entitlement or eligibility to become entitled under the LSL Act; it is between:
>
> - an entitlement or eligibility to become entitled under an award [etc]; and
> - an entitlement under the LSL Act.
>
> This, in my view, also suggests that the determination is not made by comparing the entitlements under an award [etc] as a whole with the entitlements under the LSL Act as a whole.

16 Kenner C joined in dismissing the appeal, but took a somewhat different approach insofar as his Honour said that s 4(3) 'does not necessarily require the crystallisation of the entitlement or a 'milestone' event to be reached, as found by the … Magistrate, but it may do'.[10]

The LSL Act

The terms of the LSL Act[11]

17 According to its long title, the LSL Act is '[a]n Act to provide for the granting of long service leave to certain Western Australian employees and for matters incidental thereto'.

18 Part II of the LSL Act is entitled 'Construction and application of this Act'. It contains s 4 - s 7. Section 4(1) sets out defined terms, which are to apply unless the context requires otherwise.

19 Section 4(1) defines 'employee' as follows:

> ***employee*** means, subject to subsection (3) -
>
> (a) any person employed by an employer to do work for hire or reward including an apprentice;
>
> (b) any person whose usual status is that of an employee;
>
> (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or

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[7] Full Bench decision [34].

[8] Full Bench decision [50], [57].

[9] Full Bench decision [65] - [68].

[10] Full Bench decision [91].

[11] The LSL Act as it stood at the date of the Agreement.

(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee.

20 Section 4(3) has been set out earlier.

21 Section 5 provides that an employer and employee may agree that the employee may forgo his entitlement to long service leave under the LSL Act if the employee is given 'an adequate benefit in lieu of the entitlement', and the agreement is in writing.

22 Section 8 of the LSL Act, referred to below, provides for the entitlement to long service leave in respect of 'continuous employment' with either the same employer, or a person 'deemed' to be the same employer: s 8(1). In general terms, an employer is 'deemed' to be the same employer where a business has been 'transmitted' from one employer to another employer: s 6(4) and s 6(5).

23 The concepts of 'employment' and 'continuous' employment are addressed in s 6(1) - (3) of the LSL Act. For the purposes of the LSL Act, 'employment' of an employee, whether before or after the commencement of the LSL Act, is deemed to include, by s 6(1)(a) - (c), periods of absence from duty for annual leave, long service leave, public holidays, sickness (up to 15 days per year) and any period following any termination of the employment where such termination has been effected by the employer to avoid its long service leave obligations under the LSL Act. By s 6(d), 'employment' also includes any period where the employment of the employee was or is interrupted by certain military service.

24 For the purposes of the LSL Act, the employment of an employee, whether before or after the commencement of the LSL Act, is deemed to be, by s 6(2), 'continuous' notwithstanding the 'transmission' of a business, any interruption referred to in s 6(1), absences authorised by the employer, the standing down of an employee under certain Commonwealth statutes, absence from duty (subject to certain matters) arising from an industrial dispute, termination from employment by the employer in specified circumstances where the employee is subsequently re-employed by the same employer within certain time frames, and reasonable absence on legitimate union business. It is also deemed to be 'continuous', notwithstanding any absence of the employee from his employment after the coming into operation of the LSL Act by reason of any cause not specified in subsections (1) or (2) unless the employer, during the absence or within 14 days of the termination of the absence, gives written notice to the employee that the continuity of his employment has been broken by the absence. In such a case, the absence is deemed to have broken the continuity of employment.[12]

25 Section 7 contains three subsections. The heading to s 7 is 'Employment before commencement of this Act'. However, only s 7(1) deals with that topic exclusively, and the heading to a section is taken not to be part of the written law: s 32 of the *Interpretation Act 1984* (WA).

26 Section 7(1) provides, in effect, as follows. Where an employee is employed by an employer at the time the LSL Act comes into operation (ie, 24 December 1958), for the purposes of the LSL Act, the 'employment' by that employer is deemed to have commenced when the employee first commenced employment by that employer. However, in calculating the employee's entitlement to long service leave under the LSL Act, no more than 20 years continuous employment prior to the commencement of the operation of the LSL Act, is to be counted.

27 Section 7(2) of the LSL Act provides:

> Any leave, in the nature of long service leave or, as the case may be, payment in lieu thereof, granted, whether before or after the coming into operation of this Act, under any long service leave scheme and irrespective of this Act to an employee in respect of any period of continuous employment with his employer, shall be taken into account in the calculation of the employee's entitlement to long service leave under this Act as if it were long service leave taken under this Act, or, as the case may be, payment in lieu of long service leave under this Act and to be satisfaction to the extent thereof of any entitlement of the employee under this Act.

28 Section 7(3) of the LSL Act provides:

> The entitlement to leave under this Act shall be in substitution for and satisfaction of any long service leave to which the employee may be entitled in respect of employment of the employee by the employer.

29 Part III of the LSL Act is entitled 'Entitlements to long service leave or to payment in lieu thereof'. It contains s 8 - s 10.

30 Section 8 of the LSL Act provides:

> **8. Long service leave**
>
> (1) *An employee is entitled* in accordance with, and subject to, the provisions of this Act, *to long service leave* on ordinary pay in respect of *continuous employment* with one and the same employer, or with a person who, being a transmittee, is deemed pursuant to section 6(4) to be one and the same employer.
>
> (2) An employee who has completed *at least 10 years of such continuous employment*, as is referred to in subsection (1), is entitled to an amount of long service leave as follows -
>
> (a) *in respect of 10 years so completed, 8 2/3 weeks*;

[12] Section 6(2)(i) of the LSL Act.

(b) *in respect of each 5 years' continuous employment so completed after such 10 years, 4 1/3 weeks*; and

(c) *on the termination of the employee's employment -*

(i) *by his death*;

(ii) *in any circumstances otherwise than by his employer for serious misconduct,*

in respect of the number of years of such continuous employment completed since the employee last became entitled under this Act to an amount of long service leave, a *proportionate amount on the basis of 8 2/3 weeks for 10 years of such continuous employment*.

(3) Where an employee has *completed at least 7 years of such continuous employment* since the commencement thereof, but less than 10 years, and *the employment is terminated -*

(a) *by his death*; or

(b) *for any reason other than serious misconduct,*

the amount of leave to which the employee is entitled *shall be a proportionate amount on the basis of 8 2/3 weeks for 10 years of such continuous employment*.

(4) If an employee has completed at least 9 but less than 15 years continuous employment prior to the commencement day, then, despite subsection (2)(a), the employee cannot take long service leave under subsection (2)(a) until after -

(a) if the employee has completed at least 14 years continuous employment prior to the commencement day - completing 15 years continuous employment; or

(b) in any other case - 12 months after the commencement day.

(5) Subsection (4) does not apply if the employee and his or her employer agree to that effect in writing.

(6) Subsection (4) does not apply in respect of a period of continuous employment prior to the commencement day in respect of which the employee has become entitled to take long service leave.

(7) An employee who becomes entitled to take long service leave under subsection (2)(a) in accordance with subsection (4) or (5) also becomes entitled to take long service leave under subsection (2)(b), in respect of the period of continuous employment that exceeds 10 years, pro rata.

(8) Subsection (7) does not apply to an employee if, before being granted the long service leave, the employee completes 15 years continuous employment.

(9) If an employee takes long service leave in accordance with subsection (7), the employee is entitled, after completing 15 years continuous employment, to take the remainder of his or her entitlement under subsection (2)(b) not already taken in accordance with subsection (7).

(10) In subsections (4) and (6) -

commencement day means the day on which the *Labour Relations Legislation Amendment Act 2006* Part 7 Division 2 came into operation. (emphasis added) (footnotes omitted)

31 Section 9 of the LSL Act provides:

9. Commencement of long service leave

(1) Where an employee becomes entitled to a period of long service leave under this Act the leave is to be granted and taken -

(a) subject to any agreement between the employer and the employee, as soon as reasonably practicable after it becomes due; and

(b) in one continuous period, or if the employer and the employee so agree, in separate periods of not less than one week.

(1a) Where an employer and employee have not agreed when the employee is to take the employee's long service leave, subject to subsection (1b), the employer is not to refuse the employee taking, at any time suitable to the employee, any period of long service leave to which the employee became entitled more than 12 months before that time.

(1b) The employee is to give to the employer at least 2 weeks' notice of the period during which the employee intends to take the long service leave.

(2) In a case to which section 8(2)(c) or section 8(3) applies the employee shall be deemed to have been entitled to and to have commenced leave immediately prior to such termination. In such cases and in any case in which the employment of the employee who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the employer shall, upon termination of his employment otherwise than by death pay to the employee and upon termination of employment by death pay to the personal representative of the employee upon request by the personal representative, a sum equivalent to the amount which would have been payable in respect of the period of leave to which he is entitled or deemed to have been entitled and which would have been taken but for such termination. Such payment shall be deemed to have satisfied the obligation of the employer in respect of leave hereunder.

(3) An employee is to be paid for a period of long service leave at the time payment is made in the normal course of the employment, unless -

(a) the employee requests in writing to be paid before the period of leave commences, in which case the employee is to be so paid; or

(b) the employee and employer agree to another method of payment.

(4) If -

(a) a public holiday occurs during a period of long service leave taken by an employee under section 8(2)(a) or (b); and

(b) the employee is otherwise entitled to that holiday under the employee's conditions of employment,

the period of long service leave is increased by one day for each such public holiday.

32 Section 10 of the LSL Act provides:

10. Taking leave in advance

(1) Any employer may by agreement with an employee allow leave to such an employee before the right thereto has accrued due, but where leave is taken in such a case the employee shall not become entitled to any further leave hereunder in respect of any period until after the expiration of the period in respect of which such leave had been taken before it accrued due.

(2) Where leave has been granted to an employee pursuant to subsection (1) before the right thereto has accrued due, and the employment to which the leave relates subsequently is terminated, the employer may deduct from whatever remuneration is payable upon the termination of the employment such amount as represents payment for any period for which the employee has been granted long service leave to which he was not at the date of termination of the employment or prior thereto entitled.

33 By s 11(1)(a), an industrial magistrate's court has jurisdiction to hear and determine all questions and disputes, including 'whether a person is or is not an employee, or an employer, to whom this Act applies'. Section 11 is part of pt IV entitled 'Enforcement of the provisions of the Act'.

34 Part VII of the LSL Act is entitled 'Miscellaneous provisions'. It includes s 26 and s 27.

35 Section 26 provides:

26. Keeping of employment records

(1) An employer must ensure that details are recorded of -

(a) each employee's name and, if the employee is under 21 years of age, the employee's date of birth;

(b) the date on which the employee commenced employment with the employer;

(c) the gross and net amounts paid to the employee under the contract of employment, and all deductions and the reasons for them;

(d) all leave taken by the employee, whether paid, partly paid or unpaid;

(e) details of any agreement made under section 5 between the employer and the employee;

(f) *such other details as are necessary for the calculation of the entitlement to, and payment for, long service leave under this Act*; and

(g) other matters prescribed by the regulations.

(2) The employer must ensure that -

(a) the records are kept in accordance with the regulations; and

(b) each entry is retained during the employment of the employee and for not less than 7 years thereafter.

(3) A contravention of subsection (2) is not an offence but that subsection is a civil penalty provision for the purposes of the *Industrial Relations Act 1979* section 83E.

(4) Subsection (3) extends to a contravention that occurred within the period of 12 months ending on the coming into operation of the *Labour Relations Legislation Amendment Act 2006* Part 7 Division 2 unless the employer was charged with an offence in respect of that contravention. (emphasis added) (footnotes omitted)

36 Section 27 provides:

27. Prohibition of employment during long service leave

(1) An employee shall not, during any period when he is on long service leave, engage in any employment for reward in substitution for the employment from which he is on leave.

(2) If an employee, during any period when he is on long service leave, engages in any employment for reward in substitution for the employment from which he is on leave the employee shall thereupon forfeit his right to leave hereunder in respect of the unexpired period of leave upon which he has entered, and the employer shall be entitled to withhold any further payment in respect of the period and to reclaim any payments already made on account of such period of leave.

(3) The provisions of this section shall not apply to an employee who, pursuant to section 9(2), is deemed to commence a period of leave on the day of the termination of his employment.

The history of s 4(3) of the LSL Act

37 Prior to the introduction of s 4(3) by s 46 of the *Industrial Relations Legislation Amendment and Repeal Act 1995* (WA) (Amendment Act), s 4(1) of the LSL Act excluded persons from the definition of 'employee' by providing that an 'employee':

(c) does not include a person -

(i) if and while the person is entitled, or eligible to become entitled, to long service leave rights as a member of

the Public Service of the State;

the Teaching Service of the State;

the Railway Service of the State;

the Police Force of the State;

or

a Fire Brigade which is a 'permanent fire brigade' according to the interpretation given to that expression by section four of the Fire Brigades Act, 1942; or

(ii) if and while the person is employed by the Crown in the right of the State or by any agency or instrumentality of the Crown in the right of the State as a wage employee who is entitled, or eligible to become entitled, to long service leave rights; or

(iii) if and while the person is employed under the terms of an award or industrial agreement in force under the Industrial Arbitration Act, 1912; or

(iv) if and while the person is the subject of an exemption granted under the provisions of section five of this Act; or

(v) if and while the person is entitled or eligible to become entitled to long service leave under an award or industrial agreement referred to in subparagraph (iv) of paragraph (b) of this interpretation; or

(vi) if and while the person is less than the maximum age for compulsory attendance of children at a Government or efficient school as provided by the Education Act, 1928 or any proclamation made thereunder.

38 As Kenner C noted in the Full Bench decision:[13]

The LSL Act, when first made, provided that it was an Act to grant long service leave to employees whose employment was not regulated under the then *Industrial Arbitration Act 1912* (WA). The then s 4 of the Act set out a definition of 'employee' which contained a number of exclusions, one of which in s 4(c)(iii), included a person whose terms and conditions of employment were regulated by an award or industrial agreement under the then *Industrial Arbitration Act 1912*. A number of other exclusions to the definition of 'employee' applied to persons who were 'entitled, or eligible to become entitled' to long service leave elsewhere, such as in employment in the public sector or those covered by the Commonwealth awards etc.

[13] Full Bench decision [85] - [86].

> In 1995 the *Industrial Relations Legislation Amendment and Repeal Act 1995* (WA), among other things, amended s 4 of the LSL Act to insert the current s 4(3). This amendment, which took effect on 16 January 1996, introduced for the first time, the concept of 'equivalence' between entitlements under a relevant industrial instrument and those under the LSL Act, to determine who was to be covered by the legislation.

39 In other words, prior to the commencement of s 4(3) of the LSL Act, persons were excluded from the entitlement to long service leave under the LSL Act if their terms of employment were regulated by certain awards or industrial agreements, which may not have provided for long service leave. A person was also excluded from the statutory entitlement under the LSL Act if, in effect, he or she was covered for long service leave elsewhere, irrespective of the nature and scope of any benefit contained in the other instrument.

The operation of s 8 of the LSL Act

40 The effect of s 8 of the LSL Act is to confer on an 'employee' an entitlement to 'long service leave' in accordance with, and subject to the provisions of, the LSL Act. The term 'long service leave', as used in s 8 and elsewhere in the LSL Act, is not defined. Nevertheless (as senior counsel for the Authority acknowledged),[14] when s 8 is read as a whole, it is apparent that the term encompasses two aspects of entitlement. The first is in the granting and taking of 'leave away from the employment whilst maintaining its continuity':[15] s 6(1)(a)(ii), s 8(1), s 8(2)(a) and (b). The second is a conditional right to payment in lieu of pro-rata long service leave where the employment is terminated before the leave is taken: s 8(2)(c), s 8(3). Adopting the words of the majority of the High Court in ***Collins v Charles Marshall Proprietary Limited***,[16] (in relation to the long service legislation under consideration in that case) s 8 of the LSL Act:

> begins so to speak with a primary period of long service leave to which a worker is to be entitled and it is subject to variations if his employment is terminated before he takes his leave.

41 In its latter aspect (ie, payment in lieu where the employment is terminated), the employee is deemed to have been entitled to the leave and to have commenced the leave immediately prior to termination: s 9(2). The relevant payment in such a case is 'deemed to have satisfied the obligation of the employer in respect of leave' under the LSL Act: s 9(2). The entitlement also contains its own qualifying period of continuous employment, and is contingent on the termination of the employment arising either by the death of the employee or (broadly speaking) otherwise than by reason of serious misconduct: s 8(2)(c)(i) - (ii), s 8(3)(a) - (b).

42 It appears that a general objective of the LSL Act is to reward long service, as all benefits increase proportionately to length of service: ***Kennedy v Board of Fire Commissioners***.[17] However, the entitlement to time away from employment whilst the employment continues also appears designed (subject to the operation of s 5), to serve the more specific purpose of providing 'thorough respite from work for recuperative purposes'.[18] That appears from the requirement that leave 'is to be granted *and taken*' (emphasis added) (s 9(1)), and from the prohibition on alternative employment whilst the employee is on long service leave (s 27(1)). Nevertheless, respite from service is not mandated if the employee and the employer agree, under s 5, for the employee to forgo the long service leave entitlement. In other words, the entitlement may be monetised, but only if it is in the interests of both parties for the employee to forgo the entitlement, and only if the consideration in lieu is 'adequate'.

43 In both its aspects, the entitlement to long service leave is expressed in terms of the 'amount' of leave to which the employee is entitled: s 8(2), s 8(3).

44 A feature of s 8 is the consistent ratio used for calculating an entitlement. At the stipulated leave intervals, the entitlement is, in effect, 0.866 of a week of leave, for every year of continuous service. That feature is manifested in the entitlement of $8^{2/3}$ weeks leave for 10 years of continuous service (s 8(2)(a)), and in the entitlement to $4^{1/3}$ weeks at each 5-year interval thereafter (s 8(2)(b)). It is reflected in pro-rata entitlements available on termination following the first benchmark period of 10 years and each 5-year interval thereafter (s 8(2)(c)). It is also manifested in the pro-rata entitlement available upon termination after at least 7 years but less than 10 years of continuous employment (s 8(3)).

The Agreement

45 The Agreement, according to its terms, applies to, and binds, approximately 210 employees of the Authority. These 210 employees are members, or eligible to be members, of the Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch (Union). The Agreement also binds the Authority and the Union. It is a comprehensive agreement of 86 pages, plus five schedules. It includes provisions concerning the contract of employment, the hours to be worked, wages and dispute resolution. It also contains a part relating to leave entitlements. In addition to long service leave, the Agreement provides for a large variety of other forms of approved leave, family leave, cultural and ceremonial leave, blood donor leave, maternity leave, adoption leave, partner leave, study leave,

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[14] Appeal ts 16.

[15] In the language of Barwick CJ in ***Nilsen Development Laboratories Proprietary Limited v The Federal Commissioner of Taxation of the Commonwealth of Australia*** [1981] HCA 6; (1981) 144 CLR 616, 624.

[16] ***Collins v Charles Marshall Proprietary Limited*** [1955] HCA 44; (1955) 92 CLR 529, 551.

[17] ***Kennedy v Board of Fire Commissioners*** [1967] AR 455, 456.

[18] In the language of Williams J in ***The Queen v Hamilton Knight; Ex parte The Commonwealth Steamship Owners Association*** [1952] HCA 38; (1952) 86 CLR 283, 303, albeit with respect to 'annual or other periodical leave'. See also ***Re Municipal Officers (New South Wales Electricity Undertakings) Long Service Leave Award, 1970*** (1973) 148 CAR 917, 919.

purchased leave and leave without pay. In total there are 21 types of leave under the Agreement, of which long service leave is one.

46 Clause 6.6 of the Agreement provides as follows:

> 6.6.1. An employee shall be *entitled to thirteen weeks paid long service leave on the completion of ten years continuous service and an additional thirteen weeks paid long service leave for each subsequent period of seven years* of continuous service completed by the employee.
>
> 6.6.2. Where a public holiday falls within an employee's period of long service leave such day shall be deemed to be a portion of the long service leave and no other payment or benefit shall apply.
>
> 6.6.3. Long service leave may be taken in periods of 4 weeks or more, at a mutually agreed time.
>
> 6.6.4. Long service leave shall be paid at the employee's rate of pay as prescribed in the wages clause or as specified for rostered employees.. [sic]
>
> 6.6.5. *An employee will only be entitled to pro rata long service leave if his or her employment is terminated*:
>
> (a) *by the Employer for other than disciplinary reasons*; or
>
> (b) due to the *retirement* of the employee *on the grounds of ill health*; or
>
> (c) due to *the death* of the employee, in which case the payment would be made to the employee's estate; or
>
> (d) due to employee's *retirement at the age of 55 years* or over, provided 12 months continuous service has been completed prior to the day from which the retirement takes effect; or
>
> (e) *for the purpose of entering an Invitro Fertilisation Programme, provided the employee has completed three years service* and produces written confirmation from an appropriate medical authority of the dates of involvement in the programme; or
>
> (f) due to employees *resignation for pregnancy, provided the employee has completed more than three years* and produces certification of such pregnancy and the expected date of birth from a legally qualified medical practitioner.
>
> 6.6.6. For the purposes of determining long service leave entitlement, the expression 'continuous service' includes any period during which the employee is absent on paid leave but does not include any period exceeding two continuous weeks during which the employee is absent on parental leave or leave without pay.
>
> 6.6.7. Continuity of service shall not be broken by the absence of the employee on any form of approved paid leave or by the standing down of an employee under the terms of this Agreement.
>
> 6.6.8. The employer may direct an employee to take a long service entitlement that has been accrued for more than 3 years.
>
> 6.6.9. Where an employee is directed to take long service leave entitlement, it will be taken within 12 months of the direction, at a time agreed between the employer and the employee.
>
> 6.6.10. Where a time cannot be agreed within the 12 month period, the employer will determine the date on which the employee will be required to start long service leave. Provided that the Employer shall give at least 30 days notice to the employee of the day on which the long service leave is to commence. (emphasis added)

47 Employees covered by the terms of the Agreement also have, on specified terms and with the agreement of their employer, the capacity to 'cash out' accrued long service leave under cl 6.7.

Differences between the LSL Act and the Agreement

48 The following differences, at least, may be observed between the LSL Act and the Agreement.

49 Prior to the 7-year mark of completed continuous employment, the LSL Act provides for no long service leave entitlement if the person's employment is terminated. The Agreement under cl 6.6.5, on the other hand, provides persons in certain circumstances with a pro-rata long service leave. The pro-rata rate is 1.3 weeks per year of continuous service. Clause 6.6.5 includes a provision concerning the circumstance where the employment is terminated by the employer, for other than disciplinary reasons.

50 After 7 years of continuous employment, the LSL Act provides a pro-rata entitlement upon termination (other than for serious misconduct) on the basis of 0.866 weeks per year of continuous employment. This increases the scope for entitlement beyond that under cl 6.6.5 of the Agreement, in that unlike the Agreement, it operates where the employee has resigned from his or her employment. But it applies a lower rate of leave per year of service and, unlike the Agreement, it can have no operation during the first 7 years of employment.

51 At 10 years, the Agreement provides for 13 weeks long service leave, compared with $8^{2/3}$ weeks under the LSL Act.

52 With respect to the position where employment is terminated after 10 years and prior to 17 years continuous service, under the Agreement the cl 6.6.5 benefits continue to apply at the rate of 1.3 weeks per year of continuous service. The LSL Act in relation to payment in lieu continues with its broader scope for application, but at the lower rate of 0.866 weeks per year of continuous employment completed since the employee last became entitled under the LSL Act to an amount of long service leave. As noted above, at 10 years that entitlement is only $8^{2/3}$ weeks under the LSL Act, but is 13 weeks under the Agreement.

53 Under the LSL Act, at the completion of the 15-year mark, the employee will have accrued, overall, 13 weeks leave, being $8^{2/3}$ weeks after 10 years, and $4^{1/3}$ weeks after the completion of the next 5 years. In other words, under the Agreement it takes 10 years to accrue 13 weeks long service leave, whereas it takes 15 years to accrue the same amount of long service leave under the LSL Act.

54 Under the LSL Act, the overall leave entitlement at the completion of 17 years of service stands at 14.732 weeks (13 weeks at 15 years plus 0.866 weeks multiplied by 2 years), whereas under the Agreement it is 26 weeks (13 weeks at 10 years, plus another 13 weeks at 17 years). Under the LSL Act the leave cannot yet be taken at the 17-year mark.

55 Generally under the LSL Act, the rate used for the purpose of calculating long service leave, including after year 17, is 0.866 weeks per year. Under the Agreement, for each 7 years additional service after 10 years, the effective rate is 1.857 weeks per year of service, which is approximately double the rate under the LSL Act.

The proper construction of s 4(3) of the LSL Act

56 The general principles of statutory construction were not in contest. They have been set out, relatively recently, by the Court of Appeal in, eg, ***City of Kwinana v Lamont***[19] and ***Director General of Department of Transport v McKenzie***.[20] Ms Yoon also relied upon the principle that remedial legislation should be construed beneficially. That principle, where it applies, requires that the provision in question be construed so as to give the fullest relief which the fair meaning of its language will allow, but not that its true signification should be strained or exceeded: ***Bull v Attorney-General (NSW)***;[21] ***Khoury v Government Insurance Office (NSW)***.[22] The court is not at liberty to give the provision a construction that is unreasonable or unnatural: ***IW v City of Perth***.[23] Further, in ***Victims Compensation Fund Corporation v Brown***[24] it was said that to commence the process of construction by posing the type of construction to be afforded - liberal, broad or narrow - may obscure the essential question regarding the meaning of the words used in the text.

57 In this case, the task of construction concerns the meaning of s 4(3) of the LSL Act. The following observations may be made. First, what is to be compared under s 4(3) is a person's entitlement, or eligibility to become entitled, to long service leave 'by virtue' of an award, industrial agreement, statutory instrument etc, with the 'entitlement' to long service leave under the LSL Act. It invites attention to the provisions of the respective instruments for comparison purposes. Secondly, the words 'a person' do not, in this context, direct attention to the personal circumstances of an individual in the course of their employment history. The words 'a person' in s 4(3) are to be read in the context of s 4(1), which defines (subject to subsection (3)) an employee as being 'any person' falling within certain broadly stated categories of person. Section 4(3) involves the identification of a person by reference to their entitlement, or eligibility to become entitled, to long service leave under another instrument. This identification effectively creates its own class of persons who fall outside of the s 4(1) categories of 'employee'. Also, it is difficult to see that the focus of s 4(3) is on the circumstances of 'the person making the claim' (as Ms Yoon submitted), when s 4(3) refers to 'a person' without the added complexion of such a person being in the position of a claimant, asserting an existing right.

58 Thirdly, the words '*entitled to, or eligible to become entitled to*' in s 4(3) require consideration. They appear to be a vestige of the language of exclusion in the former version of the LSL Act, which referred to the person not being an employee '*if and while* the person is entitled, or eligible to become entitled, to long service leave [elsewhere]' (emphasis added). The words in question are contained within that part of s 4(3) which provides 'a person is, by virtue of [another instrument] entitled to, or eligible to become entitled to, long service leave'.

59 These words are to be read in the context of s 4(3) and the LSL Act as a whole, including s 8 and s 9. The words 'entitled to, or eligible to become entitled to' form a composite phrase upon which, as a whole, the preceding words operate. The preceding words are 'a person' who is 'by virtue of [an agreement] …'. Read as a whole, and in this context, it appears to be used as an expansive phrase to comprehend an actual or contingent entitlement under another instrument, irrespective of whether it has accrued, or has not yet accrued. In other words, in its context, the phrase appears to be a comprehensive one used by the legislature to refer to an actual or contingent entitlement which any person has under another instrument to long service leave, irrespective of whether it has been accrued or not. Accordingly, it indicates that the comparison required by s 4(3) does not have its focus on the individual's employment history from time to time (as the

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[19] ***City of Kwinana v Lamont*** [2014] WASCA 112; (2014) 201 LGERA 334 [47].

[20] ***Director General of Department of Transport v McKenzie*** [2016] WASCA 147 [45] - [48].

[21] ***Bull v Attorney-General (NSW)*** [1913] HCA 60; (1913) 17 CLR 370, 384.

[22] ***Khoury v Government Insurance Office (NSW)*** [1984] HCA 55; (1984) 165 CLR 622, 638.

[23] ***IW v City of Perth*** [1997] HCA 30; (1997) 191 CLR 1, 12.

[24] ***Victims Compensation Fund Corporation v Brown*** [2003] HCA 54; (2003) 77 ALJR 1797 [33]; ***New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*** [2016] HCA 50 [33].

comparison is to be undertaken irrespective of any accrual of entitlement), but, rather, on the person's entitlement as appears from the terms of the two respective instruments (the LSL Act and the other instrument).

60 Fourthly, the use of the definite article in the phrase 'the entitlement to long service leave under this Act' suggests that s 4(3) is intended to operate on the basis that the LSL Act provides for a comprehensive entitlement, albeit comprising successive specific entitlements or benefits with increasing longevity of service. That is consistent with the structure of s 8, under which s 8(1) provides that an employee 'is entitled in accordance with, and subject to, the provisions of this Act, to long service leave'. The specific entitlements or benefits which make up 'the entitlement to long service leave under' the LSL Act are specified in s 8(2) and s 8(3). The words '[t]he entitlement' with respect to leave under the LSL Act, also appear in s 7(3), discussed below.

61 The foregoing considerations indicate that the comparison required by s 4(3) is to be made prospectively by reference to the terms of the respective instruments, rather than from time to time during the course of the employment history of a particular employee. That construction is confirmed by a consideration of s 7 of the LSL Act.

62 As noted earlier, s 7(3) provides:

> The entitlement to leave under this Act shall be in substitution for and satisfaction of any long service leave to which the employee may be entitled in respect of employment of the employee by the employer.

63 In other words, where the s 4(3) comparison results in the person being an 'employee' for the purposes of the LSL Act, and thereby entitled to leave under the LSL Act, '[t]he entitlement' under the LSL Act applies in substitution for, and satisfaction of, 'any' long service leave entitlement under the other instrument. There appears to be no dual operation intended. Section 7(1) is complemented by s 7(2), which refers to the grant of leave 'under any long service leave *scheme* and irrespective of this Act' (emphasis added). The effect of s 7(2) is that where, by virtue of s 4(3), the LSL Act applies, but, in fact, there has been a grant of leave (or a payment in lieu) under any other long service leave 'scheme', then that is taken into account in calculating the employee's entitlement to long service leave under the LSL Act as if it were long service leave taken (or payment in lieu made) under the LSL Act. Sections 7(2) and (3) indicate that when the statutory entitlement applies, it applies to the exclusion of the scheme under the other instrument. In other words, it appears that the legislature did not (objectively) intend that the two schemes should operate in tandem. On that basis, there could be no prospect of any doubling-up between the two.

64 That conclusion tends to be confirmed by reference to the long title to the LSL Act. The expression 'the granting of long service leave to certain Western Australian employees' denotes the provision of statutory long service leave to some employees only. Ms Yoon's approach to construction suggests an enactment of a different character. On Ms Yoon's approach, statutory long service leave is provided to virtually all employees (having regard to the breadth of the definition) in order, effectively, to 'top up' aspects of their existing benefits from time to time over the course of their working lives.

65 The following observations in ***Kennedy*** are also pertinent in this context, notwithstanding certain differences in the statutory language. In ***Kennedy***, the Commission was dealing with a submission that an employee whose industrial agreement provided for long service leave was nevertheless entitled to a particular long service leave benefit included in the relevant NSW legislation (certain payment in lieu), which was not included in her industrial agreement. The submission was made in the context of a provision which precluded the application of the long service entitlement provided by the statute where there was an award or an industrial agreement 'with provisions … more favourable to the worker than those' under the relevant statute. The Commission said:

> In effect, the submission of … the complainant, is that the overriding intention of the Act is that no worker shall in any circumstances be entitled to long service leave benefits which are less favourable than those provided in the Act. It was submitted that each individual case must be considered at the point of time when, if s 4 [the conferral of the statutory entitlement] were applicable, some benefit under it would arise. If, at this time, the Act provides a more favourable benefit than the industrial agreement, the Act must prevail and that benefit must be granted irrespective of the provisions of the agreement. This involves a submission that, except in a stage of his service when the agreement is more favourable, the worker is no part of a class for which more favourable provisions have been made. *This means that individual workers may move backward and forward between the Act and the agreement according to relative favourableness at many different points of time. This is surely unrealistic when it is remembered that provisions for long service leave in industrial agreements, awards and Acts of Parliament contain composite schemes covering the whole range of employment.* In fact, the word 'scheme' is used in the Act (s 5(2)(a)) to describe similar arrangements by employers which may be exempted (457). (emphasis added)

66 The above reasons would suggest that the first of the two constructional issues referred to in [9] above should be resolved in favour of the Authority, subject to a consideration of the second issue below.

67 The second issue raises a question as to how the comparison is to be made under s 4(3). It may be accepted that there is some force in Ms Yoon's contention concerning the difficulties which may arise in the application of s 4(3) if the comparison is not made by reference to the individual circumstances of the person at various times in their working life. Ms Yoon's construction would no doubt make the task of comparison easier in one sense, although the degree of difficulty in any prospective comparison would, of course, vary depending upon the terms of the other instrument. Further, as the Authority submitted, Ms Yoon's construction produces its own potential difficulties in the application of the LSL Act.

68 If one were to look at the position under the Agreement compared with the position under the LSL Act (as both parties suggested for illustration purposes), prima facie, Ms Yoon's approach would have the following result. An employee, after 10 years continuous service, would be entitled to 13 weeks long service leave under the Agreement. After a further 5 years continuous service, the employee would be entitled, under the LSL Act, to take a further $4^{1/3}$ weeks, given that there is no long service leave entitlement at the 15-year mark under the Agreement. Two years later, after 17 years continuous service, the employee would be entitled, under the Agreement, to a further 13 weeks long service leave.

69 Nevertheless, Ms Yoon contended that this would not be the consequence of her construction, and adopted the reasoning of Beech CC in that regard. Beech CC[25] said that in such a case, the person would not be an 'employee' within the meaning of the LSL Act at the 15-year service mark. That is because, at that point, the employee was 'eligible to become entitled' to a further 13 weeks after only 2 more years continuous service. In other words, the person is 'eligible to become entitled' under the Agreement to long service leave, at least equivalent to the $4^{1/3}$ weeks given by the LSL Act at year 15, because of the future entitlement to 13 weeks at the end of year 17 under the Agreement.

70 Two observations may be made about Beech CC's reasoning on this point. The first is that it involves a prospective comparison, at least at the point of the 15-year service mark, with the difficulties inherent in any prospective exercise. It is, in substance, inconsistent with the underlying hypothesis that s 4(3) requires a comparison based on the person's employment history as it exists at the time that they make a claim for long service leave entitlement for the purpose of identifying any accrued rights they may then have under either instrument. The second is that it is implicit, in the reasons of Beech CC as a whole, that the words 'eligible to become entitled to' long service leave in s 4(3) have a prospective operation in relation to an entitlement to days off, but not in relation to payment in lieu on termination. If the person resigned after 15 years, the person would, at that point, receive payment in lieu of $4^{1/3}$ weeks, even though they would not be entitled to take that amount of leave. It is, however, difficult to see that the LSL Act is, objectively, intended to operate differentially between the two types of long service leave entitlement.

71 Whilst the parties' references to the Agreement serve to illustrate the competing constructions of the LSL Act for which they contended, ultimately, of course, the difficulties (or otherwise) in comparing the long service leave entitlement under the Agreement with the long service leave entitlement under the LSL Act, are irrelevant to the proper construction of the LSL Act. The construction is to be determined in accordance with the principles referred to earlier in these reasons.

72 Ultimately, the potential for difficulties associated with the Authority's suggested construction does not seem to weigh so greatly as to require a different conclusion from that suggested above in relation to the resolution of the first issue. The word 'equivalent' ordinarily means equal in value, measure, effect or significance.[26] The task of identifying whether there is at least equivalence between the two instruments is necessarily a broad and evaluative one involving the overall weighing of the benefits provided under the two respective instruments. The evaluation is to be undertaken having regard to the objectives of the LSL Act, referred to in [42] above.

73 That conclusion is confirmed by, but not dependent upon, the further observation that a legislative intention that a comparison be undertaken prospectively between a legislative entitlement to long service leave on the one hand, and an entitlement under an award or industrial agreement on the other, is not a novel one, as the decision in ***Kennedy*** indicates. In ***Kennedy***, the Commission observed:[27]

> As this comparison has to be made without advance knowledge of how particular individuals may fare ultimately in their employment, it must be based on an estimate of what is likely to be best for the majority of individuals involved - in other words, on the principle of the greatest good for the greatest number. The only way to do this is to examine each set of provisions as a whole, weighing the various pros and cons and arriving at a final balance on an overall basis. This means that the workers have to be considered as a group over the whole range of their possible employment. This may involve speculation often on imprecise material but, in the end, the answer must be 'Yes' or 'No'. To answer 'Yes and No' is not permissible.

74 The approach taken in ***Kennedy*** has been applied, relatively recently, in, for example, ***New South Wales Nurses' Association v Ramsay Health Care Australia Pty Ltd***.[28] In that case, the relevant union sought a determination as to the proper construction of an award. The employer raised a jurisdictional issue as to whether the entitlement to long service leave contained in the award applied exclusively to the relevant employees, or whether the employees' legal entitlement to long service leave was to be ascertained by reference both to the award and the entitlement provided for in the *Long Service Leave Act 1955* (NSW) (NSW LSL Act). In what was, in substance, a reversal of the roles taken in this appeal, the union contended that the employees had an entitlement under the award only, and not an entitlement through the combined operation of the award and the NSW LSL Act. The employer took the contrary position.[29] The court resolved that issue in favour of the union by applying the observations in ***Kennedy***.[30]

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[25] Full Bench reasons [71].

[26] *Macquarie Online Dictionary*.

[27] ***Kennedy*** (459).

[28] ***New South Wales Nurses' Association v Ramsay Health Care Australia Pty Ltd*** [2009] FMCA 579; (2009) 185 IR 1.

[29] ***New South Wales Nurses' Association*** [56] - [58], [61] - [64], [79] - [81], [89] - [91].

[30] ***New South Wales Nurses' Association*** [98] - [102].

75 The second issue should also be resolved in favour of the Authority.

76 A different conclusion is not warranted by reference to the principles with respect to the construction of beneficial legislation referred to earlier. The LSL Act is not intended to confer an entitlement to long service leave in any circumstances where, by virtue of another instrument, a person has at least the equivalent entitlement to long service leave. The question is what does the statutory language of s 4(3) mean in that regard. The construction advanced by Ms Yoon is not, in light of the foregoing considerations, one which is reasonably open. The mere fact that, in the events which have happened, the LSL Act may not apply to Ms Yoon (or someone in her position) does not mean that the preferred construction does not give the statute the fullest scope for operation as beneficial legislation which its terms allow.

77 Finally, at the hearing of the appeal, senior counsel for the Authority sought to rely on a document entitled 'Industrial Relations Legislation Amendment and Repeal Bill 1995 Explanatory Notes (Notes)'. Page 28 of the Notes referred to cl 54 of the Amendment Act, which was the clause that introduced s 4(3) into the LSL Act. Senior counsel for the Authority submitted that the Notes showed that there is 'nothing … that supports the kind of construction determined by [the Full Bench] in this case'.[31] Counsel for Ms Yoon contended that the Notes were not admissible on the question of construction.[32] In particular, counsel referred to a statement at the foot of each page in the Notes, which stated:

> These Explanatory Notes on the Industrial Relations Legislation Amendment and Repeal Bill 1995 have been prepared by the Department of Productivity and Labour Relations as a general aid to understanding the Bill and its relationship with other industrial legislation. These Notes are not part of the Bill and should not be used to interpret any provision of the legislation.

78 It is unnecessary for present purposes to determine its admissibility, because even if the material could be considered, it sheds no light on the proper construction of s 4(3) of the LSL Act.

Conclusion

79 The Authority has established its ground of appeal. There has been an error in the construction of the LSL Act by the Full Bench. The error leads to injustice to the Authority, and there is no occasion to confirm the decision, notwithstanding the error, under s 90(3a) of the *Industrial Relations Act 1979* (WA).

80 The appeal should be allowed. The Full Bench's decision should be set aside. The Full Bench has failed to address the relevant issue on the true construction of the relevant legislation. As the Full Bench is a specialist tribunal and as this court has not had the benefit of full submissions on whether Ms Yoon's entitlement under the Agreement is at least equivalent to her entitlement under the LSL Act on its proper construction, the matter should be remitted to the Full Bench for further hearing and determination according to law, pursuant to s 90(3) of the *Industrial Relations Act*.

81 **KENNETH MARTIN J**: I have had the advantage of reading the draft reasons of Buss and Murphy JJ. I am in agreement with all that their Honours have written, save as regards remitting of the matter back to the Full Bench for a further hearing. I do not, with respect, favour that course.

82 By my assessment, this court may, by s 90(3) of the *Industrial Relations Act 1979*, 'reverse' the Full Bench's decision and by that route allow (rather than dismiss) the appeal to the Full Bench which was taken by the PTA against the first instance decision of Cicchini IM - thereby setting aside the payment order which he made to Ms Yoon of $6,108.82 and, in lieu, rejecting her payment claim in its entirety.

83 By my assessment, the above course, rather than that of a remittal, should be taken, since it is clear to me that objectively assessed at the commencement of the industrial agreement applicable to her employment, Ms Yoon's position as an employee under the terms of the *Public Transport Authority Railway Employees (Transperth Train Operators) Industrial Agreement 2011* is, for the purposes of s 4(3) of the *Long Service Leave Act 1958* (WA) (LSL Act), 'at least equivalent to' any entitlement to long service leave that Ms Yoon might otherwise have enjoyed as an employee under the LSL Act.

84 By my assessment, there are only two possible areas where it might be argued by Ms Yoon that her overall long service leave position under the 2011 industrial agreement, is not at least equivalent to the position under the LSL Act.

85 First, it might be argued that an enjoyment of a second tranche of long service paid holidays after 15 years of continuous employment under the LSL Act, is superior to the position than under the 2011 industrial agreement - where the second tranche of long service leave holidays is enjoyed after 17 (not 15) years of continuous service.

86 However, the first argument is not ultimately persuasive, once it is appreciated that under the LSL Act, an employee's first and second tranches of paid holidays, when they are reached after 15 years of continuous service, will, if added, only amount then to (8 2/3 + 4 1/3 weeks) 13 weeks paid long service holidays.

87 But that same amount of long service leave (ie, 13 weeks of paid holidays) by contrast, is earlier reached to then be enjoyed by the employee regulated under the 2011 industrial agreement. Their first tranche of 13 weeks long service leave entitlement is available after only 10 years of continuous service. The employee under the 2011 industrial agreement then has the opportunity to reach and enjoy (13 + 13) 26 weeks of aggregated paid holidays, upon seventeen (17) years of continuous service. At 15 years of continuous service the employee regulated by the 2011 industrial

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[31] Appeal ts 8 - 9.

[32] Appeal ts 8, 38 - 39.

agreement has earlier reached (at 10 years) the entitlement of 13 weeks paid long service leave and is then only two years away from being entitled to another 13 weeks of paid leave.

88 Hence, the overall aggregated amounts of long service holidays capable of being reached under the 2011 industrial agreement, viewed overall, are superior to the periods of holidays achievable under the LSL Act.

89 A second possible argument favouring the LSL Act over the 2011 industrial agreement that might be made, would be to the benefit of the broader coverage scope of the circumstances open under the LSL Act to receive pro rata payments in lieu of long service leave not taken, following a termination of the employment relationship - being a termination effected at the behest of the employee.

90 A voluntarily terminating employee's pro rata hypothetical payment in lieu position under the LSL Act is to be assessed by reference to either s 8(2)(c)(ii) or by s 8(3)(b).

91 The payment in lieu regime of the LSL Act may be argued to be superior to what is a less plenary termination payment in lieu coverage of the 2011 industrial agreement. This is because for the employee under the 2011 industrial agreement to be entitled to receive a pro rata payout payment via cl 6.6.5, the employee needs, in all cases, to first meet one of six (6) nominated cl 6.6.5 situations ((a) to (f)), to be eligible to receive a pro rata payment in lieu of long service leave not taken at the time of the employment termination.

92 Two of the six scenarios (ie, employer dismissal for other than disciplinary reasons and a death of the employee) are broadly analogous to the coverage of the LSL Act.

93 But the remaining four specified cl 6.6.5 situations in aggregate can be seen to be less expansive in their pro rata payment in lieu entitlement coverage, in contrast to the LSL Act's payment in lieu criteria of 'any circumstances' otherwise than employer dismissal for 'serious misconduct' - as the LSL Act specifies under s 8(2)(c)(ii) (after 10 years of continuous employment), or by s 8(3)(b) (after seven years of continuous employment 'for any reason other than serious misconduct').

94 But effectively counterbalancing any objectively perceived initial superiority in the pro rata long service leave payment position of the LSL Act over the 2011 industrial agreement are, in my view, the following rival considerations, all favouring the 2011 industrial agreement over the LSL Act:

(a) Under the 2011 industrial agreement there is no required (seven year, ten year, or otherwise) minimum qualifying period of continuous service needed by an employee, in order for them to be eligible to receive a pro rata payout at their termination, in respect of long service leave not taken at that time. Eligibility arises, provided they can meet one or other of the six specified scenarios under cl 6.6.5, immediately following a commencement of the employment relationship. Hypothetically then, the employee under the 2011 industrial agreement could be eligible for a pro rata termination payout in year two of their employment.

(b) Under the 2011 industrial agreement the quantitative amount of the pro rata money payout in lieu calculation for a terminated employee (who is within cl 6.5.5) starts from a higher monetary base, for the amount of paid long service holiday leave enjoyed post 10 years of continuous service - namely, from the higher base of 13 weeks (not 8 2/3 weeks as per the 10 year entitlement of the LSL Act) paid holiday leave that is available after 10 years of service. The 2011 industrial agreement termination pro rata payout position is calculated on a higher and therefore superior base of 13 weeks paid holiday leave.

By illustration, at seven years of continuous service, the terminating employee under the LSL Act would, at that point, have enlivened a potential eligibility for a termination pro rata monetary payout, calculated at the worth of 70% of 8 2/3 weeks paid leave. In contrast, the same employee governed by the 2011 industrial agreement (if eligible by meeting one of the six situations open under cl 6.6.5) would enjoy a higher pro rata payment in lieu of long service leave calculated at the worth of 70% of 13 weeks (not 8 2/3 weeks) of paid holidays.

(c) The voluntary termination scenarios specified under cl 6.6.5 as (c) (employee termination for ill health), (d) (retirement at age 55 following a minimum of 12 months' continuous service), (e) (retirement for a purpose of entering into an in vitro fertilisation programme), and (f) (resignation for reason of pregnancy), are all seen to reflect what must be the negotiated termination coverage bargain outcomes, reached no doubt by reason of a specific industry sector utility for those chosen termination situations, to the 2011 industrial agreement's cohort of employees. The utility of a tailored termination pro rata payment in lieu coverage to meet chosen situations on a bespoken basis, is a positive factor to be weighed favouring the 2011 industrial agreement over the LSL Act.

(d) The 2011 industrial agreement, as regards pro rata termination payments in lieu of long service leave not taken, displays the underlying, industry sector objective of encouraging covered employees to actually take their long service paid holidays close to after the entitlement accrues, that is, first at post ten (10) years of continuous service and then at subsequent seven-year intervals of continuous service.

95 Clause 6.6.5 of the 2011 industrial agreement reflects a workplace objective. Rather than incentivising, as the LSL Act might be assessed to do, a pursuit of lump sum termination amounts in lieu of long service leave not taken by the time of a voluntary termination, the 2011 industrial agreement provides for greater periods of leave, but it then narrows the range of pro rata payment in lieu opportunities.

96 Pro rata lump sums in lieu of long service leave not taken are only available under the 2011 industrial agreement to meet the six chosen termination scenarios, as negotiated. Outside those six specified situations, however, an overall industry sector workplace welfare policy of the 2011 industrial agreement is clear. A covered employee either takes their accrued long service holidays as they are earned, or possibly risks losing them if they are not taken. It is legitimate for an industry sector to incentivise its workforce by a negotiated outcome to actually take their long service leave paid holidays as they accrue as an overall reasonable welfare objective.

97 Taking those counterbalancing factors into account as regards the second argument, it is not established that the pro rata in lieu long service leave eligibility position for the employee under the 2011 agreement, objectively assessed at 2011 when the industrial agreement took effect, is worse than the LSL Act. The employee is in a position for pro rata payments in lieu under the 2011 industrial agreement, overall, to at least equivalent to the position of the employee - as regards eligibility for a pro rata termination payout of long service leave not taken under the LSL Act.

98 Aside from those two rejected arguments for the superiority of the LSL Act over the 2011 industrial agreement now discussed, no other comparative factor considerations present towards supporting the contention that the overall long service leave entitlement position under the 2011 industrial agreement objectively assessed at 2011, was not at least equivalent to the entitlement position under the LSL Act. The long service leave regimes are different. But it simply cannot be rationally contended, taking a broad pragmatic view of all the long service related benefits, namely holidays as well as payments in lieu, as one aggregate package of rival long service leave entitlements, that an employee under the LSL Act is in an any better overall long service leave entitlement position than under the 2011 industrial agreement. Each has its attractions and its positive and negative features. But overall, there is no proven lack of equivalence in the package of benefits viewed comparatively as a whole.

99 On an objective comparison approach, taking an holistic view of all eligibilities to enjoy all long service leave related entitlements under both regimes, does not deliver a persuasive comparative conclusion that the long service leave benefits available to a person covered by the 2011 industrial agreement are, overall, not at least equivalent to those long service leave benefits afforded to employees by the LSL Act.

100 The only basis by which an opposing conclusion as to a superiority of the overall benefits under the LSL Act can be reached (in way of a s 4(3) LSL Act comparison), is by taking a wholly confined and subjective view of Ms Yoon's personal position, temporally focused solely and specifically at the time of her voluntary retirement, at seven years and three months into her employment with the PTA, then conducting a subjective outcomes assessment towards just one aspect of all her long service benefits under the 2011 industrial agreement, namely her pro rata long service payment at that particular time - on a basis that she then in her personal situation did not meet any of the cl 6.6.5 situations. Such a comparison approach is wrong in concept, as the joint reasons have explained. It is neither feasible nor warranted by the terms of s 4(3) of the LSL Act, in my view.

101 By my assessment then, this appeal must be allowed and the decision of the Full Bench reversed, with the consequence that the PTA's appeal against the first instance decision of Cicchini IM is then allowed and with the allied consequence that the payment order for $6,108.82 favouring Ms Yoon be set aside, with her application consequently dismissed.

2017 WAIRC 00076

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 7 OF 2015 GIVEN ON 6 OCTOBER 2015

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPELLANT
	-v-
	JUNGHEE YOON
	RESPONDENT
CORAM	BUSS J
	MURPHY J
	KENNETH MARTIN J
DATE	THURSDAY, 9 FEBRUARY 2017
FILE NO/S	IAC 4 OF 2015
CITATION NO.	2017 WAIRC 00076

Result	Appeal allowed
Representation	
Appellant	Mr G Tannin SC and Ms C Pilot (counsel), State Solicitor's Office
Respondent	Mr C Fogliani (counsel), W.G. McNally Jones Staff Lawyers

Order

For the appeal against decision heard on 20 July 2016, and the reasons published to counsel, IT IS ORDERED THAT:

1. The appeal is allowed.
2. The Full Bench's decision is set aside.
3. The matter is remitted to the Full Bench for further hearing and determination according to law, pursuant to s 90(3) of the *Industrial Relations Act 1979* (WA).

(Sgd.) S MASON,
[L.S.] Clerk of Court.

PRESIDENT—Unions—Matters dealt with under Section 66—

2017 WAIRC 00084

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETER FRANCIS O'KEEFFE

APPLICANT

-and-

THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA UNION OF WORKERS

RESPONDENT

CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	MONDAY, 20 FEBRUARY 2017
FILE NO.	PRES 1 OF 2016
CITATION NO.	2017 WAIRC 00084

Result	Order made
Appearances	
Applicant	In person
Respondent	Mr P F O'Keeffe and Mr M Zoetbrood

Order

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

The application be and is hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Acting President.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2017 WAIRC 00136

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PUBLIC TRANSPORT AUTHORITY

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

RESPONDENT

CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDDAY, 10 MARCH 2017
FILE NO/S	APPL 57 OF 2016
CITATION NO.	2017 WAIRC 00136

Result	Award Varied
Representation (by correspondence)	
Applicant	Ms V Annese
Respondent	Mr P Robinson

Order

HAVING heard Ms V Annese on behalf of the applicant and Mr P Robinson on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the *Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006* be varied in accordance with the following schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after Friday, 10 March 2017.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

SCHEDULE

1. Clause 3.3. - Meal and Rest Breaks: Delete paragraph (b) of subclause 3.3.2 of this clause and insert the following in lieu thereof:

(b) The employer shall provide such employee a meal allowance of $12.60 to cover the cost associated with the purchase of foods associated with the taking of a second crib.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

2. Clause 4.3. - Suburban Electric Railcar Allowance: Delete paragraph (a) of subclause 4.3.1 of this clause and insert the following in lieu thereof:

4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following allowance in addition to the appropriate rate of pay.

		Rate per week
(1)	First Year	$40.30
(2)	Thereafter	$40.60
(3)	Special Case	$41.20

3. Clause 5.1 – Shift Work: Delete subclause 5.1.1 of this clause and insert the following in lieu thereof:

5.1.1 The employer may, if the employer so desires, work any part of its business on shifts in accordance with the following provisions;

(a) On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of $2.74 an hour on all time paid at ordinary rate.

(b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of $3.18 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of $2.74 an hour on all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance, an employee will be paid an allowance of $3.18 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

(f) The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 5.2. - Temporary Transfer Allowance: Delete subclause 5.2.1 of this clause and insert the following in lieu thereof:

5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:

(a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the employee's home depot, the employee shall be paid an allowance of $1.72 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled.

The rates referred to in this subclause shall be adjusted by the Employer from time to time by reference to changes to the median of the Perth metropolitan Tariff 1 weekday pay rates per kilometre charged by all licensed taxis in Perth. The adjustment shall take effect from the date nominated by the employer, which shall be no later than 28 days after being notified in writing by the Union of a change to the median weekly rate.

(b) When the period of relief is for one week or less the allowance of $7.35 per shift shall be paid in recognition of the disruption to the employee's normal roster.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.3. - On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees on call outside the ordinary hours of duty will be paid an allowance of $4.07 per hour for all time on call.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2017 WAIRC 00134

PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PUBLIC TRANSPORT AUTHORITY

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

RESPONDENT

CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDDAY, 10 MARCH 2017
FILE NO/S	APPL 56 OF 2016
CITATION NO.	2017 WAIRC 00134

Result	Award Varied
Representation (by correspondence)	
Applicant	Ms V Annese
Respondent	Mr P Robinson

Order

HAVING heard Ms V Annese on behalf of the applicant and Mr P Robinson on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the *Public Transport Authority (Transwa) Award 2006* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after the Friday 10 March 2017.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

SCHEDULE

1. Clause 5.1 - Shift Work: Delete this clause and insert the following in lieu thereof:

5.1 - SHIFT WORK

5.1.1 On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of $2.67 an hour on all time paid at ordinary rate.

5.1.2 On a night shift, which commences at or between 1800 and 0359 hours, an employee will be paid an allowance of $3.08 an hour on all time paid at ordinary rate.

5.1.3 On an early morning shift, which commences at or between 0400 and 0530, an employee will be paid an allowance of $2.67 an hour on all time paid at ordinary rate.

5.1.4 In addition to the hourly shift work allowance, an employee will be paid an allowance of $3.08 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

5.1.5 In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

5.1.6 The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 5.2 - Temporary Transfer Allowance:

A. Delete subclause 5.2.1 of this clause and insert the following in lieu thereof:

5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:

(a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from his usual place of residence to the employee's home depot, the employee shall be paid an allowance of $1.72 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled, and in addition:

(b) When the period of relief is for one week or less the allowance of $7.35 per shift shall be paid in recognition of the disruption to the employee's normal roster.

3. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of $4.43 per hour for all time on call.

That allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 5.5 - Away From Home And Meal Allowances: Delete subclause 5.5.2 of this clause and insert the following in lieu thereof:

5.5.2 Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of $29.25 for each 8 hour period and, where less than 8 hours is worked, at the rate of $7.25 for each 2 hour period or part thereof worked.

2017 WAIRC 00138

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY
	APPLICANT
	-v-
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH & ELECTRICAL TRADES UNION OF WA
	RESPONDENTS
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 10 MARCH 2017
FILE NO/S	APPL 58 OF 2016
CITATION NO.	2017 WAIRC 00138

Result	Award Varied
Representation (by correspondence)	
Applicant	Ms V Annese
First Respondent	Mr P Robinson
Second Respondent	Mr A Lindsey
Third Respondent	Mr A Giddens

Order

HAVING heard Ms V Annese on behalf of the applicant and Mr P Robinson on behalf of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders:

THAT the *Railway Employees' Award No. 18 of 1969* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after the Friday, 10 March 2017.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

SCHEDULE

1. Clause 4.3 – Experience Allowance: Delete this clause and insert the following in lieu thereof:

4.3. - EXPERIENCE ALLOWANCE

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes:

After 12 months service with the employer - $ 6.40

After 24 months service with the employer - $ 13.20

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 4.4 – Tool Allowance: Delete paragraph (a) of subclause 4.4.1 of this clause and insert the following in lieu thereof:

(a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of $16.10 per week to such tradesperson/apprentice.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 4.5 - Leading Hands: Delete this clause and insert the following in lieu thereof:

4.5. - LEADING HANDS

Leading Hands shall be paid the following rate per week:

(a) Class 3

When in charge of not less than three and not more than ten others, paid $29.90 extra per week

(b) Class 2

When in charge of more than 10 but fewer than twenty others, paid $45.10 extra per week

(c) Class 1

When in charge of more than twenty others, paid $58.10 extra per week

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 4.6. - Electrical Licence Allowance: Delete this clause and insert the following in lieu thereof:

4.6. - ELECTRICAL LICENCE ALLOWANCE

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his or her employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force in the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $21.30 per week.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.1 – On Call Allowances: Delete subclause 5.1.2 - On Call Allowance of this clause and insert the following in lieu thereof:

5.1.2 On Call Allowance

An employee who is directed by the Head of Branch or other duly authorized officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call allowance of $4.43 per hour.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

6. Clause 5.3 - After Hours Contact: Meals and Expenses: Delete subclause 5.3.1 – Meal Breaks of this clause and insert the following in lieu thereof:

5.3.1 Meal Breaks

(a) An employee who having responded to a call is unable to return to the employee's home during a recognized meal period for a meal shall be supplied with a meal or be paid a meal allowance of $10.95 as provided under this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

(b) For the purpose of this sub-clause recognized meal periods shall be defined as:

Breakfast	0530 hours to 0730 hours
Lunch	1200 hours to 1400 hours
Dinner	1700 hours to 1900 hours

7. Clause 5.4. - Away from Home Allowances:

A. Delete subclause 5.4.2 of this clause and insert the following in lieu thereof:

5.4.2 Where sub clause 5.4.1. applies, the employee shall be paid an allowance of $48.20 per day except when the accommodation includes dining facilities and meals, in which case an allowance of $36.10 per day shall be paid.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

B. Delete subclause 5.4.5 of this clause and insert the following in lieu thereof:

5.4.5 When an employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of $12.70 per day.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

8. Clause 5.6. - Travelling Time – Traffic: Delete subclause 5.6.3 of this clause and insert the following in lieu thereof:

5.6.3 When the period of relief is for one week or less an allowance of $7.35 per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in sub clause 5.6.2.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

9. Clause 5.7. - Meal Allowance: Delete subclause 5.7.2 of this clause and insert the following in lieu thereof:

5.7.2 Meal Allowance

Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid $10.95 in lieu where:

(a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after 1800 hours; or

(b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

10. Clause 5.8. - Shifts and/or Night Work Allowance - (Six - Day Shift Work): Delete subclause 5.8.1 of this clause and insert the following in lieu thereof:

5.8.1 The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Saturday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work. The employer shall post the shift work roster at least 14 days in advance of the start date.

(a) On an afternoon shift, which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of $2.67 an hour on all time paid at the ordinary rate.

(b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of $3.08 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of $2.67 an hour for all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance an employee will be paid an allowance of $3.08 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) The provisions of subparagraphs (a) to (d) of this clause will not apply to employee's continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of $3.18 per hour.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

(f) Provided that shift penalties do not apply to Saturday and Sunday hours, which are paid as follows: ordinary hours on Saturday are paid with a 50% loading in accordance with subclause 3.3.2(c), additional hours on Saturdays are paid at double time in accordance with subclause 3.3.2(b) and all time on Sunday is paid at double time in accordance with subclause 3.3.2(a).

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2016 WAIRC 00384

INTERPRETATION OF CLAUSE 36 OF WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 23 JUNE 2016
FILE NO.	P 3 OF 2016
CITATION NO.	2016 WAIRC 00384

Result	Direction issued
Representation	
Applicant	Mr C Fordham
Respondent	Mr T Clark

Direction

HAVING heard Mr C Fordham on behalf of the applicant and Mr T Clark on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the matter be listed for hearing on a date to be fixed.

(2) THAT the applicant and respondent file and serve an outline of submissions no later than three days prior to the date of the hearing.

(3) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2017 WAIRC 00048

INTERPRETATION OF CLAUSE 36 OF WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 2 FEBRUARY 2017
FILE NO/S	P 3 OF 2016
CITATION NO.	2017 WAIRC 00048

Result	Discontinued by leave
Representation	
Applicant	Mr C Fordham
Respondent	Mr R Andretich of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

INDUSTRIAL MAGISTRATE—Claims before—

2017 WAIRC 00109

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2017 WAIRC 00109
CORAM	**:**	INDUSTRIAL MAGISTRATE M FLYNN
HEARD	**:**	WEDNESDAY, 8 FEBRUARY 2017
DELIVERED	**:**	WEDNESDAY, 1 MARCH 2017
FILE NO.	**:**	M 172 OF 2014
BETWEEN	**:**	MARTIN FEDEC
		CLAIMANT
		AND
		THE MINISTER FOR CORRECTIVE SERVICES
		RESPONDENT

CatchWords	**:**	Alleged failure to comply with Department of Corrective Services - Registered Nurses (ANF) Industrial Agreement 2010 – Entitlements after employment ends – Pro-rata long service leave – Paid overtime after elect to accrue time in lieu of payment.
Legislation	**:**	*Public Sector Management Act 1994* *Workers' Compensation and Injury Management Act 1981* *Industrial Relations Act 1979* *Long Service Leave Act 1958*

Instrument	**:**	Department of Corrective Services – Registered Nurses (ANF) Industrial Agreement 2010 Water Corporation Enterprise Agreement 2004 Children's Hospital Child Care Centre Association Inc. Enterprise Bargaining Agreement 2005
Case(s) referred to in reasons	**:**	***Mohebatullah Mohazab v Dick Smith Electronics Pty Ltd (No 2)*** (1995) 62 IR 200 ***Comcare v Martin*** [2016] HCA 43 ***Travel Compensation Fund v Tambree T/As R Tambree and Associates*** [2005] HCA 69 ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287 ***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [2006] FCA 813 ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelsior Pty Ltd*** [2013] FCA 638 ***The State School Teachers' Union of W.A. (Incorporated) v The Governing Council, South Metropolitan TAFE*** [2016] WAIRComm 291 ***Public Transport Authority of Western Australia v Yoon*** [2017] WASCA 25 ***United Voice WA v The Minister for Health*** [2011] WAIRComm 1065 ***BP Refinery (Western Port) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*** (1977) 180 CLR 266 ***Dolly Holzinger v Midland Information, Debt and Legal Advice Service Inc*** [2004] WAIRC 11392 ***Griggs v Noris Group of Companies*** [2006] SASC 23
Result	**:**	Claim dismissed
Representation:		
Claimant	**:**	Mr K. Singh as agent employed by Chapmans Barristers & Solicitors.
Respondent	**:**	Ms L. Allen as counsel.

REASONS FOR DECISION

Introduction

1 Martin Fedec (Mr Fedec) was employed by the respondent to work as a nurse at Bandyup Women's Prison until his employment ended on 24 March 2014. The terms and conditions of his employment are found in the Department of Corrective Services – Registered Nurses (ANF) Industrial Agreement 2010 (AG 28 of 2011) (the Industrial Agreement). Mr Fedec's employment ended as a result of his resignation being accepted by the respondent. The resignation of Mr Fedec was a term of the settlement of a workers' compensation claim. Mr Fedec had lodged the claim following an injury to his back after a fall at Bandyup Women's Prison on 11 July 2011 (the Workers' Compensation Claim). At a conference convened on 24 March 2014 in connection with the Workers' Compensation Claim, an agreement was reached for the settlement of the Workers' Compensation Claim. The terms of that agreement included the payment of a lump sum to Mr Fedec and for his resignation from his employment by the respondent with effect from 24 March 2014. This case is about a dispute over Mr Fedec's claim to payments for pro-rata long service leave in the sum of $4,519.87 (Pro-rata Long Service Leave claim) and for overtime worked during the course of his employment in the sum of $1,295.71 (Overtime claim).

Pro-rata Long Service Leave Claim

2 Clause 29 of the Industrial Agreement provides, subject to conditions, for long service leave and cl 29(11) provides, subject to conditions, for 'payment in lieu of long service proportionate' to an employee's length of service. Mr Fedec relies upon the terms of cl 29(11)(a)(iii) providing for a pro-rata payment where an employee has completed at least 12 months' continuous service and the employment 'has been ended by his/her Employer on account of incapacity due to old age, ill health or the result of an accident'. The respondent contends, inter alia, that the conditions for payment of pro-rata long service leave found in cl 29(11) have not been satisfied in that:

(a) Mr Fedec's employment was ended by *his* resignation and was not ended 'by the *Employer'*;

(b) Mr Fedec's employment was ended on account of the settlement of the Workers Compensation Claim and was not ended on account of 'ill health or an accident'; and

(c) Although cl 29(11)(a)(iii) provides for a pro-rata payment where an employee has completed at least *12 months continuous service* (and other conditions are satisfied), the opening words of cl 29(11)(a) providing for an entitlement to pro-rata long service leave 'if the employment ends before he/she has completed *the first further qualifying periods* in accordance with' cl 29(1) may have the effect of delaying entitlement until to a pro-rata payment until after ten year continuous service.

The issue for determination is whether, properly construed, the application of the cl 29(11) of the Industrial Agreement to the facts of Mr Fedec's situation has the result that he is entitled to pro-rata long service leave as claimed?

Overtime Claim

3 Clause 24(1) of the Industrial Agreement provides that 'an employee authorised to work overtime will be paid overtime provided that an employee may elect to accrue time off in lieu of payment'. Mr Fedec alleges that, as at 24 March 2014 he had elected to accrue 1830 minutes of time off in lieu of $1,295.71 in paid overtime. He submits that, given the circumstances of the end of his employment, he was unable to use the time off and became entitled to the paid overtime. The Respondent contends that:

(a) Mr Fedec has failed to prove that the overtime upon which he claims was properly authorised;

(b) the Industrial Agreement does not provide for an entitlement to be paid overtime where, before the employment relationship has ended, an employee has not sought to reverse the election to accrue time off in lieu.

There are two issues issue for determination. First, whether I am satisfied that the overtime upon which he claims was properly authorised? Secondly, whether, properly construed, the application of the Industrial Agreement, and particularly cl 24, to the facts of Mr Fedec's situation has the result that he is entitled to paid overtime as claimed?

Facts

4 In this claim, Mr Fedec carries the burden of proving his claim. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. Where in this decision I state that 'I am satisfied' of a fact or matter I am saying that '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.

5 Save for one issue (overtime authorisation), the facts relevant to my determination of the issues are either not in dispute or are the subject of uncontroverted evidence that I consider to be reliable. I am satisfied of each of the facts set out below. On the issue of overtime authorisation, I have summarised the relevant evidence and set out reasons for my findings of fact.

6 On 11 July 2011 Mr Fedec was working as a nurse. He was working in a part-time or casual capacity at Bandyup Women's Prison. On that day, he suffered an injury at work as a result of slipping on a deck. He completed and lodged a worker's compensation claim form soon after the injury he suffered on 11 July 2011 (the Workers Compensation Claim).

7 Although he continued to be employed as a nurse at Bandyup Women's Prison until 24 March 2014, 'worker's compensation progress medical certificates' were also issued for significant periods, particularly toward the end of his employment.

8 Mr Fedec's employment status changed when on 1 February 2012 he commenced work as a full-time employee of the Minister for Corrective Services.

9 While working at Bandyup Women's Prison, Mr Fedec maintained his own computer record of overtime hours that he worked (the Overtime Record) in the form of a table with columns headed 'date', 'event', 'time' and 'TOIL' and a separate row corresponding to each date entry. Mr Fedec's evidence was that each row reflected the details of overtime that had been approved by his supervisor or leave taken by him that had been approved by his supervisor; the TOIL column was said to be a recording the 'balance' of accrued overtime in 'minutes'. The Overtime Record states that Mr Fedec worked overtime in: December 2012, January 2013, February 2013, March 2013, April 2013, May 2013, June 2013, July 2013, August 2013 and September 2013. It states that he took leave in January 2013 and June 2013. The balance in the TOIL column at the end of the document is recorded as an entry on 2 September 2013: 1830 minutes.

10 The respondent disputes the reliability of the Overtime Record on two grounds. First, it submits that it is implausible or inherently unlikely that Mr Fedec was not required by a supervisor at Bandyup Women's Prison to utilise 'departmental forms' for the purpose of recording overtime and leave. I do not accept the submission. The respondent did not tender any evidence to contradict Mr Fedec's evidence that no such forms were used in his workplace. There is no reason not to accept the evidence of Mr Fedec on this issue. Secondly, the respondent submits that Mr Fedec is not a truthful witness because of an 'admission' that he is currently working as a nurse, when, in August 2013, for the purpose of the Workers' Compensation Claim, he maintained that he had a permanent impairment. My view is that Mr Fedec satisfactorily answered the submission when he said, in effect, that he currently works as a nurse notwithstanding the continued existence of a permanent impairment in the form of 'left-sided low-back pain' (described in a letter from Dr Brian Galton-Fenzi to RiskCover on 28 November 2013). I am satisfied as to the reliability of the Overtime Record.

11 Mr Fedec was not paid for the 1830 minutes of overtime he worked. The 'value' of that overtime under the Industrial Agreement, if Mr Fedec had been paid, was $1,295.71. The reason that Mr Fedec has not paid for the overtime that he worked is that he did not, during the period that he was employed, make a claim for payment for that overtime. The reason that he did not make a claim for paid overtime is that he intended to take advantage of the 'time off in lieu of payment' conditions of his employment by requesting authorised 'time off in lieu' to the extent of the 1830 minutes. Mr Fedec did not make that request before his employment ended on 24 March 2014.

12 On the 24 March 2014 Mr Fedec and his solicitor attended a conference in connection with the Workers' Compensation Claim. Negotiations commenced with view to settlement of that claim. The negotiations canvassed, inter alia, the amount of a lump sum to be paid to Mr Fedec and whether Mr Fedec would resign from his employment by the respondent. Mr Fedec's position during the negotiations was that he was not willing to resign and the respondent's position in the negotiations was that it required his resignation. The negotiations ended upon the parties reaching an agreement to settle of the Workers' Compensation Claim. The agreement provided, inter alia, for payment of a lump sum to Mr Fedec and for Mr Fedec to resign with effect from 24 March 2014.

13 Reflecting that agreement, at the conclusion of the conference, Mr Fedec signed a hand-written note. The note read:

> *I, Martin Fedec, agree that as a part of my worker's compensation settlement I will resign from my employment with Department of Corrective Services. I will tender my letter of resignation in exchange for the settlement monies.*

14 On 30 March 2014 Mr Fedec posted a letter to the respondent. The letter bears two dates; a typed date 24 March 2014 and a hand-written date under Mr Fedec's signature. The handwritten date is 30 March 2014. The letter states:

> *I hereby give notice of resignation from my employment with Department of Corrective Services effective 24 March 2014 but subject to receiving the settlement monies. Please forward my outstanding entitlements to the above address.*

15 The letter continues in hand-writing:

> *As well as monies outstanding for time off in lieu and my annual leave entitlements to be paid on the next pay cycle.*

Principles relevant to the Construction of an Industrial Agreement

16 I have noted in the introduction that the resolution of the issues for determination of this case requires the construction of the Industrial Agreement. It is convenient to set out the principles, relevant to this task, that have been enunciated by higher courts:

(a) The construction of an instrument involves ascertaining the intention of the parties at the time that the instrument was made. This is determined by ascertaining what a 'reasonable person would have understood the words of the instrument to mean' and not the subjective intention of the parties. ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287 [18] – [19] Pullin JA, Le Miere AJA agreeing; Buss JA at [81] - [84].

(b) Ascertaining the intention of the parties begins with a consideration of the ordinary meaning of the words of the instrument. Ascertaining the ordinary meaning of the words requires attention to the context and purpose of the clause being construed. ***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [2006] FCA 813 [53] – [57] (French J).

(c) Context may appear from the text of the instrument taken as a whole, its arrangement and the place of the provision under construction. The context includes the history of the instrument and the legal background against which the instrument was made and in which it was to operate.***City of Wanneroo*** [53] – [57]; ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelsior Pty Ltd*** [2013] FCA 638 [28] - [30] (Katzmann J).

(d) One relevant contextual consideration is that regard may be had to industrial realities. 'There is a long tradition of generous construction over a strictly literal approach'. 'Courts will not make too much of infelicitous expression in the drafting nor be astute to discern absurdity or illogicality or apparent inconsistencies.' That said, a court must not determine an issue of construction on a 'notion of what is fair or just regardless of what is written in the instrument.***City of Wanneroo*** [53] – [57] (French J); ***Excelsior Pty Ltd*** [28] - [30] (Katzmann J).

Pro-rata Long Service Leave Claim

17 The relevant parts of cl 29 of the Industrial Agreement are as follows:

> *29. LONG SERVICE LEAVE*
>
> *(1) Long Service Leave Entitlement*
>
> *Subject to the conditions of this clause all employees will become entitled to 13 weeks long service leave:*
>
> *(a) after a period of ten (10) years continuous service.*
>
> *(b) after each further period of seven (7) years continuous service.*
>
> …
>
> *(11) Pro Rata Long Service Leave*
>
> *(a) If the employment of an employee ends before he/she has completed the first further qualifying periods in accordance with subclause (1) of this clause, payment in lieu of long service proportionate to his/her length of service will not be made unless the employee:*
>
> *(i) has completed a total of at least three (3) years continuous service and his/her employment has been ended by his/her Employer for reasons other than serious misconduct; or*

(ii) *is not less than 55 years of age and resigns but only if the employee has completed a total of not less than twelve (12) months continuous service prior to the day from which the resignation has effect; or*

(iii) *has completed a total of not less than twelve (12) months continuous service and his/her employment has been ended by his/her Employer on account of incapacity due to old age, ill health or the result of an accident; or*

(iv) *has completed a total of not less than three (3) years' continuous service and resigns because of her pregnancy and who produces at the time of resignation or termination certificate of such pregnancy and the expected date of birth from a legally qualified medical practitioner; or*

(v) *dies after having served continuously for not less than twelve (12) months before his/her death and leaves his/her spouse, children, parent or invalid brother or sister dependent on him/her in which case the payment shall be made to such spouse or other dependent; or*

(vi) *has completed a total of not less than three (3) years continuous service and resigns in order to enter an Invitro Fertilisation Programme provided she produces written confirmation from an appropriate medical authority of the dates of involvement in the programme.*

18 Mr Fedec submits that his situation falls within the provision in cl 29(11)(a)(iii) for payment of pro-rata long service leave to an employee who has completed 12 months' continuous service and whose employment has been ended by his employer on account of ill health or the result of an accident. He points to his continuous service of over 12 months (1 February 2012 to 24 March 2014 i.e. 24 months 28 days) and the role of the respondent in requiring him to resign as a condition of settlement of the Workers' Compensation Claim as being 'the employer ending his employment on account of ill health or accident'. The respondent does not dispute that Mr Fedec has completed at least 12 months' continuous service. However, the respondent contends that the effect of the settlement of the Workers' Compensation Claim is that, by agreement, it was Mr Fedec and not 'his Employer' who initiated the end of his employment. My view is that, for the following reasons, the respondent is correct.

(a) Subject to the terms of the Industrial Agreement and any agreement made by the parties, an employee and an employer are free to mutually agree to terminate the employment relationship. Clause 10 of the Industrial Agreement reflects this freedom. It provides for termination of the contract of employment in circumstances proscribed and upon notice for the periods proscribed. However, it also provides for termination at any time by an employee where 'mutually agreed by the employee and the employer': cl 10(6). The note signed by Mr Fedec on 24 March 2014 stated, 'I will resign from my employment.' It reflected an agreement between him and his employer for the termination of the employment relationship with effect from day. The existence of this (mutual) agreement is inconsistent with a characterisation of what happened on 24 March 2014 as employment ended *by* the respondent.

(b) Mr Fedec relies upon a decision of the Industrial Relations Court of Australia in ***Mohebatullah Mohazab v Dick Smith Electronics Pty Ltd (No 2)*** [1995] 62 IR 200; IRCA 645 [205] – [206] (Lee, Moore and Marshall JJ). There will be cases where scrutiny of the circumstances of the employee's 'resignation' reveals unfair conduct of an employer such that it cannot be said that there has been a true 'agreement' to end the employment relationship. Indeed, the facts of ***Mohazab*** was such a case. The employee's resignation occurred after being presented with a choice by his employer: resign or face a police investigation into an allegation of stealing. The evidence adduced by Mr Fedec on the circumstances of his resignation on 24 March 2014 do not reveal any conduct of the respondent that would suggest to me that Mr Fedec's will was overborne in any sense that was comparable to the position of the employee in ***Mohazab***. On 24 March 2014, Mr Fedec had a choice. He could accept or refuse the offer made to him in settlement of his Workers' Compensation Claim. He had the opportunity to take advice from his solicitor. If he refused the offer, he would remain an employee. He accepted the offer and, pursuant to the terms of settlement, he resigned.

(c) At issue is the meaning of the words 'by his/her Employer' in the phrase 'his employment has been ended by his/her Employer on account of incapacity due to old age, ill health or the result of an accident' in cl 29(11)(a)(iii). The words require an assessment of the causal connection between, on the one hand, the end of the Mr Fedec's employment relationship, and on the other hand, the conduct of the respondent. In one sense it is true to say that 'but for' the injury to Mr Fedec on 11 July 2011, there would not have been the Workers' Compensation Claim and 'but for' the position taken by the respondent during negotiations of the claim on 24 March 2014, Mr Fedec would not have resigned. However, it has been recognised that a 'but for' test of causation is inadequate as a comprehensive test of causation (e.g. ***Travel Compensation Fund v Tambree T/As R Tambree and Associates*** [2005] HCA 69 [25]). The better view is to examine the text and context of cl 29(11)(a)(iii) to determine the appropriate causal connection: ***Comcare v Martin*** [2016] HCA 43 [42] – [49] (French CJ, Bell, Gageler, Keane and Nettle JJ). My view is that there are a number of indications in the text and context of cl 29 that suggest the ending of employment following an employee's resignation is not encompassed by cl 29(11)(a)(iii). The ordinary meaning of the text 'by his/her Employer' suggests that the *employer* must have *initiated* a factual step necessary to end the employment relationship. A resignation is *initiated* by an *employee.* This ordinary meaning is reinforced by the content of the other subclauses of

cl 29(11)(a) revealing a distinction between employee initiated terminations (pro-rata long service leave available to an employee who is aged 55 who 'resigns': cl 29(a)(ii)) and employer initiated terminations (pro-rata long service leave available to an employee of 3+ years whose employment ended 'by his/her Employer': cl 29(a)(i)). The context of cl 29(11)(a)(iii) includes the statutory power of the respondent to terminate employment on the grounds of ill health: s 39 of the *Public Sector Management Act 1994* (WA) ('a public service officer called on to retire by an employing authority on the grounds of ill health shall forthwith retire').

(d) The conclusion is consistent with the reasoning and result in ***The State School Teachers' Union of W.A. (Incorporated) v The Governing Council, South Metropolitan TAFE*** [2016] WAIRComm 291 [18] - [39] (Cicchini IM) to the effect that an entitlement to pro-rata long service leave 'upon being retired *by* the employer' (my emphasis) is not enlivened upon the expiration of a fixed term contract of employment.

19 My reasons in the previous paragraph resolve the Pro-Rata Long Service Leave claim against Mr Fedec. In deference to the arguments made by the parties on other aspects of this claim, I make the following additional observations:

(a) If, contrary to my conclusion above, Mr Fedec's employment was ended by the respondent, my view is that his employment was ended on account of his ill health. I am unable to agree with the respondent that there is a relevant distinction between ending employment 'on account of the settlement of the Workers Compensation Claim' and ending employment 'on account of ill health'. The *Workers' Compensation and Injury Management Act 1981* (WA) regulates compensation for incapacity for work resulting from an injury and there is evidence of Mr Fedec suffering ill health in the form of 'left-sided low-back pain' as set out in a letter from Dr Brian Galton-Fenzi to RiskCover on 28 November 2013 and Mr Fedec testifying that that injury has never abated.

(b) I have noted that, in addition to continuous service of over 12 months, the opening words of cl 29(11)(a) of the Industrial Agreement may provide for an additional period of continuous service before being entitled to pro-rata long service leave per cl 29(11)(a)(iii). The relevant opening words state that the entitlement to pro-rata long service leave arises 'if the employment ends before he/she has completed *the first further qualifying periods* in accordance with' cl 29(1). The relevant part of cl 29(1) provides that 'all employees will become entitled to 13 weeks long service leave: (a) after ten (10) years continuous service. (b) after each *further* period of seven (7) years continuous service.' The reference to 'further' in each of cl 29(11)(a) and cl 29(1) give rise to the possibility that an employee may not become entitled to pro-rata long service leave until after ten years (10) years continuous service and *during* the first of the 'further' period of seven (7) years continuous service i.e. the entitlement is only during the period of 10-17 years of continuous service. On this view, the use of the word 'further' in cl 29 (11)(a), 'picks up' *the* y year period in cl 29(1)(b) without the 10 year period in cl 29 (1)(a). An alternative possibility is place emphasis on the word 'before' in cl 29(11)(a) with the result that an employee becomes entitled to pro-rata long service leave if his/her employment ends at any time *before* he/she has completed the first further periods of seven (7) years continuous service including *before* the commencement of the *further* period of seven (7) years continuous service i.e. the entitlement is during the period of 0 - 17 years of continuous service. On this view, the use of the word 'further' in cl 29 (11)(a), 'picks up' *both* the 7 year period in cl 29(1)(a) *and* the 10 year period in cl 29(1)(b). Although the subject matter of each of (i) - (vi) might suggest that the latter view is preferable, I have decided not to express a view on these alternatives. This is because there is a possibility that the intention of the parties is best expressed by a third possibility: as if the word 'or' were to appear in cl 29(11)(a) so that the entitlement to pro-rata long service leave arises 'if the employment ends before he/she has completed the first *or* further qualifying periods in accordance with' cl 29(1). This possibility was not adverted to be either party and it is not appropriate for me to express a view in those circumstances. I note that this is the 'usual' effect of provisions creating an entitlement to pro-rata long service leave. I also note, in the case of at least one other industrial instrument made under the *Industrial Relations Act 1979* (WA) there is a clause that is identical to cl 29 save for the addition of the word 'or' as I have indicated as a possible intention of the parties: see clauses 8(1) and 8(11) of Children's Hospital Child Care Centre Association Inc. Enterprise Bargaining Agreement 2005 (AG 84 of 2005).

20 ***Public Transport Authority of Western Australia v Yoon*** [2017] WASCA 25 is distinguishable, on the facts, from this claim. At issue in ***Yoon*** was the construction of section 4(3) the *Long Service Leave Act 1958* (WA) (LSL Act) providing, in effect, that where a person is by virtue of an industrial agreement 'entitled to long service leave at least equivalent to the entitlement to long service leave' under the LSL Act, the person has no entitlement under the LSL Act. It was held that because the LSL Act required a prospective comparison of the rights of an employee under each of the LSL Act and the industrial agreement, it was not relevant that during a particular period (viewed retrospectively), an employee had an entitlement to pro-rata long service leave under the Act and no entitlement under the industrial agreement. The case is of no assistance to Mr Fedec in circumstances where, on any view, he has no entitlement under the LSL Act.

Overtime Claim

21 The relevant parts of cl 24 of the Industrial Agreement are as follows:

24. OVERTIME

(1) An employee authorised to work overtime will be paid overtime in accordance with this Agreement provided that an employee may elect to accrue time off in lieu of payment proportionate to the payment to which the employee is entitled. Such time off will be taken at a mutually convenient time.

22 Under the heading, 'Facts' above I noted that Mr Fedec was not paid for 1830 minutes of overtime that he worked (i.e. $1,295.71) because he intended to take advantage of the 'time off in lieu of payment' conditions of his employment. I also noted that he did not request any of this 'time off' before his employment ended on 24 March 2014, but that by a letter posted on 30 March 2014 he made a demand for 'monies outstanding for time off in lieu'.

23 In the language of cl 24 of the Industrial Agreement:

(a) Mr Fedec made an 'election to accrue time off in lieu of payment'. My view is that this election was made by Mr Fedec on each occasion (after the authorised overtime was worked) that he did not make a claim upon the respondent for an overtime payment.

(b) Neither Mr Fedec nor the respondent had nominated a 'mutually convenient time' for the time off to be taken before his employment ended on 24 March 2014.

24 Mr Fedec submits that where it 'becomes impossible for an employee to take time off at a mutually convenient time' because the employment has ended, the right to be paid for working overtime *reverts* back to the employee (Claimants Outline of Submissions, [9] - [12]). The respondent submits that Mr Fedec's claim fails because he did not '*during his employment* with the respondent request a reversal of his election of time off in lieu to be converted' to an overtime payment (Respondents Outline of Submissions, [28]).

25 On the assumption, in favour of Mr Fedec, that he had the right while employed to unilaterally reverse his election to accrue time off in lieu and request paid overtime, it is necessary to determine the effect of the Industrial Agreement as a result of Mr Fedec:

(a) having an accrued balance of 'time off in lieu' at the date of the end of his employment on 24 March 2014; and

(b) on 30 March 2014 (i.e. after the end of his employment) purporting to reverse his election and request paid overtime.

26 There is nothing in the text of the Industrial Agreement, particularly clauses 24 (Overtime), 10 (Contract of Employment), 15 (Payment of Salary), 17 (Recovery of Underpayments), 33 (Cashing out Leave Entitlements) that expressly provides:

(a) for the balance of an employee's 'time off in lieu' to be converted to an overtime payment and paid upon termination;

(b) that *after* the end of the contract of employment, an employee may reverse an election to accrue time off in lieu and elect to be paid overtime.

This stands in contrast to provisions of the Industrial Agreement expressly providing for payment of other forms of leave entitlements upon termination. For example, cl 29(9) provides for the payment of accrued long service leave upon the end of employment.

27 On the assumption, in favour of Mr Fedec, that it is open to the court find that an industrial agreement contains an implied term (as was done in ***United Voice WA*** [2013] WASCA 287 [89] Buss JA ff.; but see ***United Voice WA v The Minister for Health*** [2011] WAIRComm 1065 [68] - [69] (Cicchini IM)), Mr Fedec has not satisfied me as to satisfaction of the criteria for implication of a relevant term: See ***BP Refinery (Western Port) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*** (1977) 180 CLR 266 [283]. In particular, an implied term for the balance of an employee's 'time off in lieu' to be converted to an overtime payment and paid upon termination or for an employee to have the right, *after* the end of the contract of employment, to elect to be paid overtime are *not* terms that are necessary to ensure the effectiveness of the Industrial Agreement. Further, I am not satisfied that the terms proposed are 'so obvious' as to go 'without saying'.

28 My conclusion that, in circumstances of this case, there is no relevant express term to support the Overtime claim and that no relevant term may be implied to support the Overtime claim is consistent with the result in: ***Dolly Holzinger v Midland Information, Debt and Legal Advice Service Inc*** [2004] WAIRC 11392; and ***Griggs v Noris Group of Companies*** [2006] SASC 23; (2006) 94 SASR 126. However, each of the cases are distinguishable on the facts. Each concerned an instrument that purported to limit the opportunity for a payment in place of accrued time in lieu employee.

Conclusion

29 In the result, the Pro-rata Long Service Leave claim and the Overtime claim have each failed. The claim will be dismissed.

M. FLYNN

INDUSTRIAL MAGISTRATE

2017 WAIRC 00088

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2017 WAIRC 00088
CORAM	:	INDUSTRIAL MAGISTRATE G. CICCHINI
WRITTEN SUBMISSIONS RECEIVED	:	WEDNESDAY, 18 JANUARY 2017, WEDNESDAY, 25 JANUARY 2017 AND MONDAY, 30 JANUARY 2017
DELIVERED	:	THURSDAY, 23 FEBRUARY 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	:	Orders for the payment of redundancy entitlement - Whether interest should be ordered – Whether penalties should be ordered, quantum of penalties – Whether costs order should be made.
Legislation	:	*Fair Work Act 2009* *Workplace Relations Act 1996* *Supreme Court Act 1935 (WA)* *Crimes Act 2014*
Case(s) referred to in reasons	:	***Trigg, Bestwick and Tomlinson v Group Training South West Inc and Liaros*** [2017] WAIRC 17 ***Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd*** (2002) 121 IR 250 ***Kelly v Fitzpatrick*** (2007) 166 IR 14 ***Mason v Harrington Corporation Pty Ltd*** [2007] FMCA 7 ***Ingersole v Castle Hill Country Club Limited*** [2015] FCCA 1055 ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8 ***Commonwealth of Australia v Director, Fair Work Building Inspectorate*** [2015] HCA 46 ***Fair Work Ombudsman v Maclean Bay Pty Ltd*** (No. 2) [2012] FCA 557 ***Cerin v ACI Operations Pty Ltd and others*** [2015] FCCA 2762 ***Markarian v R*** (2006) 228 CLR 357 ***Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)*** [2016] FCA 244

		Sayed v Construction, Forestry, Mining and Energy Union [2016] FCAFC 4 ***Fair Work Ombudsman v Skilled Offshore Australia Pty Ltd (No 2)*** [2015] FCA 1509 ***Suda Ltd v Sims (No 2)*** [2014] FCCA 190 ***Chileshe v E & M Business Trust*** [2014] FCCA 1381 ***Construction, Forestry Mining and Energy Union v Clarke*** [2008] 170 FCR 574 ***Ryan v Primesafe*** [2015] FCA 8 ***Daglish v MDRN Pty Ltd (No 2)****I [2014] 287 FLR 227* ***Direct Freight Express Pty Ltd v King*** [2015] FCCA 1006 ***Vandeven v Virgin Blue Airlines*** [2013] FCCA 2031 ***Melbourne Stadium Ltd v Sautner*** [2015] FCAFC 20
Result	**:**	Orders made
Representation:		
Claimants	**:**	Mr G. McCorry as agent.
Respondents	**:**	Mr D. S. Mare as agent.

REASONS FOR DECISION

Introduction

1 On 12 January 2017 I delivered reasons for decision in ***Trigg, Bestwick and Tomlinson v Group Training South West Inc and Liaros*** [2017] WAIRC 17. I concluded therein that Group Training South West Inc (the first respondent) had contravened s 44 of the *Fair Work Act 2009* (FW Act) because it had failed to pay the claimants their redundancy entitlements. I also found that, in Mr Tomlinson's case, the first respondent had contravened s 323 of the FW Act by failing to pay him his redundancy entitlement required by his contract of employment. I found also that the first respondent's chief executive officer Mr Stan Liaros (the second respondent) had been involved in those contraventions.

2 Upon receipt of those reasons the parties agreed to provide written submissions concerning the orders to be made. Their submissions have been received and considered.

3 The submissions address the following issues:

1. The quantum of each claimant's redundancy entitlement;
2. Whether interest should be ordered and if so, the rate to be applied;
3. Whether the first respondent should be penalised for its contravention of s 44 and s 323 of the FW Act;
4. Whether the second respondent should be penalised; and
5. Whether a costs order should be made against the respondents.

Redundancy Entitlements

4 The respondents accept (written submissions at [16] and [17]) that the claimants are entitled to the redundancy payments claimed as follows:

- Mr Glenn Edward Trigg (first claimant) - $9,422 (seven weeks x $1,368);
- Mr Adrian Troy Bestwick (second claimant) - $13,680 (10 weeks x $1368);
- Mr Gregory Paul Tomlinson (third claimant) - $40,014 (27 weeks x $1,482).

5 Accordingly, the first respondent will be ordered to pay each claimant his respective redundancy entitlement outlined above.

Interest

6 Section 547 (2) of the FW Act provides that in making the order the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary. Each claimant has made an application for interest and no good cause has been advanced as to why interest should not be ordered.

7 Each claimant's contract of employment ended on 30 June 2015 and therefore his redundancy entitlement was payable before 31 July 2015 (see s 323(1) of the FW Act). Consequently, interest runs from 31 July 2015 until judgement.

8 The rate of interest will be at the discretion of the court.

9 In ***Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd*** (2002) 121 IR 250 Goldberg J, in granting interest under the *Workplace Relations Act 1996* (WR Act), followed a number of Federal Court of Australia authorities in which the relevant state penalty interest rate had been applied.

10 In Western Australia the relevant state penalty interest rate is that prescribed by s 31 of the *Supreme Court Act 1935* (WA).

11 The respondents have submitted (written submissions [34]) that the maximum Supreme Court rate of 6% usually applied in this state is unrealistic and out of date and that a more appropriate rate is 3%.

12 There appears to be no reason as to why this court should depart from the application of the 6% penalty interest rate usually applied in this State. Indeed such rate is relatively consistent with the current Federal Court of Australia's pre-judgement interest rate which is the cash rate plus 4%. The interest due to the claimants should be applied at the rate of 6% for the period 31 July 2015 to 31 January 2017 (549 days) as follows:

- First claimant - $850.95;
- Second claimant - $1,235.25;
- Third claimant - $3,612.42.

13 Thereafter daily interest accrues as follows:

- First claimant - $1.55;
- Second claimant - $2.25;
- Third claimant - $6.58.

Penalties

14 When the first respondent contravened s 44 and s 323(1) (civil penalty provisions) of the FW Act, the applicable maximum penalty for each contravention was 60 penalty units.

15 Section 12 of the FW Act provides that a penalty unit has the meaning given to it by s 4AA of the *Crimes Act 2014*. At the material time each penalty unit was $170.

16 Although the maximum applicable penalty for each contravention was $10,200 (60 x $170) the first respondent (being a body corporate) was, pursuant to s 546(2)(b) of the FW Act, exposed to a maximum penalty five times that amount being $51,000.

17 Section 546(1) of the FW Act provides that a court may order a person to pay a pecuniary penalty that the court considers appropriate if the court is satisfied that the person has contravened a civil penalty provision. Such power is discretionary. There is no principle or requirement that the court must, in all cases of proven contravention, impose a penalty. The FW Act does not give any express or explicit guidance about the circumstances in which a penalty will be appropriate. Nor does it give any indication as to the criteria which might guide the court in relation to the exercise of the discretion or the determination of the level of penalty that is appropriate. There is, however, a checklist of factors that courts have suggested may be taken into account.

18 In ***Kelly v Fitzpatrick*** (2007) 166 IR 14 Tracy J referred with approval to the 'non-exhaustive range of considerations' identified by Mowbray FM in ***Mason v Harrington Corporation Pty Ltd*** [2007] FMCA 7 to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does, the amount of that penalty.

19 In ***Ingersole v Castle Hill Country Club Limited*** [2015] FCCA 1055 Barnes J said that although such factors are to be considered it must be borne in mind that it is necessary to have regard to the particular circumstances of the individual case and to all the evidence. The checklist is no more than a starting point.

20 The list is not a rigid catalogue of matters for attention. At the end of the day the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations (Buchanan J in ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8).

21 The non-exhaustive range of considerations identified in ***Mason*** were:

- The nature and extent of the conduct which led to the breaches;
- The circumstances in which that conduct took place;
- The nature and extent of any loss or damage sustained as a result of the breaches;
- Whether there had been similar previous conduct by the respondent;
- Whether the breaches were properly distinct or arose out of the one course of conduct;
- The size of the business enterprise involved;
- Whether or not the breaches were deliberate;
- Whether senior management was involved in the breaches;
- Whether the party committing the breach had exhibited contrition;
- Whether the party committing the breach had taken corrective action;
- Whether the party committing the breach had co-operated with the enforcement authorities;
- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- The need for specific and general deterrence.

22 There are three broad purposes for imposing penalties for breaches of industrial law: punishment, deterrence and rehabilitation. In ***Commonwealth of Australia v Director, Fair Work Building Inspectorate*** [2015] HCA 46 [126] – [127] French CJ, Kiefel, Bell, Nettle and Gordon JJ observed:

> *[53] Civil penalty proceedings are civil proceedings and therefore an adversarial contest in which the issues and scope of possible relief are largely framed and limited as the parties may choose, the standard of proof is upon the balance of probabilities and the respondent is denied most of the procedural protections of an accused in criminal proceedings.*
>
> *[54] Granted, both kinds of proceeding are or may be instituted by an agent of the state in order to establish a contravention of the general law and in order to obtain the imposition of an appropriate penalty. But a criminal prosecution is aimed at securing, and may result in, a criminal conviction. By contrast, a civil penalty proceeding is precisely calculated to avoid the notion of criminality as such.*
>
> *[55] No less importantly, whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in Trade Practices Commission v CSR Ltd, is primarily if not wholly protective in promoting the public interest in compliance:*
>
> > *Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. …The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a prices on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act.*

23 In determining whether penalties should be imposed I follow the approach suggested in ***Mason***.

The Nature and Extent of Conduct Which Led to the Breaches

24 The respondents suggest that their conduct arose from a genuine disagreement about the legal requirement of the first respondent to make redundancy payments. It is suggested that there was no attempt to avoid legal obligations or to defraud the claimants. The respondents say that their views were sincere and did 'not involve the cynical exploitation or the audacious manipulation of employees who were ignorant or at a disadvantage'.

25 I note however that the first respondent's conduct was clearly in breach of the express terms of its contract with each claimant. That was particularly demonstrative in the third claimant's case.

26 I observe, in any event, that ignorance and a failure to obtain proper advice about the issue cannot be used as a shield. It was incumbent for the first respondent to meet its obligations and its misapprehension of law cannot justify or ameliorate its conduct.

Circumstances in Which the Conduct Took Place

27 The respondents say that the first respondent's refusal to pay redundancy entitlements flow from their interpretation of each claimant's contract of employment as being for a fixed term. Further, in light of the uncertainty of the meaning of the contracts it was not unreasonable for the respondents to have taken the stance that they took. Also, they suggest that the claimants contributed to the outcome by voluntarily signing an agreement which contained conflicting provisions.

28 I am somewhat surprised by that submission because hitherto it had been the respondents' position that there was no confusion about the terms of the contracts. In that regard, I observe that the contract was prepared by the first respondent and any uncertainty in the contracts remains its responsibility and cannot be shifted to the claimants.

The Nature and Extent of Loss

29 The nature of the loss incurred by each claimant was their non-receipt of redundancy payments. The extent of the loss was significant in each instance.

Similar Previous Conduct

30 There is no evidence of any previous similar conduct.

Whether the Breaches Were Distinct or Arose Out of the One Course of Action

31 It is clear that the breaches arose out of one course of conduct. The third claimant does not seek a separate penalty for the breach of s 323 of the FW Act.

Size of the Business

32 The first respondent's business is large, employing over 300 people. The second respondent is employed in that business and is its chief executive officer.

Whether or Not the Breaches Were Deliberate

33 The breaches were clearly deliberate because the second respondent made the conscious decision for the first respondent to not make the redundancy payments. That is so, notwithstanding the demand for such payment made by the claimants.

34 The breaches did not occur as a result of ignorance or inadvertence. It was a deliberate and considered decision made not to pay redundancy payments.

Involvement of Senior Management

35 The second respondent made the decisions on behalf of the first respondent. He was the most senior person in the organisation. The decision made not to pay the claimants redundancy payments was made at the highest level of the first respondent.

Contrition and Corrective Action

36 The respondents have expressed contrition following the publication of my reasons for decision in this matter. They have undertaken to conduct a total review of its employment contracts and to immediately remove all uncertain terms in those contracts. They have also undertaken to participate in training programs to better understand the FW Act and on the law of redundancy (Affidavit of Stan Liaros sworn 25 January 2017).

37 The expression of contrition is noted but the weight that it attracts is not significant. The corrective action indicated is of little benefit to the claimants but I accept that it is aimed at preventing further contraventions.

38 The corrective action taken must be considered in determining whether penalties should be imposed and if so, the amount.

Co-operation with Enforcement Attitudes

39 This factor is not relevant in these matters.

Need to Ensure Compliance with Minimum Standards by the Provision of an Effective Means of Investigation and Enforcement

40 This factor is not particularly relevant to these matters.

Deterrence

41 The respondents contend that the need for general and specific deterrence is not high. They say that the contraventions flow from an incorrect interpretation of the terms of an agreement and not from a refusal to pay redundancy payments.

42 The respondents have expressed both contrition and corrective action and to that extent, the need for specific deterrence is not high.

43 I am of the view that there is a need for general deterrence.

44 On 14 February 2016 the respondents were put on notice (Affidavit of Graham McCorry sworn 18 January 2017) that their position in denying the payment of redundancy entitlements was not maintainable. Notwithstanding that, they failed to obtain independent legal advice and allowed the breaches to continue for a lengthy period resulting in the claimants not receiving their entitlements. The need to discourage others from such behaviour is a significant consideration.

Should Penalties Be Imposed?

45 Given the considerable loss incurred by the claimants (which still continues) in circumstances where the loss has not arisen out of ignorance or inadvertence, it will be necessary that a general deterrent penalty be imposed to bring home not only to the respondents but others that any decision to deny the payment of redundancy payment can only be made after careful consideration with the benefit of legal advice.

46 Employers must be deterred from making unilateral ill-considered decisions without the benefit of legal advice, particularly in circumstances where the employer's decision will significantly and negatively impact its employees. That is particularly the case for employers employing a large work force as was the case in this instance.

47 It will be important to impose a penalty to mark the court's disapproval of such behaviour.

48 There is a need for the imposition of a penalty against the first respondent. Further, the second respondent's acts were integral to the first respondent's conduct and accordingly he too should be penalised.

49 In ***Fair Work Ombudsman v Maclean Bay Pty Ltd*** (No. 2) [2012] FCA 557 Marshall J said in relation to a similar proceeding under the WR Act:

> *[29] …It is important to ensure that the protections provided by [the Workplace Relations Act 1996 (Cth)] to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected …*

Quantum of Penalty

50 Although heard together and having almost identical elements, there are three distinct proceedings on foot. Only one breach is alleged with respect to each claimant. The claimants concede that although s 557 of the FW Act is not applicable to these proceedings, it is appropriate in the exercise of the court's discretion and the totality principle for a single penalty to be imposed on each of the respondents and apportioned equally (claimants' written submissions - 18 January 2017 at [19]).

51 The task of fixing the penalty is a process of instinctive synthesis (***Australian Ophthalmic Supplies Pty Ltd*** [26] – [28]) having regard to the circumstances of the case and the need to maintain public confidence in the statutory regime.

52 The claimants submit an appropriate penalty for each respondent is 60% of the maximum provided by the FW Act. In that regard, they point out that in ***Cerin v ACI Operations Pty Ltd and others*** [2015] FCCA 2762 the respondent's essentially cavalier attitude towards its obligations with respect to an employee involving an insignificant sum, saw it receive a penalty of 40% of the maximum penalty.

53 In his paper on civil penalty contraventions delivered to an Employment Law Symposium of the Law Society of Western Australia on 30 November 2011 Gilmour J of the Federal Court of Australia observed that:

> *Determining penalties is not a matter of precedent. There is no tariff. Regard must be had in fixing a penalty to the individual circumstances of a case and should not be determined by a line by line comparison with another case. In* ***NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*** *(1996) 71 FCR 285 at 295 Buchanan J said:*
>
> > *'The facts of the instant case should not be compared with a particular reported case in order to derive therefrom the amount of the penalty to be fixed. Cases are authorities for matters of principle; but the penalty found to be appropriate, as a matter of fact, in the circumstances of one case cannot dictate the appropriate penalty in the different circumstances of another case.'*
>
> *This proposition was supported in ABCC v CFMEU (No. 2) (2010) 199 IR 373 at [11] per Barker J and upheld by the Full Court on appeal in* ***McDonald v Australian Building and Construction Commissioner*** *[2011] FCAFC 29.*

54 His Honour cited the High Court of Australia in ***Markarian v R*** (2006) 228 CLR 357 which said that in considering the appropriate penalty, careful attention needs to be given to the maximum penalties because:

1. The legislature has legislated for them;
2. They invite a comparison between the worst possible case and the case before the court; and
3. They provide a yard stick to balance other, relevant factors.

55 In determining the appropriate penalties in these matters, I observe that the contraventions are not in the worst category in that they do not arise in circumstances of a deliberate defiance of the law, but rather have occurred in circumstances in which the respondents have arrived at a misguided conclusion about the first respondent's liability with respect to the payment of redundancy entitlements. Such must be viewed against a previously unblemished record. An aggravating factor however is the size of the loss incurred by each claimant which remains outstanding.

56 The respondents' expressed contrition and remedial action, which are mitigating considerations, are of limited value in determining the appropriate penalty. The respondents' contrition has not manifested itself in letters of apology to the claimants and, of course, their entitlements remain unpaid. The taking of remedial action simply to comply with the law is of little consequence.

57 In the end result, the penalties imposed must be appropriate to the circumstances of the case and must be proportionate as well as being in accordance with the prevailing standard of punishment.

58 Taking those factors into account, I have concluded that the penalty to be imposed against each respondent is 50% of the maximum available penalty. In the case of the first respondent, that is $25,500 and in the case of the second respondent, $5,100.

59 The penalties are to be apportioned equally between the claimants with the result being that the first respondent is penalised $8,500 in respect to each claimant and the second respondent $1,700 in respect to each claimant.

60 Section 546(3) of the FW Act provides:

> *(3) The court may order that the pecuniary penalty, or part of the penalty, be paid to:*
>
> *(a) the Commonwealth*
>
> *(b) a particular organisation, or*
>
> *(c) a particular person.*

61 In ***Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)*** [2016] FCA 244 [40] – [44], Mortimer J summarised the law with respect to s 546(3) of the FW Act citing what was said in ***Sayed v Construction, Forestry, Mining and Energy Union*** [2016] FCAFC 4:

> *The power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. The initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law for suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the "Gibbs exception" (****Gibbs v The Mayor, Councillors and Citizens of City of Altona*** *[1992] FCA 553) that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.*

62 I have concluded for the reasons outlined by the Full Federal Court in ***Sayed*** that the penalties should be paid to the claimants.

Costs

63 The claimants ask that an order be made pursuant to s 570(2)(b) of the FW Act that the respondents pay their costs on an indemnity basis. On 14 February 2016 the claimants' agent sent a letter to the respondents' representative pointing out in detail that there was no substance in fact or law that would support their pleaded defences.

64 The claimants submit that a reasonable offer was made to the respondents to settle the proceedings at that stage and their failure to accept that offer or to otherwise then settle the claims and actively pursue arguments that had no reasonable prospect of success was an unreasonable act that justifies an award of indemnity costs from 14 February 2016.

65 The claimants submit further that the pursuit of a case by a party in circumstances where, on the materials before the party at the time, there was no substantial prospects of success may constitute an unreasonable act or omission (see ***Fair Work Ombudsman v Skilled Offshore Australia Pty Ltd (No 2)*** [2015] FCA 1509 [12]). The respondents' continuation of their defences which were not maintainable in the face of evidence and authority amounts to an unreasonable act or omission.

66 Section 570 of the FW Act provides:

> ***570 Costs only if proceedings instituted vexatiously etc.***
>
> *(1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.*
>
> *Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.*
>
> *(2) The party may be ordered to pay the costs only if:*
>
> *(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or*
>
> *(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or*
>
> *(c) the court is satisfied of both of the following:*
>
> *(i) the party unreasonably refused to participate in a matter before the FWC;*
>
> *(ii) the matter arose from the same facts as the proceedings.*

67 Section 570(2)(c) is not relevant to my considerations. Similarly, s 569 and s 569A of the FW Act do not have application in this instance.

68 Section 570(1) of the FW Act provides that a costs order is entirely discretionary, subject however to the constraints imposed by s 570(2) of the FW Act. Section 570(2) of the FW Act ensures that litigants involved in the proceedings under the FW Act are not exposed to costs orders being made against them save in limited circumstances (see ***Suda Ltd v Sims (No 2)*** [2014] FCCA 190 per Lucev J [20]).

69 Section 570(2) of the FW Act provides protection. If a party believes, in good faith that a set of facts exist that entitles him or her to a legal remedy of defence, then he or she will not be exposed to an adverse costs order if either:

1. The evidence leads a court to make a different finding as to the facts (see ***Chileshe v E & M Business Trust*** [2014] FCCA 1381 [39]); or
2. He or she is mistaken about the application of the law to those facts.

70 In ***Suda***, Lucev J repeated what was said in ***Construction, Forestry Mining and Energy Union v Clarke*** [2008] 170 FCR 574, that the court ought not exercise its discretion to award costs (under s 570(2) of the FW Act) 'with too much haste'. The discretion to award costs must be considered against the policy behind s 570(2) of the FW Act.

71 In ***Ryan v Primesafe*** [2015] FCA 8, Mortimer J said:

> *The discretion conferred by the confined terms of s 570(2) should be exercised cautiously, and the case for its exercise should be clear. The reason for caution is the potential for discouraging parties' pursuit in a complete and robust way of the claims for contravention which they seek to make under the Fair Work Act, or the defence of such claims. The policy behind s 570 is to ensure that the spectre of costs being awarded if a claim is unsuccessful does not loom so large in the mind of potential applicants (in particular, in my opinion) that those with genuine grievances and an arguable evidentiary and legal basis for them are put off commencing or continuing proceedings. It is an access to justice provision. Insofar as it operates to the benefit of respondents, it is designed to ensure respondents feel free to pursue arguable legal and factual responses to the claims made against them* [64].

72 In ***Skilled Offshore (Australia) Pty Ltd*** Gilmour J said:

> *[8] The purpose of s 570 is to ensure that litigants, including respondents, are not deterred from "complete[ly] and robust[ly]" defending claims for contravention.*
>
> *[9] In light of this purpose, costs will rarely be awarded under [s 570] and exceptional circumstances are required to justify the making of such an order. Courts should be particularly cautious before finding that a party has engaged in an unreasonable act or omission, lest that discourages parties from pursuing litigation in the matter which they deem best.*
>
> *[10] That a party has a "self-evidently weak case" is not enough to warrant a costs order. There must be 'a higher level of criticism or disapprobation'. Indeed, costs were not awarded against the FWO in **Fair Work Ombudsman v Valuair Limited (No 3)** [2014] FCA 1182 even though elements of the FWO's case were "artificial and unsatisfactory" and "potentially bizarre".*

[11] Where a party relies on s 570(2)(b), the Court must be satisfied of two matters:

there must be an unreasonable act or omission; and that act or omission must have "caused" costs to be incurred.

[12] The pursuit of a case by a party in circumstances where, on the materials before the party at the time, there was no substantial prospect of success may constitute an unreasonable act or omission. However, that an argument is ultimately not accepted does not mean it is unreasonable to put it.

[13] Even if the Court is satisfied of a s 570(2) precondition, it retains a discretion not to order costs.

73 In ***Suda*** his Honour Lucev J, in dealing with s 570(2)(b) of the FW Act, adopted what was said by the Full Court of the Federal Court of Australia in ***Clarke*** [382] per Tamberlin, Gyles and Gilmour JJ. Their Honours observed that the exercise of the discretion is not necessarily engaged because:

(a) A party does not conduct litigation efficiently;

(b) A concession is made late;

(c) A party may have acted in a different or timelier fashion; or

(d) A party adopted a genuine but misguided approach.

74 The basis upon which the claimants say the respondents acted unreasonably was their refusal to accept the offer of settlement made on 14 February 2016. There are a number of authorities (***Daglish v MDRN Pty Ltd (No 2)*** *[2014] 287 FLR 227;* ***Direct Freight Express Pty Ltd v King*** [2015] FCCA 1006; ***Vandeven v Virgin Blue Airlines*** [2013] FCCA 2031; ***Melbourne Stadium Ltd v Sautner*** [2015] FCAFC 20) which confirm that a failure to accept a reasonable offer of settlement may constitute an unreasonable act or omission. However, it will not always be the case that the failure to accept a reasonable offer constitutes an unreasonable act.

75 In ***Sautner*** their Honours Tracey, Gilmour, Jagot and Beach JJ observed that 'Calderbank letters presupposed the existence of a "costs jurisdiction". No such jurisdiction existed (subject to s 570(2)) where claims are made under the Fair Work Act' [168].

76 The respondents deny that their failure to accept the offer and advice received on 14 February 2016 constituted an unreasonable act or omission within the meaning of s 570(2)(b) of the FW Act.

77 The respondents submit that they requested the claimants to further and better explain certain matters in their letter of offer but that the claimants either failed or refused to provide those details (Affidavit of Dietlof Siegfried Von S Mare sworn 25 January 2017). In the circumstances their non- acceptance of the offer until the provision of further information was not unreasonable.

78 Further, the respondents contend that the claims made by the claimants were a moving feast with regard to the facts and the quantum of the third claimant's claim. The respondents point out that the claimants initially alleged that they were dismissed on 22 May 2015 and that allegation was not altered until just prior to the commencement of the trial. Further, that the increase in the third claimant's claim from $23,712 to $40,014 occurred late without the respondents being given a proper opportunity to consider the same.

79 I agree with the respondents that it was not unreasonable for them to have rejected the offer made, given that the issues between the parties were in a state of contention with respect to the facts and the quantum sought. Indeed, the claimants' pleaded facts as at 14 February 2016 were not the same as those relied upon at trial.

80 It was not unreasonable for the respondents to have sought clarification about issues. The failure to provide the information sought by the respondents may well have impeded settlement.

81 I find that the respondents did not act unreasonably.

82 In respect to the second limb of the claimants' argument as to costs, it suffices to say that the fact that the respondents adopted a genuine but misguided approach as to the first respondent's liability is not of itself a sufficient ground for an order for costs. That a party has a self-evidently weak case is not enough to warrant a costs order (***Skilled Offshore (Australia) Pty Ltd*** [8]).

83 Section 580(1) of the FW Act makes it clear that the award of costs is entirely discretionary. The exercise of discretion must take into account the merits of the claim and the way in which the litigation was conducted. All of those factors need to be considered in the context of the policy behind s 570 of the FW Act, which is to ensure that parties are not dissuaded from making or resisting claims because of the prospect of an adverse costs order being made, and further that costs orders are exceptional in nature.

84 In these matters, I am satisfied that the respondents were genuine in defending the claims and believed they had a legitimate defence. Ultimately, they were unsuccessful because the respondents were mistaken as to the application of the law.

85 In the circumstances, the respondents should not be subject to an adverse costs order. Irrespective of s 570(2) of the FW Act, my general discretion under s 570(1) of the FW Act is exercised in refusing the costs application.

86 The costs application is refused.

Orders

87 I propose to make the following orders.

1. The first respondent shall pay to the first claimant $9,422 plus interest thereon from 31 July 2015 until judgment in the sum of $885.05.
2. The first respondent shall pay to the second claimant $13,680 plus interest thereon from 31 July 2015 until judgment in the sum of $1,284.75.
3. The first respondent shall pay to the third claimant $40,014 plus interest thereon from 31 July 2015 until judgment in the sum of $3,757.18.
4. The first respondent shall pay to the first claimant a civil penalty of $8,500.
5. The first respondent shall pay to the second claimant a civil penalty of $8,500.
6. The first respondent shall pay to the third claimant a civil penalty of $8,500.
7. The second respondent shall pay to the first claimant a civil penalty of $1,700.
8. The second respondent shall pay to the second claimant a civil penalty of $1,700.
9. The second respondent shall pay to the third claimant a civil penalty of $1,700.
10. The claims are otherwise dismissed.

G. CICCHINI

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 00078

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NOLAN PAUL GROBLER
	APPLICANT
	-v-
	MR ANDRE STASIKOWSKI
	STASS ENVIRONMENTAL (ABN 73 976 537 552)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 15 FEBRUARY 2017
FILE NO/S	B 189 OF 2016
CITATION NO.	2017 WAIRC 00078

Result Order issued

Order

HAVING heard the applicant on his own behalf and Mr A Stasikowski 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 by 1 March 2017, the respondent provide to the applicant and the Commission, by email, its records of annual leave accrued and annual leave taken by the applicant during the applicant's period of employment.
2. THAT by 1 March 2017, the applicant file and serve written submissions in reply to the respondent's jurisdictional objection.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2017 WAIRC 00115

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00115
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	WEDNESDAY, 15 FEBRUARY 2017 WRITTEN SUBMISSIONS: WEDNESDAY, 8 FEBRUARY 2017; TUESDAY, 28 FEBRUARY 2017
DELIVERED	**:**	FRIDAY, 3 MARCH 2017
FILE NO.	**:**	B 189 OF 2016
BETWEEN	**:**	NOLAN PAUL GROBLER Applicant AND MR ANDRE STASIKOWSKI STASS ENVIRONMENTAL (ABN 73 976 537 552) Respondent

CatchWords	**:**	Industrial law - Whether the Commission has jurisdiction to deal with a claim for enforcement of a contract of employment against a national system employer - Whether claim for denied contractual benefits is a non-excluded matter under s 27(1) of the *Fair Work Act 2009* (Cth) - Contractual benefits that are also safety net entitlements - Difference between a safety net entitlement and a contractual benefit - Jurisdictional objection not upheld
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii) *Fair Work Act 2009* (Cth) s 12, s 26, s 26(1), s 26(3)(c), s 27, s 27(1)(c), s 27(2)(o), s 61(2), s 139(1), s 541, s 542(1), s 543, s 548
Result	**:**	Matter to be listed for hearing
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr A Stasikowski

Cases referred to in reasons:

Higgins v Gateway Printing [2010] WAIRC 00296; (2010) 90 WAIG 529

Triantopoulos v Shell Company of Australia Ltd [2011] WAIRC 00004; (2011) 91 WAIG 67

Reasons for Decision

Background

1 Mr Grobler was employed by Stass Environmental from 15 December 2011 until 30 September 2016. Mr Grobler says Stass Environmental denied him contractual benefits including annual leave and annual leave loading owed under contracts of employment dated 2 September 2011 and 11 November 2013 (**Contracts**). Mr Grobler referred his claim for denied contractual benefits to the Commission on 18 November 2016.

2 Stass Environmental refused to participate in conciliation at the Commission. It objects to the Commission dealing with Mr Grobler's claim because it says that the Commission does not have jurisdiction.

3 The Commission held a directions hearing on 15 February 2017. At the directions hearing, the parties agreed that I should decide on the papers whether the Commission has jurisdiction to deal with Mr Grobler's application.

4 Stass Environmental filed written submissions on 8 February 2017. Mr Grobler filed written submissions on 28 February 2017.

The law

5 Under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (**IR Act**), the Commission may determine whether an employee has been denied contractual benefits.

6 Section 26 of the *Fair Work Act 2009* (Cth) (**FW Act**) generally excludes state laws:

> **26 Act excludes State or Territory industrial laws**
>
> (1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.
>
> (2) A ***State or Territory industrial law*** is:
>
> (a) a general State industrial law; or

(b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:

(i) regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);

(ii) providing for the establishment or enforcement of terms and conditions of employment;

(iii) providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;

(iv) prohibiting conduct relating to a person's membership or non-membership of an industrial association;

(v) providing for rights and remedies connected with the termination of employment;

(vi) providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment; or

(c) a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or

(d) a law of a State or Territory providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal or comparable value; or

(e) a law of a State or Territory providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; or

(f) a law of a State or Territory that entitles a representative of a trade union to enter premises; or

(g) an instrument made under a law described in paragraph (a), (b), (c), (d), (e) or (f), so far as the instrument is of a legislative character; or

(h) either of the following:

(i) a law that is a law of a State or Territory;

(ii) an instrument of a legislative character made under such a law;

that is prescribed by the regulations.

…

7 The IR Act is a 'general State industrial law': s 26(3)(c) of the FW Act.

8 The effect of s 26(1) of the FW Act is that the FW Act generally excludes the application of the IR Act to national system employees and national system employers.

9 But s 27(1)(c) of the FW Act states that s 26 of the FW Act 'does not apply to a law of a State' so far as the law 'deals with any non-excluded matters'.

10 Under s 27(2)(o) of the FW Act, 'non-excluded matters' include 'claims for enforcement of contracts of employment, except so far as the law in question provides for a matter to which paragraph 26(2)(e) applies'.

11 It is useful to note that Stass Environmental argues that the Commission does not have jurisdiction to deal with a claim for denied contractual benefits where the contractual benefit is also a safety net entitlement. Though 'safety net entitlement' is not defined in the FW Act, it is clear from the FW Act that the National Employment Standards (**NES**) and modern awards (**national system awards**) provide safety net entitlements for national system employees.

Issue

12 I must decide whether Mr Grobler's claim for denied contractual benefits is a non-excluded matter and therefore within the Commission's jurisdiction.

Stass Environmental's submissions

13 As set out below, the parties do not agree about the identity of the Mr Grobler's former employer.

14 Stass Environmental says its correct name is Stass Environmental Pty Ltd. I understand its submission to be that Stass Environmental is a constitutional corporation. As a result, Stass Environmental is a national system employer and Mr Grobler is a national system employee under the FW Act.

15 In response to Mr Grobler's submissions, Stass Environmental sent an email to my Associate on 2 March 2017 stating:

> …Stass Environmental Pty Ltd has been registered with ASIC on 30th June 2016. It is on this date that the ABN and all other responsibilities in respect of Stass Environmental have been transferred from Patricia Margaret Stasikowski to Stass Environmental Pty Ltd.
>
> As of 30th of June 2016, Patricia Margaret Stasikowski was no longer a trustee for Stass Family Trust as this was taken over by Stass Environmental Pty Ltd.

16 Mr Grobler's Contracts provide for annual leave and annual leave loading.

17 Stass Environmental concedes that the FW Act does not apply to a claim for the enforcement of a contract of employment: s 27(2)(o) of the FW Act, citing ***Triantopoulos v Shell Company of Australia Ltd*** [2011] WAIRC 00004; (2011) 91 WAIG 67 (***Triantopoulos***) as authority for the proposition that the Commission can deal with claims for contractual benefits under a contract of employment against a national system employer.

18 Stass Environmental says the Commission does not have jurisdiction to deal with a claim for denied contractual benefits where an employee claims safety net entitlements against a national system employer.

19 It says s 12 of the FW Act defines a 'safety net contractual entitlement' as an entitlement under a contract that relates to subject matters described in s 61(2) or s 139(1) of the FW Act.

20 Section 61(2) of the FW Act sets out the NES relating to annual leave.

21 Section 139(1) of the FW Act provides that a modern award may include terms about leave, leave loading and arrangements for taking leave.

22 Stass Environmental's argument that Mr Grobler's claim for denied contractual benefits is not a non-excluded matter under s 27 of the FW Act relies on its construction of s 542(1) of the FW Act.

23 Section 542(1) of the FW Act provides that:

> For the purposes of this Part, a safety net contractual entitlement of…a national system employee, as in force from time to time, also has effect as an entitlement of the…employee under this Act.

24 Stass Environmental says this means that the FW Act applies to safety net entitlements and excludes the IR Act under s 26 of the FW Act. Therefore, the Commission does not have jurisdiction to deal with a claim for safety net entitlements against a national system employer.

25 Stass Environmental says there is a difference between safety net entitlements and a 'purely contractual employment benefit' because safety net entitlements are a minimum benefit that a national system employer must provide to a national system employee, whereas a purely contractual employment benefit is in excess of safety net entitlements. Stass Environmental says it is clear that the FW Act applies to safety net entitlements and this excludes the Commission's jurisdiction.

26 Stass Environmental says if a contract provides for the same benefit as the entitlement under the NES, then the benefit under the contract should be considered a safety net entitlement. It says the Contracts provide for four weeks' annual leave per year which is the same as the entitlement under the NES. Therefore, Mr Grobler's annual leave benefit under the Contracts should be considered a safety net entitlement.

27 Stass Environmental argues the same reasoning applies in relation to annual leave loading. The Contracts provide for 17.5% annual leave loading which is the same as the annual leave loading provided for by the *Manufacturing and Associated Industries and Occupations Award 2010*, which it says covered Mr Grobler. Alternatively, if Mr Grobler was not covered by that national system award, he was covered by the *Professional Employees Award 2010*, which also provides for annual leave loading of 17.5%. Because the contractual benefit to annual leave loading is the same as the national system award entitlement to annual leave loading, it is therefore a safety net entitlement.

28 Stass Environmental says that if the annual leave and the annual leave loading benefits in the Contracts were above safety net entitlements 'they would have been purely entitlements, in other words, "contractual benefits", not contemplated by the [FW Act], and accordingly, the [FW Act] would not exclude the operation of the [IR Act].'

29 Stass Environmental did not provide, and I am unaware of, any authority to support its argument that the Commission does not have jurisdiction to deal with a claim for denied contractual benefits where the benefit claimed is also a safety net entitlement under the FW Act.

Mr Grobler's submissions

30 At the directions hearing, Mr Grobler was unsure about the identity of his former employer. In his written submissions, Mr Grobler says he was employed by Patricia Margaret Stasikowski as trustee for Stass Family Trust trading as Stass Environmental. I understand that Mr Grobler asks that I issue an order amending the respondent's name accordingly.

31 Mr Grobler says because Patricia Margaret Stasikowski is a natural person, Stass Environmental is not a national system employer. The Commission has jurisdiction to deal with his claim.

32 Even if Stass Environmental is a national system employer, Mr Grobler says the Commission has jurisdiction to deal with his claim.

33 Mr Grobler says he is claiming unpaid annual leave and leave loading owed to him under the Contracts. The Commission has jurisdiction to deal with such a claim: ***Higgins v Gateway Printing*** [2010] WAIRC 00296; (2010) 90 WAIG 529.

34 Mr Grobler says the Commission should reject Stass Environmental's characterisation of contractual benefits as safety net entitlements.

35 A claim for contractual benefits, even if those benefits are considered safety net entitlements, can be made outside of the FW Act: s 548 of the FW Act.

Consideration

36 Along with his submissions about jurisdiction, Mr Grobler filed documents as evidence to support his submission that his employer was Patricia Margaret Stasikowski as trustee for Stass Family Trust trading as Stass Environmental.

37 Stass Environmental has not had an opportunity to test that evidence or to put its own evidence to the Commission.

38 I do not consider that I can make a finding about whether Mr Grobler was employed by Stass Environmental Pty Ltd or Patricia Margaret Stasikowski as trustee for Stass Family Trust trading as Stass Environmental. The parties have not been properly heard about that issue.

39 It is not necessary for me to decide whether Mr Grobler was employed by Stass Environmental Pty Ltd or Patricia Margaret Stasikowski as trustee for Stass Family Trust trading as Stass Environmental to deal with Stass Environmental's jurisdictional objection. This is because, as I will explain, I find that even if Stass Environmental is a national system employer, s 26 of the FW Act does not exclude the Commission's jurisdiction to deal with Mr Grobler's claim.

40 Section 26 of the FW Act excludes the application of the IR Act to national system employees and national system employers. But s 26 of the FW Act does not apply so far as the law deals with a non-excluded matter: s 27(1)(c) of the FW Act. Non-excluded matters in s 27(2) of the FW Act include claims for enforcement of contracts of employment (except in so far as the law provides for a matter in s 26(2)(e) of the FW Act, which is not relevant here).

41 Scott ASC found in ***Triantopoulos*** that the FW Act does not exclude the Commission's jurisdiction to deal with claims for denied contractual benefits. I agree with her reasoning.

42 That annual leave or annual leave loading happen to be safety net entitlements does not mean annual leave or annual leave loading are no longer contractual benefits.

43 That a national system employee may be able to apply under the FW Act to enforce a claim for failure to pay annual leave or annual leave loading as safety net contractual entitlements does not exclude this Commission's jurisdiction under s 29(1)(b)(ii) of the IR Act. A claim for enforcement of a contract of employment is a non-excluded matter under the FW Act.

44 At [30] of his written submissions, Mr Grobler says 'Applicant [sic] could apply for payment of an entitlement, even if deemed to be a safety net entitlement, outside of the Fair Work instrument', referencing s 548 of the FW Act.

45 Section 548 of the FW Act enables proceedings to be dealt with as small claims proceedings in certain circumstances. That section is not relevant to this matter. It does not relate to claims for denied contractual benefits made in this Commission.

46 The difference between a safety net entitlement and a contractual benefit is not, as Stass Environmental suggests, the quantum. The difference between a safety net entitlement and a contractual benefit is the source. Here the source of the benefit claimed by Mr Grobler is the Contracts, not the NES or a national system award.

47 Section 541 and s 542 of the FW Act enable an inspector to enforce safety net contractual entitlements where an inspector also applies to a court for an order relating to a contravention of a safety net entitlement. Before those sections were introduced, an inspector could not apply to a court to enforce contractual entitlements or safety net entitlements at a contractual rate of pay.

48 The sections of the FW Act Stass Environmental relies on do not prevent an employee from enforcing contractual benefits. That a safety net contractual entitlement has effect as an entitlement under the FW Act does not mean that a claim for denied contractual benefits is no longer a non-excluded matter under s 27(2)(o) of the FW Act. Provision in the FW Act for enforcement of safety net contractual entitlements is in addition to, and not excluding, enforcement under state industrial laws.

49 This construction is consistent with paragraph 2144 of the Explanatory Memorandum, Fair Work Bill 2008 (Cth):

> The effect of clauses 542 and 543 is that a national system employer or national system employee may apply to the Federal Court or the Federal Magistrates Court to enforce a statutory entitlement corresponding to a safety net contractual entitlement. This is in addition to the right to pursue breaches of a contract of employment in a State or Territory court.

50 I agree the Commission does not have jurisdiction to make orders about an entitlement under the NES or a national system award. But Mr Grobler's claim is for the enforcement of his contract of employment.

51 Just because a contract provides for a benefit that is also an entitlement under the NES or a national system award does not mean that the contractual benefit must be considered a safety net entitlement for enforcement purposes.

52 A contractual benefit exists and is enforceable as a contractual benefit even though the person entitled to it may also have an entitlement under the NES or a national system award.

53 That there may be other avenues available to Mr Grobler, including avenues under the FW Act, does not exclude this Commission's jurisdiction to deal with Mr Grobler's claim for denied contractual benefits.

54 I find Mr Grobler's claim for denied contractual benefits is a non-excluded matter under s 27 of the FW Act.

55 The Commission has jurisdiction to deal with Mr Grobler's claim.

56 Stass Environmental's objection to the Commission's jurisdiction is not upheld.

57 This matter will be listed for hearing.

2017 WAIRC 00117

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NOLAN PAUL GROBLER
	APPLICANT
	-v-
	MR ANDRE STASIKOWSKI
	STASS ENVIRONMENTAL (ABN 73 976 537 552)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 3 MARCH 2017
FILE NO/S	B 189 OF 2016
CITATION NO.	2017 WAIRC 00117

Result	Matter to be listed for hearing
Representation	
Applicant	In person
Respondent	Mr A Stasikowski

Order

HAVING heard Mr N Grobler on his own behalf and Mr A Stasikowski on behalf of the respondent;

AND HAVING given reasons for my decision;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders –

THAT the matter be listed for hearing.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2017 WAIRC 00123

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NOLAN PAUL GROBLER
	APPLICANT
	-v-
	MR ANDRE STASIKOWSKI
	STASS ENVIRONMENTAL (ABN 73 976 537 552)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 7 MARCH 2017
FILE NO/S	B 189 OF 2016
CITATION NO.	2017 WAIRC 00123

Result	Order issued

Order

HAVING heard Mr N Grobler on his own behalf and Mr A Stasikowski 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 applicant file and serve outlines of evidence by 21 March 2017.
2. THAT the respondent file and serve outlines of evidence by 4 April 2017.
3. THAT the applicant file and serve written submissions by 20 April 2017.
4. THAT the respondent file and serve written submissions by 4 May 2017.

5. THAT the matter be listed for hearing not before 8 May 2017.

6. THAT discovery be informal.

7. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2017 WAIRC 00122

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00122
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 2 FEBRUARY 2017 WRITTEN SUBMISSIONS 9 FEBRUARY 2017 AND 17 FEBRUARY 2017
DELIVERED	**:**	TUESDAY, 7 MARCH 2017
FILE NO.	**:**	U 148 OF 2016
BETWEEN	**:**	SALLY HUTCHINGS Applicant AND BIANCA AND DAVE EMPORIUM TRADING AS THORLEY'S Respondent

CatchWords	**:**	Industrial law (WA) - Termination of employment - Alleged harsh, oppressive and unfair dismissal - Employment on basis that terms would be renegotiated - Applicant's failure to renegotiate contract in reasonable time and on reasonable terms - Respondent's business performing poorly - Held dismissal not harsh, oppressive or unfair - Application dismissed - Application for costs per section 27(1)(c) - Application for costs not granted as claim not frivolous
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr C Savala, of counsel

Case cited:

Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385

Reasons for Decision

1 The respondents purchased a commercial building in Wyndham in April 2016 with the intention of operating a general store from it.

2 The applicant had worked for a previous similar business run out of the building which had failed in that when the building was purchased by the respondents nothing was paid for the goodwill of the business operating from it.

3 The respondents were both in full-time employment and they decided to employ the applicant to manage the business, which was named "Thorley's Store".

4 Exhibit 1 in these proceedings was a letter from the respondents to the applicant in the following terms:

> Date 14th April 2016
>
> Re Employment Contract of Sally Hutchings
> Dear Ms Sally Hutching
> We B.S. Crake and D.M. Crake officially employ you as of 1pm Saturday 16th April 2016 as Manager of Thorley's Store. This letter is in place until we get an official contract of employment written up.

5 The applicant's first day of actual work at the business was 20 April 2016.

6 Exhibit 1 made reference to "an official contract of employment" being "written up" and it was common in the proceedings that there was to be negotiations between the applicant and the respondents to arrive at a set of terms and conditions acceptable to both. Put another way the applicant's continued employment was subject to such an agreement being reached.

7 I find that such an agreement had to be concluded in a reasonable time and on reasonable terms. Any other finding, such as a finding that the applicant could refuse to come to an agreement in a reasonable time or on reasonable terms and remain in full-time employment on $55,000 per annum indefinitely, would be very unfair to the respondents who had no prior experience in business and had clearly employed the applicant on the basis, known to her, that the applicant's situation would be reviewed once they knew more.

8 Attempts to negotiate acceptable terms took place between 16 April 2016 and 21 July 2016 but were unsuccessful.

9 In evidence before the Western Australian Industrial Relations Commission, as Exhibits 2, 3 and 6, were examples of contracts drafted by or on behalf of the respondents which were provided to, but rejected, by the applicant.

10 I asked the applicant why she had rejected the contracts. Exhibit 6 was rejected because it provided for a 12-month period of employment only. The applicant was unable to give any real reasons for the rejection of Exhibits 2 and 3.

11 My review of Exhibits 2 and 3 show me that they offered reasonable terms and conditions of employment including reasonable remuneration, both generally and in terms of the remuneration the applicant was being paid at the time, being, in both, $50,654 per annum plus 5% of the net profit of the business.

12 However, no new contract of employment had been signed by 21 July 2016.

13 By this time the respondents had had the business for three months and data about its performance was rolling in. The news was not good. Although data over a longer period might have given a better indication of the viability of the business, it is fair to say that the data that was received before 21 July 2016 was enough to cause the respondents concern and I am sure that the concerns would have been heightened for the respondents because they were new to business and had taken an unusual, for them, risk in operating a business.

14 The concern was such that the respondents, with advice from professional consultants, turned their minds to reducing costs. At this stage they were paying the applicant $55,000 per annum due to an arrangement that they would have reasonably expected to have been superseded by that time and they were losing money in the business. It was entirely reasonable for them to attempt to bring the negotiations for a new contract of employment with the applicant to a head and to take the position in those negotiations that they had to result in reduced expenses for them.

15 On Thursday 21 July 2016 one of the respondents, Mrs Bianca Shlee Crake, brought the negotiations to a head by telling the applicant that the business was not performing financially, that the respondents could not continue to pay the applicant $55,000 and that, in fact, the respondents could pay the applicant no more than $40,000 per annum. Mrs Crake invited the applicant to take some time to think this matter over.

16 There was some suggestion in the evidence of the respondent Mr David Crake, and the written submissions of the respondent, that the $40,000 per annum offer was negotiable and that it was communicated to the applicant as being negotiable. I reject this. Mrs Crake's evidence that she told the applicant that the respondents could pay a maximum of $40,000 per annum was quite clear and the events subsequent to 21 July 2016 make best sense if the offer was one of a maximum of $40,000 per annum.

17 There was also some suggestion that the reference to $40,000 per annum was linked to discussion about the applicant working reduced hours or in a different position. However, that evidence, from both the respondents, came in answer to a leading question from their counsel (ts 64 and 83) and I reject it. I accept the evidence of the applicant, the only evidence on the question not led from a witness by a question suggesting the answer, that Mrs Crake told her that she would be getting $40,000 per annum in the same role.

18 In response to what she had been told by Mrs Crake on 21 July 2016 the applicant basically withdrew her labour. While remaining away from the workplace the applicant sent a text message to Mrs Crake on Monday 25 July 2016 to the effect that she would only return to work if she was paid at the rate of $55,000 per annum until a new contract of employment was signed.

19 By letter dated 27 July 2016, Exhibit 5 in these proceedings, the respondents terminated the applicant's employment. One week's pay was paid in lieu of notice.

20 The Western Australian Industrial Relations Commission has to decide whether in all of the circumstances the termination of the applicant's employment was harsh, oppressive or unfair in the sense of, given the respondents had a legal right to terminate the employment, that right was, in all of the circumstances, abused.

21 The Applicant has failed, and by some margin, to establish on the balance of probabilities that her dismissal was harsh, oppressive or unfair.

22 The material circumstances are that the respondents had taken a financial risk to open a business in a small town. That business, if successful, would provide an important service to the town but, if it failed, it would drain the respondents' resources, which did not appear to be any greater than ordinary. The applicant had worked in the business which had failed. She was offered a good opportunity to work for the respondents, and on good terms, but understood negotiations were necessary. She gave evidence that she knew the business was not initially thriving. She explained that it takes time for a new business to take off but this is an easier attitude to take if it is not your own money being lost in those initial months.

23 The applicant was offered contracts, especially Exhibits 2 and 3, which contained terms and conditions that were, in my view, very reasonable. The applicant would have earned as a base salary over 90% of the salary she was on with the prospect, if she could assist in profitability, of earning as much as, if not more, than her salary at the time.

24 I can well understand that the respondents were, by mid July 2016, frustrated that the terms of employment had not been agreed with the applicant.

25 I can also well understand the respondents' reaction to the financial performance of the business in its first three months and the advice they were receiving on the need to, and the best way to, reduce expenses.

26 Mrs Crake telling the applicant that the respondents could pay the applicant no more than $40,000 per annum was dramatic, especially given that figure was about the minimum payable under the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977*, but, insofar as this was induced by panic, which I think it probably was, the panic was reasonable. This was the respondents first foray into business against a background that a similar business in that location had failed and I think that elevated levels of stress were, as at mid July 2016, perfectly understandable.

27 The applicant's response to what she had been told by Mrs Crake is telling. Quite apart from withdrawing her labour the applicant made it plain that she was, in her negotiating position, insisting on a salary of $55,000 per annum until a new contract had been signed. In all of the circumstances this was, understandably, completely unacceptable to the respondents. They had tried to negotiate new terms, on very reasonable grounds, and had got nowhere. They were entitled to think if they agreed to the applicant's demand at that time that they were effectively agreeing to go on, for an indeterminate time, paying the applicant $55,000 per annum when the business was exhausting their finances. The business was, as the applicant knew, a new business and there had been an agreement that the terms and conditions of employment would be renegotiated. That they had not been and that the applicant was, as at 25 July 2016, still insisting on being paid $55,000 per annum shows how unreasonable she was being.

28 The respondents acted fairly in, at that time, bringing the applicant's employment to an end, especially given they paid the applicant a week's pay in lieu of notice.

29 The applicant points to the respondents later in the year employing a person on payments equating to $47,500 per annum. The applicant argues this points up some disingenuousness on the part of the respondents in offering her $40,000 per annum in July 2016.

30 This evidence does no such thing. What happens six months after a dismissal is highly unlikely to inform me about the fairness of that dismissal. In any event, the evidence of Mr David Crake is that the employee is employed on a casual basis. That may result in higher payment than the applicant was offered but this is because of the different nature of the engagement. In any event, the applicant had knocked back written offers greater than this for permanent employment.

31 The application is dismissed.

32 I should note that the respondents claimed that the application had been brought outside the 28 days allowed by section 29(2) *Industrial Relations Act 1979*. A review of the file shows this was not the case. The application was lodged within the 28 days of the day of the dismissal but the registry of the Western Australian Industrial Relations Commission sought more information to perfect the application and it seems the back and forth between registry and the applicant meant the stamp of the Western Australian Industrial Relations Commission was not applied until 26 August 2016, which was a few days after the 28 day time limit. In any event, the respondents did not point to any prejudice suffered as a result of the delay beyond 28 days, if indeed there was one, and I would have, if it had been necessary, made an order under section 29(3) *Industrial Relations Act 1979* on that basis it would have been unfair not to do so.

33 While I have dismissed the application the circumstances do not warrant any order under section 27(1)(c) *Industrial Relations Act 1979*. The application has fallen well short of meeting the standard for success but was not frivolous.

2017 WAIRC 00121

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SALLY HUTCHINGS
	APPLICANT
	-v-
	BIANCA AND DAVE EMPORIUM TRADING AS THORLEY'S
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 7 MARCH 2017
FILE NO/S	U 148 OF 2016
CITATION NO.	2017 WAIRC 00121

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr C Savala, of counsel

Order

HAVING heard the applicant on her own behalf and Mr C Savala, of counsel, on behalf of the respondent on 2 February 2017; and

HAVING received written submissions on 9 February 2017 and 17 February 2017; and

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

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

The applicant's claim is dismissed.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2017 WAIRC 00097

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00097
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	WEDNESDAY, 8 FEBRUARY 2017 WRITTEN SUBMISSIONS: WEDNESDAY, 15 FEBRUARY 2017; WEDNESDAY, 22 FEBRUARY 2017
DELIVERED	**:**	FRIDAY, 24 FEBRUARY 2017
FILE NO.	**:**	B 86 OF 2016
BETWEEN	**:**	REBECCA SCARLETT VICTORIA KIRKMAN Applicant AND FALCON SETTLEMENTS PTY LTD (ABN 62 097 79 7996) T/A PEEL LEGAL, BARRISTERS & SOLICITORS Respondent

CatchWords	**:**	Contractual benefits claim - Entitlements under contract of employment - Applicant's lack of communication - Principles applied - Hardship to applicant outweighed by significant delay, inadequate explanation for the delay and prejudice to the respondent - Application dismissed for want of prosecution
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 27(1)(a)
Result	**:**	*Application dismissed for want of prosecution*
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr M Bassett-Scarfe

Case referred to in reasons:

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barminco Pty Ltd – Plutonic Project (2000) 80 WAIG 3162

Reasons for Decision

Background

1 Ms Kirkman is a legal practitioner and lay associate who worked for Falcon Settlements Pty Ltd trading as Peel Legal, Barristers & Solicitors (**Peel Legal**) for 8 days in 2015. She says Peel Legal has denied her contractual entitlements, including the benefit of working her probationary period of 3 months. Ms Kirkman referred her claim for denied contractual benefits to the Commission on 18 May 2016.

2 The parties did not reach an agreement at the conciliation conference on 9 August 2016. At the end of the conciliation conference and the next day by email to her solicitors, the Commission asked Ms Kirkman to let the Commission know how she would like to proceed with her application. Ms Kirkman did not reply to the Commission.

3 The Commission wrote to Ms Kirkman's solicitors on 25 October 2016 and again asked Ms Kirkman how she wanted the Commission to deal with her application. Ms Kirkman did not reply to the Commission.

4 On 17 January 2017, the Commission informed Ms Kirkman's solicitors by email that unless Ms Kirkman contacted the Commission by 19 January 2017, this matter would be listed for a hearing for Ms Kirkman to show cause why the Commission should not dismiss her application for want of prosecution. Ms Kirkman's solicitors wrote to the Commission on 17 January 2017, stating they no longer acted for Ms Kirkman and had forwarded the Commission's email to her. Ms Kirkman did not contact the Commission. On 23 January 2017, the Commission informed the parties that a show cause hearing had been listed on 8 February 2017.

5 Both parties attended the hearing on 8 February 2017 and made oral submissions. Neither party gave evidence. I directed the parties to file supplementary written submissions after the hearing.

The law

6 The Commission can dismiss a matter under s 27(1)(a) of the *Industrial Relations Act 1979* (WA):

> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part thereof is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> …
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

7 In ***The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barminco Pty Ltd – Plutonic Project*** (2000) 80 WAIG 3162 (***Barminco***), the Full Bench set out the principles to consider when deciding whether to dismiss an application for want of prosecution. They include the length of the delay, the explanation for the delay, the hardship to the applicant if the application is dismissed, the prejudice to the respondent if the action is allowed to proceed, and the conduct of the respondent in the litigation: ***Barminco*** (3162).

Ms Kirkman's submissions

The length of the delay

8 Ms Kirkman concedes that there was a delay of nearly 6 months between the conciliation conference on 9 August 2016 and the show cause hearing on 8 February 2017, when she told the Commission that she wants her application to be heard.

9 At the show cause hearing, Ms Kirkman agreed she did nothing, and she did not instruct her solicitors to do anything on her behalf, to progress her application at the Commission.

10 Ms Kirkman says her solicitors stopped acting for her on 17 August 2016. They told Ms Kirkman that they would inform the Commission they were no longer acting for Ms Kirman.

The explanation for the delay

11 Ms Kirkman's written submissions say that there are two reasons for her delay.

12 First, Ms Kirkman complained to the Legal Profession Complaints Committee (**LPCC**) about her solicitors' costs agreement. She needed the result of the LPCC's investigation into her complaint to help her to decide whether to proceed with her claim against Peel Legal. Ms Kirkman did not know the investigation would take as long as it took. She was told the outcome of the investigation on the same day as the show cause hearing.

13 Second, Ms Kirkman says she had not received any correspondence from her solicitors or the Commission about the state of her matter. She did not know the Commission had contacted her solicitors about the delay in her decision to proceed. She only became aware in January 2017 that the Commission asked her solicitors about her delay.

14 At the show cause hearing, Ms Kirkman said she has a health condition involving low energy levels, which contributed to her delay. She received the correspondence from her solicitors and the Commission, but to an email account she sporadically checks. Ms Kirkman says she had told her solicitors to use a different email address.

Hardship to Ms Kirkman if her application is dismissed

15 Ms Kirkman says she will lose the opportunity to clear her name and to recover the money she says she is owed if her application is dismissed. Ms Kirkman says she has spent a considerable amount of money on her application to date.

Prejudice to Peel Legal if Ms Kirkman's application proceeds

16 Ms Kirkman says there will be no prejudice to Peel Legal if her application is allowed to proceed. Instead, Peel Legal will have the opportunity to prove its case.

Peel Legal's conduct in the matter

17 Ms Kirkman complains that Peel Legal has been difficult to contact and that it has not contacted her to 'bring the matter to a close'.

Peel Legal's submissions

The length of the delay

18 Peel Legal says the delay is significant and Ms Kirkman has not been diligent in pursuing her application.

The explanation for the delay

19 Peel Legal says Ms Kirkman's reasons for the delay, in particular her dispute with her solicitors about their costs agreement, are irrelevant.

20 Ms Kirkman's solicitors stopped acting for her a week after the conciliation conference and the Commission's email requesting that Ms Kirkman inform the Commission about how she wanted to proceed with her application. Peel Legal says Ms Kirkman knew from the conciliation conference she needed to tell the Commission how she wanted to proceed with her application. Further, the Commission can assume Ms Kirman's solicitors would have sent her the Commission's email dated 10 August 2016.

Hardship to Ms Kirkman if her application is dismissed

21 Peel Legal says there is prima facie hardship to Ms Kirman if her application is dismissed. However, the alleged damage to her reputation is unfounded and irrelevant. Her application has no reasonable prospect of success.

Prejudice to Peel Legal if Ms Kirkman's application proceeds

22 Peel Legal dismissed Ms Kirkman on 19 February 2015. Ms Kirkman referred her application to the Commission 15 months later. More than two years have passed since the relevant events took place. I understand Peel Legal's submission to be that it may be prejudiced because its witnesses' recollection of events will be adversely affected by the passage of time.

23 Peel Legal says it will experience financial hardship if Ms Kirkman's application proceeds because of the time and resources it will have to put into defending her application. It will forego earning legal fees as a result. Peel Legal will not be able to recover its legal fees because the Commission is a no costs jurisdiction.

Peel Legal's conduct in the matter

24 Peel Legal says it has conducted itself appropriately and has responded to the Commission in a timely manner. Ms Kirkman has not.

25 The Commission should exercise its discretion to dismiss Ms Kirkman's application for want of prosecution.

Consideration

26 Neither party gave evidence in this matter.

The length of the delay and the explanation for the delay

27 A delay of nearly 6 months is a significant delay.

28 The Commission communicated with Ms Kirkman's solicitors until they informed the Commission they no longer acted for Ms Kirkman. From then, the Commission communicated directly with Ms Kirkman, using the email address she provided in her *Notice of claim of entitlement to a benefit under a contract of employment*.

29 Ms Kirkman expected her solicitors to inform the Commission that they no longer acted for her. Perhaps they should have done. However, if Ms Kirkman's solicitors stopped acting for her on 17 August 2016, as she says they did, Ms Kirkman had responsibility for her matter after that. I find Ms Kirkman was responsible for the delay.

30 Even if Ms Kirkman rarely checks her email or starts to use a different email account, it is still her responsibility to update the Commission. She did not. I had to ask Ms Kirkman at the show cause hearing to provide her contact details to the Commission.

31 Ms Kirkman is the applicant. She referred her matter to the Commission and it is her responsibility to prosecute her application.

32 Ms Kirkman did not give evidence about her health condition or explain how it contributed to the delay.

33 I do not accept that Ms Kirkman needed to know the outcome of her complaint to the LPCC about her solicitors' costs agreement to prosecute her application.

34 Ms Kirkman's explanation for the delay is inadequate.

Hardship to Ms Kirkman if her application is dismissed

35 There is no evidence before the Commission of damage to Ms Kirkman's reputation.

36 Ms Kirkman may have spent a considerable amount of money on her application to date, though that is another matter she did not give evidence about.

37 I accept that dismissing Ms Kirkman's application would deny her the chance to obtain the orders she seeks, as it would any applicant whose application is dismissed for want of prosecution.

38 I am not persuaded that the hardship to Ms Kirkman outweighs the significant delay, the inadequate explanation for the delay and the prejudice to Peel Legal.

Prejudice to Peel Legal if Ms Kirkman's application proceeds

39 Allowing Ms Kirkman's application to proceed does not present an opportunity for Peel Legal. Having to respond to an application necessarily involves inconvenience and risk. Further, I accept that the delay would adversely affect a witness' recollection of events. I find Peel Legal would be prejudiced if I allow Ms Kirkman's application to proceed, because more than two years have passed since the events the subject of Ms Kirkman's application.

Peel Legal's conduct in the matter

40 There is no evidence that Peel Legal has been difficult for Ms Kirkman to contact or that Peel Legal has not attempted to resolve this matter. But in the circumstances, neither would be relevant to the question of whether I should dismiss Ms Kirkman's application. No evidence or submission has been put to the Commission that Peel Legal's conduct in the Commission caused or contributed to Ms Kirkman's delay in progressing her application. Peel Legal has conducted itself appropriately in its dealings with the Commission. I find Peel Legal has not contributed to Ms Kirkman's lack of prosecution of her application.

Conclusion

41 As I state at [9], Ms Kirkman agreed that she has not progressed her application at the Commission. Ms Kirkman did not ask the Commission to list her matter for hearing. She did not instruct her solicitors to ask the Commission to list her matter for hearing. Ms Kirkman has not prosecuted her application.

42 In the circumstances, I find the hardship to Ms Kirkman is outweighed by the significant delay, Ms Kirkman's inadequate explanation for the delay and the prejudice to Peel Legal.

43 I will exercise my discretion to issue an order dismissing Ms Kirkman's application for want of prosecution.

2017 WAIRC 00098

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REBECCA SCARLETT VICTORIA KIRKMAN
	APPLICANT
	-v-
	FALCON SETTLEMENTS PTY LTD (ABN 62 097 79 7996) T/A PEEL LEGAL, BARRISTERS & SOLICITORS
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 24 FEBRUARY 2017
FILE NO/S	B 86 OF 2016
CITATION NO.	2017 WAIRC 00098

Result	Application dismissed for want of prosecution
Representation	
Applicant	In person
Respondent	Mr M Bassett-Scarfe

Order

HAVING heard Ms R Kirkman on her own behalf and Mr M Bassett-Scarfe on behalf of the respondent;

AND HAVING given reasons for decision;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT this application be, and is hereby dismissed for want of prosecution.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2016 WAIRC 00917

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00917
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 6 DECEMBER 2016
DELIVERED	**:**	TUESDAY, 6 DECEMBER 2016
FILE NO.	**:**	U 175 OF 2016
BETWEEN	**:**	SAMANTHA MCCOURT Applicant AND SUZZANNE WILSON KARIZMA HAIR STUDIO Respondent

Catchwords	**:**	*Industrial Law (WA) - Termination of employment - Alleged harsh, oppressive and unfair dismissal - Application filed outside of 28 day time limit - Application for extension of time - Principles applied - Action taken to contest the dismissal in the Fair Work Commission - Applicant was acting under legal advice at all material times in relation to the commencement of the Fair Work Commission claim - Commission not persuaded that claim is without merit - Unfair not to accept the application out of time - Extension of time granted*
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(3)
Result	**:**	Extension of time granted
Representation:		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Ms N Olsen of counsel
Solicitors:		
Respondent	**:**	Garton Smith & Co

Case(s) referred to in reasons:

Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (84 WAIG 683)

Reasons for Decision

Ex Temporé

1 The application is brought by Ms McCourt against Karizma Hair Studio by which she alleges that she was unfairly dismissed by the respondent from her employment as a senior hairdresser according to the application, on or about 22 August 2016.

2 As the application was filed on 25 October 2016 self-evidently the application is out of time. Without focussing overly on the grounds, the applicant asserts that she was dismissed unfairly because she had obtained a medical certificate and was dismissed in circumstances which she regards as unfair for that reason. She further says that according to her understanding of the business' position, that she should not have been made effectively redundant, given the earnings she was making for the business. Thirdly she says that there were no prior warnings given to her of her dismissal in any event. Suffice to say this is disputed by the employer.

3 In relation to the reason for the application being filed out of time the applicant says that she did so because she initially pursued her claim in the Fair Work Commission under the *Fair Work Act* challenging her dismissal. It is not disputed that application was filed, according to what the respondent's solicitor informed the Commission, on or about 13 September 2016. According to the applicant, by the time the respondent filed its response to the Fair Work Commission claim and the conciliator told her that the matter as filed was in the wrong jurisdiction as the respondent was structured as a partnership, she was outside the 28-day time limit to commence these proceedings.

4 The respondent denies the applicant's dismissal was unfair. It maintains that the applicant's employment was terminated because of the downturn in business of the respondent. The respondent says that in late April 2016 or thereabouts, there was a meeting between the principal of the respondent, Ms Wilson and the staff employed in the business in relation to the state of the business operations. Ms Wilson says that she informed the two employees present, including Ms McCourt, that unless they could increase their revenue, the business could not sustain both of them in the future. Furthermore, the respondent says that since the termination of the applicant's employment, it has become aware of certain matters which it regards as a breach of the applicant's contract of employment and its policies. This relates to firstly, the applicant conducting her own hairdressing work out of hours at home or at other premises. Secondly in about June 2016, attempting to entice another employee of the respondent to work with the applicant in a new business the applicant was considering setting up. Thirdly, possibly taking clients of the respondent to do her own private work and finally, suspecting that the applicant may have used the respondent's products without authority, on out of hours' work. I might add that Ms McCourt, in her evidence briefly given this afternoon, denies all of those allegations.

5 As to the grounds raised by the applicant for her out of time application, the respondent, through the affidavit of Ms Wilson, the principal of the business, testified that in March 2016 she had a meeting with the staff members, including the applicant. At that meeting, Ms Wilson says she told the employees that the respondent was considering restructuring its business to change to a company structure, so that the relevant federal award would apply and moreover, that the business would commence trading on a Sunday to increase the business income.

6 At that meeting the respondent through Ms Wilson, said there were some mixed responses. Ms McCourt was opposed to the change as it would impact on her earnings and other terms and conditions. Accordingly, Ms Wilson's evidence is she decided against making that change. Ms Wilson also testified that the applicant would make frequent contact with "Wageline" to raise queries about her employment circumstances. Ms Wilson says she recalled one discussion with Wageline where the telephone was on loudspeaker. In the presence of the applicant and another employee, Wageline referred to the relevant State hairdressing award. According to the applicant's evidence, while she admitted she made some calls to Wageline to clarify her status as a full-time or part-time employee and her hours of work, she did not clearly understand the nature of the State or federal jurisdictions and whether Wageline necessarily was State or federal.

7 The Commission has a jurisdiction to consider whether under s 29(3) of the Act it will accept an unfair dismissal claim out of time. The rationale for that decision is whether it would be unfair not to accept an application outside of time. The relevant leading authority which has been provided to both parties in that connection is the decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (84 WAIG 683). In *Malik* the relevant factors, set out in particular by EM Heenan J at par 74, were in the following terms:

> 74 The principles enunciated by Marshall J in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298 are apposite. In that case his Honour was considering the jurisdiction under s 170EA of the Industrial Relations Act 1988 (Cth), as it then was, to grant an extension of time. His Honour said, after examining previous applicable authority:
>
> "I agree, with respect, that those principles are appropriate to be applied in the circumstances of this matter.
>
> Briefly stated the principles are:
>
> 1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."
>
> I agree, with respect, with that formulation of the principles and their application in the present case. See also ***Clark v Ringwood Private Hospital*** (1997) 74 IR 413 (AIRC). However, counsel for the applicant/appellant citing the decision in ***Kornicki v Telstra - Network Technology Group*** [Print P3168, 22 July 1997] submits that the language of s 29(3) suggests that considerations of fairness towards an applicant are central to the exercise of the discretion and that, at least in the federal sphere, such a test was intended to convey an approach to the exercise of the Commission's discretion more generous to applicants than that which previously prevailed. I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims.

8 In this case, because the application is out of time, the burden falls on the applicant Ms McCourt, to persuade the Commission that it should accept her claim out of time. The evidence of the applicant is self-evidently, that she contested her dismissal by commencing a claim in the Fair Work Commission. I emphasise importantly, this was based upon legal advice that she said her husband obtained on her behalf, shortly after she was dismissed. That application, as I have mentioned, was filed on 18 September 2016, within time. Next there was no obvious prejudice to the respondent demonstrated, except for the usual prejudice that any party would have by having to defend itself from a claim brought by a former employee. As to the merits of the applicant's claim, whilst the Commission can only at this stage of the matter, assess such matters in a broad brush fashion, I am not persuaded on the material before me that the applicant's claim is without merit.

9 As to the knowledge of the structure of the business conducted by the respondent these matters are not straightforward for employees to understand. Whilst Ms Wilson has made submissions to the Commission to the effect that these matters ought to be clear, in my experience, for employees, even based on obtaining legal advice, these matters can be less than clear. There is often scope for genuine confusion as to the proper jurisdiction to commence claims such as this, whether that be in the State jurisdiction or in the federal jurisdiction. One thing is clear however and that is that the applicant did challenge her dismissal in the Fair Work Commission within the time provided for under the relevant federal legislation. As soon as it was made clear, as a result of the conciliation conference, that the applicant was in the wrong jurisdiction, she acted promptly to commence this claim within a few days of the conciliation conference.

10 Whilst there was some delay between the respondent filing its notice of answer in the federal proceedings, raising the issue of jurisdiction, the applicant has informed the Commission that for health reasons which I do not propose to disclose, she was under considerable stress at that time. She did not make a decision to commence a fresh claim until after the conciliation conference, when the conciliator had told her she was in the wrong place. Importantly, I emphasise that the applicant was acting under legal advice at all material times in relation to the commencement of the Fair Work Commission claim.

11 In all of the circumstances I consider it would be unfair not to accept the application out of time. I will make an order accordingly, to extend the time for the filing of the application to 25 October 2016. The application will be listed for conciliation at a later date.

2016 WAIRC 00921

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMANTHA MCCOURT
	APPLICANT
	-v-
	SUZZANNE WILSON KARIZMA HAIR STUDIO
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 9 DECEMBER 2016
FILE NO/S	U 175 OF 2016
CITATION NO.	2016 WAIRC 00921

Result	Extension of time granted
Representation	
Applicant	In person
Respondent	Ms N Olsen of counsel

Order

HAVING heard the applicant on her own behalf and Ms N Olsen of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the time for the filing of the notice of application in the herein proceedings be and is hereby extended to 25 October 2016.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2017 WAIRC 00120

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00120
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 22 FEBRUARY 2017, THURSDAY, 23 FEBRUARY 2017
DELIVERED	**:**	TUESDAY, 7 MARCH 2017
FILE NO.	**:**	B 136 OF 2016, B 137 OF 2016
BETWEEN	**:**	CATHERINE E MCKEOWN
		STEPHEN ROSE
		Claimants
		AND
		GC & K BARRETT TRADING AS CARNARVON CARAVAN PARK
		Respondent

CatchWords	:	Industrial law (WA) - Contractual benefits claims - Oral contract of employment - Claims for payment for additional hours allegedly worked - Claim contractual term that additional hours could be worked at claimants discretion - Claim additional hours to be paid at rate of $25.00 per hour cash - No term for payment of additional hours - Additional hours not worked by claimant Rose - If term for payment of $25.00 per hour cash existed it would not be enforced as it is contrary to public policy - Claims dismissed
Legislation	:	*Industrial Relations Act 1979*
Result	:	Claims dismissed
Representation:		
Claimants	:	In person
Respondent	:	Dr J T Schoombee, of counsel and with him Mr J Ip, of counsel

Cases cited:

Fazio v Fazio [2012] WASCA 72

Griggs v Noris Group of Companies (Including SA Helicopters Pty Ltd CAN 069 223 463 & Captured Pty Ltd CAN 008 134 772) (2006) 94 SASR 126

Palmer v R (1998) 193 CLR 1

Rand v Uni-Roof Safe-T-Rail Pty Ltd [2009] NSWSC 26

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings as edited by the Commission).

1 I have before me two related claims for denied contractual benefits under section 29 *Industrial Relation Act 1979*. I give my reasons for decision in relation to both at the one time.

2 To succeed the claimants need to establish that there was a term of their contract of employment with the respondents which had these effects:

(a) They could work additional hours, that is hours greater than 39 hours per week;

(b) They could do so at their own discretion and without specific authority from the respondents; and

(c) They would be paid $25.00 per hour in cash for those additional hours.

3 In my view the claimants have, by some margin, failed to make out that their contracts contained such a term.

4 Everything really turns on what happened at a meeting in late October 2015 in Carnarvon which was attended by all parties when the employment of the claimants was discussed and agreed.

5 I accept Mrs Barrett's evidence that this was a casual discussion. Matters discussed were not of a complex nature and I accept all of the parties were persons who were known to each other and on friendly terms and that this would have been a largely casual discussion.

6 The most important employment related matters were certainly discussed, and they were that the claimants would each be paid $1,000 per week paid for a 39-hour week to work as a receptionist (in the case of Ms McKeown) and as a maintenance man/caretaker (in the case of Mr Rose).

7 The claimants say that the respondents, or one of them, went on to say that if the claimants did any hours more than 39 hours they would be paid cash for those hours. I note that neither claimant said in their evidence that an amount of payment was agreed for the additional hours.

8 I have reservations about whether additional hours were discussed at that meeting.

9 I accept the evidence of the respondents, not disputed by the claimants, that the meeting in October 2015 occurred during or on the eve of the "quiet season" for the caravan park, that being the summer months, and I find that, as the respondents said, there was no reason why additional hours would have been at the forefront of anyone's mind such that it required discussion at that time. I also note that the matter of payment for additional hours was never raised by the claimants, even on their version, until 17 February 2016, which is some months after they say they had been working those additional hours. For these reasons I accept the evidence of the respondents that there was no discussion about the issue of "additional hours" and so find.

10 However, even if the respondents, or one of them, had said words to the effect claimed, that if the claimants did any hours more than 39 hours they would be paid cash for those hours, I do not think that it could possibly have been the term agreed that they could work those additional hours entirely at their own discretion, without reversion to or authority from the respondents, and the respondents would pay them $25.00 per hour cash for those hours, simply taking them at their word when and if they decided to claim for them. The words said to have been used, even if they were used, do not bear that construction with the necessary certainty.

11 That there was certainty on what would be a significant matter does not fit with what was accepted to be casual conversation, contractual in nature though it was. There are huge gaps in the treatment that such a term would have to have received in that discussion for it to be a contractual term in the way that the claimants say it was. There was no discussion about when those hours might be worked, whether authority was needed for those hours to be worked nor, indeed, was the rate of pay, on the claimants versions, discussed for those additional hours.

12 For such important matters to be part of the contract there would have to be clear expression, oral as it may be, of all the relevant parts of the term of the agreement. The statement said to have been made, "that if you work additional hours you would be paid for them", simply does not, even if it were made, get there.

13 Further, in relation to Mr Rose, I find that, in any event, he did not work the additional hours he says he did. I say this because he did not describe to me in his evidence an 11-hour work day. I also say this because he told me initially that his diary contained the hours he worked, that being 11 hours each day, but later he told me that was just a minimum number. This was when the issue of work at the Gateway Motel arose. Mr Rose told me that he worked at the Gateway Motel as well as the caravan park on some days and I questioned him on why on those days it was just 11 hours given as the hours that had been worked. He then volunteered that it was a minimum number and not the actual number that was worked. There is no reason why 11 hours was chosen as being the minimum number of hours worked. Absent a good explanation, and there was not one, I have no idea why Mr Rose chose "11 hours" as the number he decided to record in his diary. It adds to my concern about whether 11 hours were worked.

14 I also find that, even if he did work the 11 hours per day, that he did not do so with the authorisation of the respondents, or do so within the contemplation of the respondents. I accept that it was a quiet time in the caravan park and there simply was not enough work to do in an 11-hour day, unless Mr Rose was, as he was saying, doing "projects", which I accept would not be the job of a maintenance person or indeed a caretaker, or at least not without the authority of the respondents, about which there was no evidence.

15 A claim for $6,000 in unpaid contractual entitlements for the 13-week period of employment, as claimed by Mr Rose, looks high at first blush and when examined there is, in my view, no basis for it.

16 Finally, if there had been a term that additional hours were to be paid at $25.00 cash, as the claimants assert, I would decline to enforce it as it would be contrary to public policy to do so. If you make an agreement for cash payments, in my view, you take a risk because no judicial or quasi-judicial decision maker should enforce it and I would decline to do so even if I had found that there was such a term of the contract.

17 In relation to Ms McKeown's situation, it is less certain in relation to the facts. Ms McKeown's story in relation to her additional hours is essentially this; that she was to work Wednesday to Sunday with Monday and Tuesday off, but that on many occasions she had to work on Monday and Tuesday, despite those being her days off, due to the absence of Ms Gabrielle Bamford, the granddaughter of the respondents, who was supposed to work in the reception on those days.

18 However it is viewed, Ms McKeown's claim remains a claim for additional hours and relies on the same contractual term asserted by Mr Rose; that is that there was a contractual term that she would be paid at $25.00 cash for additional hours. That is, I do not think I need to decide whether the working week was Wednesday to Sunday with Monday and Tuesday off, or whether it was Monday to Saturday with Sunday off, because Ms McKeown says that additional hours were worked and she says her claim comes within the term of the contract that additional hours could be worked and would be paid at the rate of $25 per hour in cash without any reversion to the respondents.

19 I must say I am concerned about some aspects of Ms McKeown's evidence. Ms McKeown includes in her hours worked, so as to get to the additional hours stage, time when she was away from the caravan park, such as when she was at the gun club on a Sunday, but had her phone with her. The idea that she can include, as hours worked, hours when she was away from the workplace is troubling and makes me question the rationality of her approach to the matter. That is the kind of thing that is caught by on call allowances and the like in awards, but clearly if you are at the gun club you are not working whether or not you have the phone on.

20 It does make me doubt whether Sunday was a work day for Ms McKeown if she was at the gun club regularly on that day but in any event I am troubled by Ms McKeown telling me that she was actually working when she was not at the workplace.

21 I am also troubled by her answer in cross-examination to the question whether she had spoken to her husband about this matter. Initially she answered that she had. When pressed on it, or when the next question came, she changed her mind and said that she could not remember. I asked her about this later and she said she had been flustered. It is true that some self-represented persons might be flustered in what is an unusual environment for them, but in my view Ms McKeown was flustered only by the direction she thought the questions were going to take and she tactically, at that point, abandoned her oath and gave evidence which was not honest and she knew not to be honest. The issue may not have been a material one but Ms McKeown's conduct affected my opinion of her credibility.

22 However, having said all of that, Ms McKeown says that she worked in the office when Ms Gabrielle Bamford ought to have been there and she was not there and that she had to cover for Ms Bamford's absence. I am not prepared to say that did not occur in the absence of hearing from Ms Bamford. The problem for Ms McKeown was whether doing those hours and not being paid was a breach of the contract as Ms McKeown pleaded it. On the claimant's case, it comes within a term that if extra hours were worked they would be paid at $25.00 per hour in cash and I have found that there was no such term in the contract.

23 Even if I found that Ms McKeown had worked those hours, there is no term under the contract which would result in payment to her and, even if I had found there was such a term, I would not enforce it because it is a contract for cash payments.

24 It could very well be that Ms McKeown has a claim under an award, but that is for another place and another time and I do not make findings on the facts for Ms McKeown in relation to when she worked because I am not required to in light of my substantive findings on this matter.

25 If I had moved to the question of finding facts in relation to Ms McKeown, I may very well have drawn the inference that Ms Bamford's evidence would not have assisted the respondent in light of the respondent's failure to call Ms Bamford because I do not believe a good enough reason was given to me for the failure to call Ms Bamford. However, as I say, that matter falls away in light of my finding that there was no contractual term of the type that the claimants seek to enforce here.

26 Both claims will be dismissed.

2017 WAIRC 00093

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHERINE E MCKEOWN
	CLAIMANT
	-v-
	GC & K BARRETT TRADING AS CARNARVON CARAVAN PARK
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 23 FEBRUARY 2017
FILE NO/S	B 136 OF 2016
CITATION NO.	2017 WAIRC 00093

Result	Claim dismissed
Representation	
Claimant	In person
Respondent	Dr J T Schoombee, of counsel, and with him Mr J Ip, of counsel

Order

HAVING heard the claimant on her own behalf and Dr J T Schoombee, of counsel, and with him Mr J Ip, of counsel, on behalf of the respondent; and

WHEREAS I gave oral reasons for decision at the conclusion of proceedings on 23 February 2017 dismissing the claim; and

WHEREAS I will provide written reasons for decision at a later date;

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

The claim be dismissed.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2017 WAIRC 00094

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN ROSE
	CLAIMANT
	-v-
	GC & K BARRETT TRADING AS CARNARVON CARAVAN PARK
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 23 FEBRUARY 2017
FILE NO/S	B 137 OF 2016
CITATION NO.	2017 WAIRC 00094

Result	Claim Dismissed
Representation	
Claimant	In person
Respondent	Dr J T Schoombee, of counsel, and with him Mr J Ip, of counsel

Order

HAVING heard the claimant on his own behalf and Dr J T Schoombee, of counsel, and with him Mr J Ip, of counsel, on behalf of the respondent; and

WHEREAS I gave oral reasons for decision at the conclusion of proceedings on 23 February 2017 dismissing the claim; and

WHEREAS I will provide written reasons for decision at a later date;

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

The claim be dismissed.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2017 WAIRC 00075

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEALOFIOAANA NOFOASAEFA
	APPLICANT
	-v-
	YAANDINA FAMILY CENTRE INC
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 15 FEBRUARY 2017
FILE NO/S	U 133 OF 2015
CITATION NO.	2017 WAIRC 00075

Result	Application dismissed

Order

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

WHEREAS on 20 October 2015, 24 November 2016 and 22 December 2016, the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conference on 22 December 2016, the parties reached agreement in principle to settle the dispute; and

WHEREAS on 9 February 2017, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*.

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

THAT this application be, and is hereby dismissed.

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

2017 WAIRC 00112

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEAN PRITCHARD
	APPLICANT
	-v-
	SCOPE BUSINESS IMAGING (LASER FAX COPIERS)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 2 MARCH 2017
FILE NO/S	U 172 OF 2016
CITATION NO.	2017 WAIRC 00112

Result	Application dismissed

Order

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

AND WHEREAS on 22 November 2016, the Commission convened a conference between the parties;

AND WHEREAS on 28 November 2016, the applicant informed the Commission by email that he did not want to proceed with his claim in the Commission;

AND WHEREAS on 28 November 2016, Registry emailed the applicant with information about how to file a Notice of withdrawal or discontinuance;

AND WHEREAS on 3 January 2017, the Commission followed up with the applicant by email about his Notice of withdrawal or discontinuance;

AND WHEREAS the applicant has not contacted the Commission and has not filed a Notice of withdrawal or discontinuance;

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

THAT this application be, and is hereby dismissed.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2017 WAIRC 00081

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00081
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	MONDAY, 13 FEBRUARY 2017
DELIVERED	**:**	FRIDAY, 17 FEBRUARY 2017
FILE NO.	**:**	B 2 OF 2017
BETWEEN	**:**	SANDRA TYE
		Applicant
		AND
		CARE SERVICES ADMINISTRATION PTY LTD
		Respondent

CatchWords	**:**	Alleged denial of contractual entitlement - Contract of employment - Application to dismiss - No real question to be tried
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Industrial Relations Act 1979 (WA) s 27(1)(a)(i), s 27(1)(a)(ii), s 27(1)(a)(iv), s 29(1)(b)(ii)
Result	**:**	Application pursuant to s 27(1)(a) granted;
		Application dismissed
Representation:		
Applicant	**:**	Mr P Mullally as agent
Respondent	**:**	Mr A Motro of counsel and with him Ms C McLean

Reasons for Decision

1 This is an application made pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (the Act). The *Form 3 – Notice of claim of entitlement to a benefit under a contract of employment* contains a schedule which says that the applicant was employed from 1 August 2016 until 3 November 2016, and seeks payment of outstanding salary for the remainder of a fixed term of employment between 1 August 2016 and 31 October 2018. The claim says that the respondent only paid the applicant's salary until 3 November 2016, when she was dismissed. There is a balance owing of $137,970 as per a second attached schedule. That schedule sets out that the contract was said to be for 27 months and there was salary owing for 24 months at the rate of $5,748.75 per month.

2 The respondent filed a *Form 5 – Notice of answer* in which it says that the applicant was employed pursuant to a contract dated 27 July 2016 and that that contract allowed for the employment to be terminated by the respondent during the six months' probationary period by the employer providing one week's written notice or paying in lieu of that notice. The respondent says it paid the applicant her entitlements plus an ex gratia payment of two days' pay.

Application pursuant to s 27(1)(a)

3 The respondent sought that the application be discontinued or otherwise dismissed pursuant to s 27(1)(a)(i), (ii) and (iv) of the Act. The respondent says that the claim is manifestly hopeless and it has no prospect of success given that the applicant has been paid in accordance with her contractual entitlements. Further, the respondent relies upon the decision of Dixon J in *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25; (1946) 72 CLR 435, to the effect that there cannot be a payment without work.

4 The applicant says that the matter should not be struck out. She says that the test which would apply to summary judgment cases that the application was manifestly groundless or cannot possibly succeed is not met in this case. She says that the manner and reasons for the termination require examination because the letter of termination sets out a reason for termination as relating to her performance, yet in subsequent communications with the respondent's human resources staff, it became clear that the real reason relates to an alleged unauthorised absence. She says that the matter requires examination including through evidence.

5 The applicant says that in accordance with *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307, there is an industrial matter to be heard and determined relating to the employer terminating the contract early. She also refers to *Shaw v City of Wanneroo* [2011] WAIRC 00924; (2012) 92 WAIG 275 where there was a live issue relating to the circumstances giving rise to the termination.

The legislation

6 Section 29(1)(b)(ii) of the Act provides that:

> (1) An industrial matter may be referred to the Commission —
>
> (a) …
>
> (b) in the case of a claim by an employee —
>
> (i) …
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,
>
> by the employee.

7 Section 27(1)(a) of the Act provides that:

> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part thereof is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> …
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

The test

8 There are no rules in this jurisdiction, as there are in a number of courts and tribunals, to govern the way the Commission should deal with an application to dismiss under s 27(1)(a).

9 However, in *Cubillo v Commonwealth of Australia* [1999] FCA 518; (1999) 89 FCR 528 at [53]; 163 ALR 395, O'Loughlin J said:

> A well-known statement of the principles applicable to an order for the summary dismissal of proceedings is that of Dixon J (as he then was) in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91. His Honour said:
>
> > "The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."
>
> That passage was cited with approval by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130. Earlier in his judgment, the learned Chief Justice had said (at 128-129):
>
> > "The plaintiff rightly points out that the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion."

At the following page his Honour added (at 130):

> "in my opinion great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal. On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

10 Therefore, the Commission ought to exercise 'exceptional caution' in dealing with an application that a claim be dismissed without the case being run, including evidence being heard. It 'should never be exercised unless it is clear that there is no real question to be tried' (*Fancourt & Anor v Mercantile Credits Ltd* (1983) 154 CLR 87, 99; 48 ALR 1).

11 The question to be answered is whether the applicant's case is so clearly untenable that it cannot possibly succeed, whether there is a real question to be tried.

The contract

12 The applicant's contract of employment with the respondent is contained in a letter of 27 July 2016. The relevant clauses are clause **1. Appointment and Commencement**, clause **3. Probation** and clause **18. Termination**.

13 Clause 1.1 and 1.2 provide:

> 1.1 The commencement date of this contract and your terms of employment with the Company will commence on the date set out in Item 2, and will continue until terminated in accordance with item 3 of the Schedule.
>
> 1.2 You will be engaged as a full-time employee and your employment will cease on the date set out in Item 2 of the Schedule. As a fixed term employee, there is no permanent or ongoing relationship between you and the Company.
>
> …

14 The relevant parts of clause **3. Probation** provide:

> 3.1 Your employment will be subject to a six month probationary period.
>
> 3.2 Unless your employment is terminated for serious misconduct, during this period either you or the company may terminate your employment by providing one weeks written notice. The Company may elect to pay you in lieu of part or all of your notice period, or alter your duties during the notice period.
>
> …

15 The relevant parts of clause **18. Termination** provide:

> **18. Termination**
>
> 18.1 Other than where your Employment is terminated during the Probationary Period or where your Employment is terminated for serious misconduct, either you or the Company may terminate your Employment by giving four weeks written notice except when your employment is terminated during the Probationary Period or when your Employment is terminated for serious misconduct.
>
> 18.2 If the Company elects to terminate your employment and you are over 45 years of age and you have more than 2 years of continuous service, the Company will provide you with an additional week of notice.
>
> 18.3 In either case, the Company may elect to pay you in lieu of part or all of your notice period.
>
> …

16 There is a Schedule to the contract that sets out particulars relevant to this contract, as follows:

Schedule

Item 1	Position in which employed	Regional Consultant
Item 2	Commencement date of your employment	1st August 2016
Item 3	Termination date of this Contract	31st October 2018
Item 4	Total Remuneration Package (base salary plus superannuation)	$68,985
Item 5	Pay cycle	Fortnightly
Item 6	Report to position	Regional Manager
Item 7	Place of Work	WA Office
Item 8	Contact person	HR Manager

17 As the respondent points out, reference to the date the employment will cease, in clause 1.2, as being to Item 2 of the Schedule is clearly an error. Item 2 is the commencement date. Item 3 sets out the 'Termination date of this Contract'. The correct reference in clause 1.2 is to Item 3.

18 Therefore, the contract provides that the employment commences on 1 August 2016. The contract termination date is 31 October 2018. According to clause 3, there could be termination of employment by the company during the probation period by provision of one week's written notice or payment in lieu. Otherwise there could be termination at any other time by the employer giving four weeks' written notice, in accordance with clause 18.

19 On 3 November 2016, Ms Cassandra McLean, the employer's human resources manager, wrote to the applicant:

> Dear Sandra,
>
> **RE: Notice of Termination**
>
> I refer to your meeting with Bud Ranasinghe, Regional Manager and Stuart Webster, General Manager where your work performance with Care Services Administration (hereafter called Healthcare Australia "HCA") was discussed.
>
> This letter serves as an official Notice of your Termination from HCA effective 3 November 2016.
>
> As discussed, your probationary employment period with HCA is designed to assist in the evaluation of work performance to ascertain whether your appointment should continue after the expiry of the probation period. During your probationary period to date HCA has monitored your work performance. As discussed today, we wish to advise that you have not met the requirements for the position of Regional Consultant during your probationary period.
>
> In accordance with your employment contract, during the probationary period the employee or HCA can terminate an employee's employment on the giving of one week's notice. You will be paid one week's pay in lieu of notice. We have also elected to pay you 2 extra days.
>
> All final payments and entitlements will be settled through the payroll department and lodged electronically into your bank account.
>
> We ask that you return all company property today, which will assist in the prompt processing of final monies.
>
> Please contact the undersigned on [telephone number not reproduced] if you have any queries in relation to this matter.

Consideration

20 This is not a claim of harsh, oppressive or unfair dismissal. Nor is it a claim, for example, under the *Fair Work Act 2009* (Cth), of unlawful dismissal. It is a claim that seeks to enforce the contract by claiming payment for two years, said to be a term of the contract.

21 The elements of a claim made under s 29(1)(b)(ii) are that:

1. the employee has a benefit, not being a benefit arising under an award or order;
2. that the benefit is one to which the employee is entitled under the contract of employment; and
3. the employer has not allowed the employee the benefit.

22 In *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307, the Full Bench dealt with a claim that Ms Watts had a fixed term contract and she had been denied the benefit of the unexpired term of the contract by her employer dismissing her prior to its expiration. The Full Bench dealt with the meanings of the terms set out in s 29(1)(b)(ii) of 'benefit' and 'entitled'. It said (at 2313):

> The meaning of the word "benefit" is vital. If what is claimed is a "benefit" and the respondent was denied it (and the other requirements are established), then an order can be made subject to section 26(1) and (2).
>
> We agree that benefit should be interpreted as widely as possible. We also agree that "benefits" can be best seen as referring to the contractual rights of the respondent. We adopt what Kennedy J. said in Pepler's Case (op. cit.) at page 17, where he clearly differentiated between section 29(b)(i) and (ii):—
>
> > This is not a conclusion which sits easily with section 29(b) of the Act, for it would mean that under paragraph (i) the Commission's jurisdiction to order compensation is at large, whereas, under paragraph (ii), it is strictly limited to allowing an entitlement arising out of the employee's contract of service. <u>The preferable view appears to me to be that the jurisdiction under paragraph (i) is limited to ordering re-employment whilst the remedy under paragraph (ii) is restricted to the employee's contractual rights.</u> (Our underlining.)
>
> A benefit is therefore what is the employee's right under a contract.
>
> …
>
> "Entitled" in the context of the section must mean entitled as a matter of legal right, because it refers to benefits under the contract. In Leontiades *v.* F.T. Manfield Pty Ltd (1980) 43 FLR 193. Keely J. interpreted the expression "entitled to mean the existence of an enforceable legal right", and therefore Ms Watts had an enforceable legal right, it was submitted. That authority was applied in Industrial Relations Bureau *v.* Hassan (1982) 2 IR 151 and Poulos *v.* Waltons Stores (Interstate) Ltd (1986) 10 FCR 429. We agree, applying Leontiades' Case (op. cit.) that the word "entitled" must mean "legally entitled".
>
> Thus, those authorities support the view of Kennedy J. that section 29(b)(ii) relates to rights under the contract of service [see also Bartlett *v.* Indian Pacific Ltd (op. cit.)], per Fielding C. "Benefit" in section 29(b)(ii), we think, was rightly defined by Johnson C. in Balfour *v.* Travelstrength Ltd (1980) 60 WAIG 1015. He said:—
>
> > Benefit ought to be wide enough to allow an employee to bring to the Commission a matter in which the employee believes that he/she has been deprived of an advantage, entitlement, right, superiority, favour, good or perquisite by the action of an employer in contravention of a provision of the contract of service.
>
> We adopt that definition of "benefit" and the description of the effect of section 29(b)(ii).

23 The Full Bench found that Ms Watts had a contract for three years and there was no provision for termination earlier than the expiration of the three years. It found that she was entitled to the benefit under her contract of the remuneration for the balance of the three year contract.

24 Those circumstances are to be distinguished from the current matter where there is no entitlement under the contract to the remainder of the period of the contract because it is not strictly a fixed term contract. This is because there is provision for it to be terminated during the probationary period, and subsequently, on notice. There is no challenge that the applicant was not paid notice in accordance with the contract. There is no allegation of a contravention of a provision of the contract of service. Rather, there is an allegation that the reason given for termination is not the true reason.

25 The case of *Shaw v City of Wanneroo* [2011] WAIRC 00924; (2012) 92 WAIG 275 can also be distinguished. That matter involved a dispute between the parties about who actually brought the employment to an end, and the Commission enquired as to the circumstances which brought about the termination and found that it was a constructive dismissal. This brought with it certain consequences arising from the terms of the contract. That is not the case in this matter. There is no contention that the applicant was not dismissed.

Conclusion

26 The applicant was dismissed on notice, in accordance with the terms of the contract. In those circumstances, I find that there is no real allegation that a provision of the contract, a 'benefit' arising under the contract, has been denied to the applicant. The benefit she seeks is not one which arises under the contract. Whether the reason given in the letter is in conflict with other information she received does not mean that the respondent breached the contract by dismissing her and paying notice. She was not denied the benefit she claims, as she had no entitlement to work out the two years of the contract, as the contract allowed termination on notice.

27 In that sense, there is no real question to be tried. The applicant's case is so clearly untenable that it cannot possibly succeed. There are no novel issues of law arising from the matter.

28 In the circumstances, the application will be dismissed pursuant to s 27(1)(a) on the basis that I am satisfied that further proceedings are not necessary or desirable in the public interest, that there is no real question to be tried.

2017 WAIRC 00082

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANDRA TYE
	APPLICANT
	-v-
	CARE SERVICES ADMINISTRATION PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 17 FEBRUARY 2017
FILE NO/S	B 2 OF 2017
CITATION NO.	2017 WAIRC 00082

Result Application dismissed

Order

HAVING HEARD from Mr P Mullally as agent on behalf of the applicant and Mr A Motro of counsel and Ms C McLean on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

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

2017 WAIRC 00105

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY WRIGHT; KATHLENE JESSICA-LEE WRIGHT
	APPLICANTS
	-v-
	BRENDAN CLARK - CAPITAL GROUP OF COMPANIES; BRENDAN CLARKE CAPITAL GROUP OF COMPANIES
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 28 FEBRUARY 2017
FILE NO/S	U 130 OF 2016, U 131 OF 2016
CITATION NO.	2017 WAIRC 00105

Result Applications dismissed

Order

WHEREAS these are applications pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS on 28 November 2016 and 31 January 2017, the Commission convened conferences in respect of each application to conciliate between the parties, and had listed a further conference to be convened on 27 February 2017; and

WHEREAS on 22 February 2017, the applicants each filed a *Form 14 – Notice of withdrawal or discontinuance* in relation to their respective applications.

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

THAT the applications be, and are hereby dismissed.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Andrew Gow	Leonard Brush Valley View Realty	B 25/2016	Commissioner D J Matthews	Discontinued
Daniel Robert Van Den Bosch	Kalbarri Boat Hire & Canoe Safaris	U 88/2016	Commissioner D J Matthews	Discontinued

CONFERENCES—Matters arising out of—

2017 WAIRC 00087

DISPUTE RE COMMUTED OVERTIME ARRANGEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
SENIOR COMMISSIONER S J KENNER

DATE TUESDAY, 21 FEBRUARY 2017

FILE NO PSAC 8 OF 2016

CITATION NO. 2017 WAIRC 00087

Result Discontinued

Representation

Department of Transport Mr S Barrett

Civil Service Association of Western Australia Incorporated Ms K Boey of counsel

Order

HAVING heard Mr S Barrett on behalf of the Department of Transport and Ms K Boey of counsel on behalf of the Civil Service Association of Western Australia Incorporated the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] Public Service Arbitrator.

2017 WAIRC 00073

DISPUTE RE IMPLEMENTATION OF CHANGES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 14 FEBRUARY 2017
FILE NO/S	C 39 OF 2015
CITATION NO.	2017 WAIRC 00073

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 30 January 2017 the Commission informed the parties it would discontinue the herein application unless within 14 days either party indicated why the application should remain on foot;

AND WHEREAS neither party indicated why the application should remain on foot by close of business on 13 February 2017;

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

THAT this application be and is hereby discontinued.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2017 WAIRC 00047

DISPUTE RE CLAUSE 36 OF WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 2 FEBRUARY 2017
FILE NO	PSAC 1 OF 2016
CITATION NO.	2017 WAIRC 00047

Result	Discontinued by leave
Representation	
Applicant	Mr C Fordham
Respondent	Mr R Andretich of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] Public Service Arbitrator.

CONFERENCES—Matters referred—

2016 WAIRC 00881

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 15 NOVEMBER 2016
FILE NO/S	CR 9 OF 2016
CITATION NO.	2016 WAIRC 00881

Result	Order issued
Representation	
Applicant	Mr C Fogliani of counsel
Respondent	Mr D Anderson of counsel

Order

HAVING heard Mr C Fogliani of counsel on behalf of the applicant and Mr D Anderson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, and by consent, hereby orders –

THAT the memorandum of matters referred for hearing and determination under section 44(9) dated 12 September 2016 be amended in the terms of the attached Amended Schedule.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

AMENDED SCHEDULE

1. This matter is a dispute about whether the respondent unfairly dismissed Mr Stefano Merlo, a transit officer. Mr Merlo is a member of the applicant.

2. The applicant says that:

   (a) On the night of Friday 6 November 2015, Mr Merlo was working at the Perth Train Station.

   (b) At around 12:49am on Saturday 7 November 2015, Mr Merlo and his partner were called to attend a disturbance at the upper concourse of the Station.

   (c) Upon arriving at the upper concourse, Mr Merlo and his partner were threatened by an aggressive male (**POI**). The POI appeared to be affected by drugs or alcohol.

   (d) The POI made verbal threats to punch and spit at Mr Merlo and his partner. Mr Merlo warned the POI that he would use OC spray if the POI attempted to assault them.

   (e) Mr Merlo repeatedly asked the POI to go away from the Station.

   (f) The POI hocked up some phlegm, pursed his lips, and motioned as if he was going to spit at Mr Merlo. At the same time, the POI also made a fist and motioned as if he was going to throw a punch in Mr Merlo's direction. The POI's motions turned out to be a baulk.

   (g) Mr Merlo had a split second to react to the POI's baulk. Mr Merlo felt threatened and in danger. Mr Merlo was concerned that the POI may have had a disease that could have passed through the POI's spit.

(h) Mr Merlo reacted by deploying his OC spray at the POI. This was a reflex action by Mr Merlo that occurred in a split second.

(i) The OC spray did not have any immediate effect on the POI. The POI was offered aftercare but refused it. The POI instead kept threatening the transit officers. The POI eventually left the Station.

(j) Mr Merlo apologised to the respondent for his involvement in the 7 November 2015 incident.

(k) After the incident, Mr Merlo actively sought counselling from his supervisors and peers about how he could have handled things better.

(l) Between 7 November 2015 and 9 June 2016, Mr Merlo continued to work as a transit officer. He was faced with other threatening situations in that time. Mr Merlo took on the advice from his supervisors and peers and increased the distance between himself and other persons who had threatened him with violence.

(m) Mr Merlo offered to undergo retraining and to participate in a performance management process. The respondent refused this offer.

(n) On 9 June 2016, the respondent terminated Mr Merlo's employment due to his involvement in the 7 November 2015 incident.

(o) Mr Merlo has two dependent children. Those children were aged 10 and 12 at the time of the dismissal. Mr Merlo's children rely on Mr Merlo's income from his employment with the respondent to survive. Mr Merlo's income pays for their food, clothing, schooling and accommodation. Mr Merlo has a mortgage on his family home.

(p) Mr Merlo has no other skills, trade or qualifications. The prospects of him finding equivalent work are slim.

(q) Mr Merlo was a good employee. There was no reason for the respondent to suspect that this would change in the future.

3. The applicant contends that Mr Merlo's dismissal was harsh, oppressive and unfair because it was not open to the respondent to make the finding it did and further, or in the alternative, the penalty applied is disproportionate to the misconduct alleged.

4. The respondent says the following by way of response:

(a) By memorandum dated 17 November 2015, the respondent informed and invited Mr Merlo to respond to an allegation received on 7 November 2015:

> "On 7 November 2015, you deployed OC spray whilst located on the Eastern Concourse of the Perth Railway Station on a 12 year old juvenile. This deployment may have been in contravention of section 3.17.3 of the Transit Officer Operations Manual due to the potential threat posed by that juvenile in relation to his comparative size and location to you."

(b) By letter dated 3 December 2015, Mr Merlo wrote to the respondent in response to its memorandum dated 17 November.

(c) By memorandum dated 10 December 2015, in accordance with clause 2.11.8 of the Public Transport Authority (Transit Officers) Industrial Agreement 2015 (Agreement), of a formal allegation of breach of discipline:

> "On 7 November 2015, you deployed OC spray whilst located on the Eastern Concourse of the Perth Railway Station on a 12 year old juvenile."

5. In accordance with clause 2.11.8(d) of the Agreement, Mr Merlo was informed that a formal investigation had commenced.

(a) By letter dated 10 May 2016, the respondent wrote to Mr Merlo to enclose a copy of its investigation report and to invite Mr Merlo to respond to proposed adverse findings and a proposed penalty of dismissal.

(b) By letter dated 21 May 2016, Mr Merlo wrote to the respondent in response to its letter dated 10 May 2016.

(c) By letter dated 8 June 2016, the respondent wrote to Mr Merlo finding:

> "I find, and you later admitted, that you have engaged in breaches of discipline on 7 November 2015 on the Eastern Concourse at Perth Railway Station when you used excessive force by deploying OC spray at [the POI] off PTA property, therefore breaching Sections *3.17 – Carriage and Use of OC Spray, 3.18 – Off PTA Property* and *7.10 – Use of Force of the Transit Operations Manual*."

6. The respondent objects to and opposes the applicant's claim. It maintains that in all of the circumstances, Mr Merlo's dismissal was justified.

7. In determining whether the respondent's dismissal of Mr Merlo was harsh, oppressive or unfair, the parties, by agreement, invite the Commission to decide the following issues:

(a) Did Mr Merlo deploy OC spray at the POI in self-defence?

(b) Did Mr Merlo cease the use of the OC spray once the threat to his safety, health and well-being had subsided?

(c) Was Mr Merlo's use of force against the POI commensurate with the force that the POI applied to Mr Merlo?

(d) Did Mr Merlo issue the POI with a verbal warning about his intention to deploy OC spray? If not, was it impracticable to do so?

(e) Once Mr Merlo had drawn his OC spray, did he conceal it from the POI's view?

(f) Did Mr Merlo deploy OC spray at the POI solely for the purpose of keeping the POI from coming on to PTA property?

(g) Was Mr Merlo's use of OC spray on the POI authorised by section 3.17.3 of the Transit Officer Manual?

(h) Did Mr Merlo use excessive force by deploying OC spray at the POI?

(i) Did Mr Merlo admit to using excessive force by deploying OC spray at the POI?

(j) Did Mr Merlo breach section 3.17, 3.18 or 7.10 of the Transit Officer Operations Manual?

(k) Was dismissal a proportionate and appropriate penalty for Mr Merlo's conduct?

2017 WAIRC 00066

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00066
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 23 SEPTEMBER 2016, WEDNESDAY, 16 NOVEMBER 2016, FRIDAY, 18 NOVEMBER 2016
DELIVERED	**:**	WEDNESDAY, 8 FEBRUARY 2017
FILE NO.	**:**	CR 9 OF 2016
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
		Applicant
		AND
		THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
		Respondent

Catchwords	**:**	*Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Whether transit officer used excessive force by deploying OC spray - Whether dismissal was a proportionate and appropriate penalty - Principles applied - Dismissal was harsh, oppressive and unfair - Appropriate penalty should have been a demotion - Application upheld*
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Application upheld
Representation:		
Counsel:		
Applicant	**:**	Mr C Fogliani of counsel
Respondent	**:**	Mr D Anderson of counsel
Solicitors:		
Applicant	**:**	W.G. McNally Jones Staff Lawyers
Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Frank Scott v Consolidated Paper Industries (WA) Pty Ltd (1998) 78 WAIG 4940

Reasons for Decision

Brief background

1 The matter referred for hearing under s 44(9) of the Act is a dispute between the Union and the Authority in relation to the dismissal of a transit officer, Mr Stefano Merlo. Mr Merlo was dismissed by letter dated 8 June 2016 as a result of a finding by the Authority that Mr Merlo had used excessive force by deploying Oleoresin Capsicum Spray during the course of an incident on the Eastern Concourse at the Perth Railway Station in the early hours of 7 November 2015.

2 The Union contended that Mr Merlo's dismissal was harsh, oppressive and unfair. The Authority denies the Union's claim and in all the circumstances contended that Mr Merlo's dismissal was the appropriate and proportionate response to his conduct on the night in question.

3 The contentions of the Union and the Authority in relation to the dispute are set out in the amended schedule to the memorandum of matters referred for hearing and determination under s 44(9) of the Act. That amended schedule, relevantly provides as follows:

1. This matter is a dispute about whether the respondent unfairly dismissed Mr Stefano Merlo, a transit officer. Mr Merlo is a member of the applicant.

2. The applicant says that:

   (a) On the night of Friday 6 November 2015, Mr Merlo was working at the Perth Train Station.

   (b) At around 12.49 am on Saturday 7 November 2015, Mr Merlo and his partner were called to attend a disturbance at the upper concourse of the Station.

   (c) Upon arriving at the upper concourse, Mr Merlo and his partner were threatened by an aggressive male (**POI**). The POI appeared to be affected by drugs or alcohol.

   (d) The POI made verbal threats to punch and spit at Mr Merlo and his partner. Mr Merlo warned the POI that he would use OC spray if the POI attempted to assault them.

   (e) Mr Merlo repeatedly asked the POI to go away from the Station.

   (f) The POI hocked up some phlegm, pursed his lips, and motioned as if he was going to spit at Mr Merlo. At the same time, the POI also made a fist and motioned as if he was going to throw a punch in Mr Merlo's direction. The POI's motions turned out to be a baulk.

   (g) Mr Merlo had a split second to react to the POI's baulk. Mr Merlo felt threatened and in danger. Mr Merlo was concerned that the POI may have had a disease that could have passed through the POI's spit.

   (h) Mr Merlo reacted by deploying his OC spray at the POI. This was a reflex action by Mr Merlo that occurred in a split second.

   (i) The OC spray did not have any immediate effect on the POI. The POI was offered aftercare but refused it. The POI instead kept threatening the transit officers. The POI eventually left the Station.

   (j) Mr Merlo apologised to the respondent for his involvement in the 7 November 2015 incident.

   (k) After the incident, Mr Merlo actively sought counselling from his supervisors and peers about how he could have handled things better.

   (l) Between 7 November 2015 and 9 June 2016, Mr Merlo continued to work as a transit officer. He was faced with other threatening situations in that time. Mr Merlo took on the advice from his supervisors and peers and increased the distance between himself and other persons who had threatened him with violence.

   (m) Mr Merlo offered to undergo retraining and to participate in a performance management process. The respondent refused this offer.

   (n) On 9 June 2016, the respondent terminated Mr Merlo's employment due to his involvement in the 7 November 2015 incident.

   (o) Mr Merlo has two dependent children. Those children were aged 10 and 12 at the time of the dismissal. Mr Merlo's children rely on Mr Merlo's income from his employment with the respondent to survive. Mr Merlo's income pays for their food, clothing, schooling and accommodation. Mr Merlo has a mortgage on his family home.

   (p) Mr Merlo has no other skills, trade or qualifications. The prospects of him finding equivalent work are slim.

   (q) Mr Merlo was a good employee. There was no reason for the respondent to suspect that this would change in the future.

3. The applicant contends that Mr Merlo's dismissal was harsh, oppressive and unfair because it was not open to the respondent to make the finding it did and further, or in the alternative, the penalty applied is disproportionate to the misconduct alleged.

4. The respondent says the following by way of response:

   (a) By memorandum dated 17 November 2015, the respondent informed and invited Mr Merlo to respond to an allegation received on 7 November 2015:

   > "On 7 November 2015, you deployed OC spray whilst located on the Eastern Concourse of the Perth Railway Station on a 12 year old juvenile. This deployment may have been in contravention of section 3.17.3 of the Transit Officer Operations Manual due to the potential threat posed by that juvenile in relation to his comparative size and location to you."

   (b) By letter dated 3 December 2015, Mr Merlo wrote to the respondent in response to its memorandum dated 17 November.

(c) By memorandum dated 10 December 2015, in accordance with clause 2.11.8 of the Public Transport Authority (Transit Officers) Industrial Agreement 2015 (Agreement), of a formal allegation of breach of discipline:

> "On 7 November 2015, you deployed OC spray whilst located on the Eastern Concourse of the Perth Railway Station on a 12 year old juvenile."

5. In accordance with clause 2.11.8(d) of the Agreement, Mr Merlo was informed that a formal investigation had commenced.

(a) By letter dated 10 May 2016, the respondent wrote to Mr Merlo to enclose a copy of its investigation report and to invite Mr Merlo to respond to proposed adverse findings and a proposed penalty of dismissal.

(b) By letter dated 21 May 2016, Mr Merlo wrote to the respondent in response to its letter dated 10 May 2016.

(c) By letter dated 8 June 2016, the respondent wrote to Mr Merlo finding:

> "I find, and you later admitted, that you have engaged in breaches of discipline on 7 November 2015 on the Eastern Concourse at Perth Railway Station when you used excessive force by deploying OC spray at [the POI] off PTA property, therefore breaching Sections *3.17 – Carriage and Use of OC Spray, 3.18 – Off PTA Property* and *7.10 – Use of Force of the Transit Operations Manual*."

6. The respondent objects to and opposes the applicant's claim. It maintains that in all of the circumstances, Mr Merlo's dismissal was justified.

Issues to be determined

4 As a part of the referral of the dispute under s 44(9) the parties have, by agreement, invited the Commission to determine a number of issues in relation to the dismissal of Mr Merlo. As set out in the amended schedule to the memorandum those issues are:

(a) Did Mr Merlo deploy OC spray at the POI in self-defence?

(b) Did Mr Merlo cease the use of the OC spray once the threat to his safety, health and well-being had subsided?

(c) Was Mr Merlo's use of force against the POI commensurate with the force that the POI applied to Mr Merlo?

(d) Did Mr Merlo issue the POI with a verbal warning about his intention to deploy OC spray? If not, was it impracticable to do so?

(e) Once Mr Merlo had drawn his OC spray, did he conceal it from the POI's view?

(f) Did Mr Merlo deploy OC spray at the POI solely for the purpose of keeping the POI from coming on to PTA property?

(g) Was Mr Merlo's use of OC spray on the POI authorised by section 3.17.3 of the Transit Officer Manual?

(h) Did Mr Merlo use excessive force by deploying OC spray at the POI?

(i) Did Mr Merlo admit to using excessive force by deploying OC spray at the POI?

(j) Did Mr Merlo breach section 3.17, 3.18 or 7.10 of the Transit Officer Operations Manual?

(k) Was dismissal a proportionate and appropriate penalty for Mr Merlo's conduct?

The facts

5 The essential facts as to the incident which occurred on 7 November 2015 and subsequent events, are not significantly in dispute. A summary of the evidence led in the proceedings before the Commission in relation to the incident and its aftermath, is as follows.

6 Mr Merlo was at the material time a Transit Officer Level 5 and was in his sixth year of employment with the Authority. Mr Merlo described the varied duties he performed as a transit officer and the security and customer service aspects of the position. Mr Merlo spent much of his time on the Midland line where he testified that he regularly encountered customers who were affected by drugs and alcohol. On occasions, an officer would be required to use OC spray as a force option, in dealing with certain situations.

7 The events as they unfolded on 7 November 2015 were outlined by Mr Merlo. He testified that he was working at the Perth Station on that night. He was working with another transit officer as his partner, Ms Warr. He said that they received a radio call while they were on the platform that there was a problem with some individuals on or about the upper concourse of the station. When they arrived at the location at about 12.50 am Mr Merlo said there were two male youths one of whom was quite large. This person, who will be referred to in these reasons as "A" given he is a minor, was very abusive and appeared to be quite intoxicated. Mr Merlo said he assumed the abusive person was about 15 or 16 years of age given his size, apparent state and the fact he was in the Station area at that time of the night. This was not controversial as although it transpired that A was only 12 years old at the time, all involved in the incident acknowledged he appeared to be considerably older.

8 Mr Merlo said that A was particularly aggressive. Mr Merlo said that Transit Officer Warr told A to leave the concourse area. In response Mr Merlo said that A became abusive and made a number of threats of physical violence towards in particular, Transit Officer Warr and also himself. According to Mr Merlo, whilst A was on the public access side of the metal fence and hence not on Authority property, A made a number of threats to jump the barrier and assault Transit Officer Warr.

9 Additionally, and importantly for present purposes, Mr Merlo testified that A repeatedly threatened to spit at him. Mr Merlo testified that he has been previously spat upon and spent time waiting for test results as to whether he had been infected with any diseases. He described this situation as very stressful.

10 Transit Officer Warr testified that on receiving the radio transmission both her and Mr Merlo went to the concourse. She said that A was "off property" at the time they arrived and was being very verbal and his behaviour was described by Transit Officer Warr as disorderly. When they arrived at the concourse two revenue officers were also present. Transit Officer Warr testified that on viewing the scene and the behaviour of A she did not personally feel threatened. In her evidence and also in her written report to the Investigator dated 26 November 2015, Transit Officer Warr referred to A's conduct and behaviour and noted that there was a metal barrier separating A and herself and Mr Merlo. She said this indicated that A was off the property of the Authority at the time.

11 Transit Officer Warr turned and walked away from the confrontation. She said that she thought Mr Merlo would be walking back with her. Transit Officer Warr did not realise that Mr Merlo had remained where he was. She testified that she did not hear any threat of spitting by A towards Mr Merlo and nor did she communicate directly with Mr Merlo. Transit Officer Warr also testified that she did not hear Mr Merlo provide a warning that he would use his OC spray. However, she did see Mr Merlo stepping back at about the time when the OC spray was used. Additionally, when she turned around to look back at A and Mr Merlo, she saw A running off. Once she had realised what had occurred, Transit Officer Warr testified that she asked Mr Merlo words to the effect "whether he had done the right thing?". After getting permission from the supervisor on duty, Transit Officer Warr said that she went off the Authority's property and attended on A to provide "aftercare" assistance to him. In order to do so, Transit Officer Warr escorted A back on to Authority property. A refused aftercare and according to Transit Officer Warr, continued to behave abusively and issued threats towards the transit officers.

12 When asked about the circumstances that confronted both Mr Merlo and herself on the night in question, Transit Officer Warr testified that according to what she understood from her training, in cases where an individual is threatening a transit officer, the appropriate course is for the officer to disengage and where possible, walk away. This is so a safe distance can be established between the officer and the individual concerned. Transit Officer Warr also said that she has had occasions where individuals confronting her had "baulked". In response she has moved back to create further space between her and the person concerned. She also testified that she has faced abusive people on the Eastern Concourse at the Perth Station and has also experienced situations of people spitting at her, which has required her to cover her face. Transit Officer Warr agreed however, that being spat upon was a very unpleasant and stressful experience, given the possibility of infectious diseases being transmitted.

13 Mr Svirac is the Authority's Transit Manager – Security. He testified that he was familiar with the incident which occurred involving Mr Merlo. He is also familiar with the Transit Officer Operations Manual. Mr Svirac gave some evidence in relation to the training of transit officers. He said that from a training perspective, a key component is teaching officers to disengage with potential offenders by moving away from them and creating distance. After referring to the Manual, Mr Svirac testified that the authority of transit officers only extends to the exercise of powers on Authority property. Also, an offender needs to be on Authority property to commit an offence.

14 In relation to the incident involving Mr Merlo, from Mr Svirac's review of the CCTV footage, which was in evidence and played during the hearing, he noted that the other officers present moved back from A. In Mr Svirac's view, it would have been better for Mr Merlo to have disengaged, moved back and called for backup. He said that these types of issues are regularly discussed in safety committee meetings. By taking a step back and creating further distance, Mr Svirac said that Mr Merlo would have been out of range for A or anyone else to have spat on him.

15 When he was asked about the incident in cross-examination, Mr Svirac agreed that Mr Merlo had stood back, to be sufficiently out of range to stop any attempted punch from A striking Mr Merlo. Mr Svirac also agreed that the incident, as revealed in the CCTV footage, occurred over only a couple of seconds. This was from the point of A moving towards Mr Merlo and threatening to spit and baulking at him, and Mr Merlo deploying his OC spray. When Mr Svirac was questioned about relevant parts of the Manual, in particular s 3.17 dealing with the carriage and use of OC spray, he agreed that Mr Merlo, from the CCTV footage, only used his OC spray when A appeared to try to spit at him. Mr Svirac also accepted that a transit officer may use their OC spray in self-defence. However, he also said that in his view the first option is always to attempt to disengage. In relation to the defence of Mr Merlo that A was attempting to spit at him, Mr Svirac did accept that being spat upon is probably one of the worst things to occur to an officer.

16 Specifically, also, Mr Svirac accepted that Mr Merlo did give A a warning before using his OC spray and that aftercare was offered to A. Overall, Mr Svirac remained of the opinion that in the circumstances of the night in question, Mr Merlo should have distanced himself from A so as to put himself out of range of any potential hazard.

17 Mr Italiano is the Authority's General Manager Transperth Train Operations. A part of Mr Italiano's responsibilities is to deal with disciplinary matters as the delegate of the Chief Executive Officer, in accordance with the disciplinary procedure set out in the relevant industrial agreement. Mr Italiano testified that he had an interview with Mr Merlo, after reviewing the Investigation Report. Mr Italiano testified that the two issues for him to decide were findings in relation to the allegations of misconduct and if established, what penalty should apply. He said that he did not accept all of what Mr Merlo had told the investigators. As to these issues, when taken to the Investigation Report (Tab 10 exhibit A1), Mr Italiano, having reviewed the CCTV footage, did not agree that A had raised a fist towards Mr Merlo. Rather, A had raised his left arm and hand.

18 Furthermore, as to Mr Merlo's assertion that he issued three to four warnings to A that he would use his OC spray, Mr Italiano did not necessarily accept this as he said Transit Officer Warr had no recollection of it. Therefore, Mr Italiano was of the view there was no corroboration in this respect. The third point raised by Mr Italiano was that Mr Merlo had no recollection of stepping forward when he deployed his OC spray. This was opposed to clear evidence that he did on the CCTV footage. Mr Italiano thought Mr Merlo should have recollected this aspect of the incident.

19 Overall it seemed Mr Italiano's view was, having reviewed the Investigation Report and the incident generally, including the CCTV footage, that Mr Merlo should not have put himself in the position that he did. He did not accept that Mr Merlo was in an imminent position of danger. There was a barrier between Mr Merlo and A. Also, the fact that Transit Officer Warr did not apprehend any imminent threat to her safety or wellbeing at the time, seemed to have influenced Mr Italiano's thinking about the appropriate response to the incident.

20 In terms of Mr Merlo's work history there have been some prior issues of performance raised, which were set out in Mr Italiano's letter of 8 June 2016 dismissing Mr Merlo. Mr Italiano's evidence as to those matters was that he had no difficulty with Mr Merlo's competency or integrity as a transit officer, or anything from the various "My Action Plans" in evidence before the Commission. What Mr Italiano said he drew from Mr Merlo's work history were some issues of punctuality in the past, but accepted they had been remedied. He was however, also concerned about what he described as breaches of various parts of the Manual and his lack of confidence that this would not continue to occur. Mr Italiano also testified that he had some reservations as to Mr Merlo's temperament, having regard to the duties and responsibilities of a transit officer. When asked about alternatives to dismissal, Mr Italiano said that he did consider the options of demotion and transfer. However, he did not consider they were appropriate, having reached the view that Mr Merlo seemed to have difficulties with compliance with procedures.

Consideration

21 There is no doubt as to the relevant legal principles to apply in this case. As I said in *Frank Scott v Consolidated Paper Industries (WA) Pty Ltd* (1998) 78 WAIG 4940 at 4943:

> Was the Applicant's Dismissal Harsh, Oppressive or Unfair?
>
> The law in this jurisdiction is well settled in relation unfair dismissal. It must be demonstrated that there has been an abuse of the employer's right to dismiss an employee, such that the dismissal is rendered harsh or oppressive: *Miles v The Federated Miscellaneous Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (1985) 65 WAIG 385. It is also established that it is not for the Commission to assume the role of the manager in considering whether the dismissal is or is not unfair. The test is an objective one in accordance with the Commission's duty pursuant to s 26(1)(a) and (c) of the Act.
>
> Moreover, contemporary standards of industrial fairness require in my view, that before an employee is dismissed, the employee be given some fair warning that his or her employment is at risk if his or her performance or conduct does not improve as required by the employer. This requires more than a mere exhortation to improve and should place the employee in the position of being in no doubt that their employment may be terminated, unless they take appropriate remedial steps: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635. It should be emphasised that whether an employee is afforded procedural fairness is but one factor for the Commission to consider, however it may be a most important factor, depending upon the circumstances of the particular case: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. It follows however, that a dismissal will not necessarily be unfair in the event of procedural unfairness alone, as all the circumstances need to be considered.

22 I adopt and apply this approach in this case.

23 For the following reasons, which I can succinctly summarise, in addressing the questions posed, having regard to all of the circumstances of the case and the particular aspects of the incident that occurred on 7 November 2015, the dismissal of Mr Merlo was harsh, oppressive and unfair. I consider that the appropriate penalty that should have been imposed on Mr Merlo, having regard to the particular features of the incident, was a demotion. In particular, I have reached the view that with the benefit of hindsight, Mr Merlo could have taken an alternative course by creating more distance between himself and A. However, this does not detract from the fact that finding himself in the position he did, in my view, Mr Merlo acted with reasonable cause.

24 The demotion should be to a Transit Officer Level 3. This will mean the loss of two increment levels for Mr Merlo. He should be provided with any necessary refresher training that the Authority considers appropriate.

Did Mr Merlo deploy OC spray at the POI in self-defence?

25 In my view having regard to all of the circumstances of this case and having carefully viewed the CCTV footage, Mr Merlo did deploy his OC spray in self-defence. I do not accept that Mr Merlo did so in any way to provoke or inflame the situation with A as it unfolded. The evidence clearly revealed that A did "baulk" and did appear to clearly prepare to spit at Mr Merlo. I consider that taking the evidence as a whole, Mr Merlo had a basis to believe, on reasonable grounds, that he was about to be spat upon by A and his deployment of OC spray was to prevent that occurring.

26 The fact of the existence of the fence barrier between A and Mr Merlo would not have prevented this from occurring. The deployment of the OC spray only occurred in response to A's actions and was responsive to it.

Did Mr Merlo cease the use of the OC spray once the threat to his safety, health and well-being had subsided?

27 Mr Merlo did cease the use of OC spray after its first application and after it was clear that A was no longer prepared to or intended to spit at him.

Was Mr Merlo's use of force against the POI commensurate with the force that the POI applied to Mr Merlo?

28 It is one thing with the benefit of hindsight, sitting in the comfort of my Chambers, and with all of the information available to me now, to assess Mr Merlo's actions and the response of the Authority. However, it is another thing to put oneself in Mr Merlo's position on the night in question, having to make a split second decision in response to a person engaging in the behaviour and conduct that A was at the time. I do consider that Mr Merlo's use of OC spray in all of the circumstances, was commensurate with responding to A's threat. There was some conjecture as to whether A raised a fist towards Mr Merlo, and the CCTV footage appeared to suggest something less than that. However, the accounts of the incident given by Revenue Officer Aurang and Revenue Officer Webb, referred to in the Investigation Report at pp 10-15, also supported the contention that A "tried to take swing" and "started air boxing or throwing punches across the gate" in Mr Merlo's direction. While these officers were not called to give evidence in this case, those statements were open to be taken into consideration by the Authority in its decision concerning the disciplinary allegations against Mr Merlo.

29 Most importantly however, it also must be borne in mind that Mr Merlo's use of force option was not in response to that issue itself. It was in response to what he regarded as a clear threat of A spitting on him at a distance where Mr Merlo would be affected. The evidence revealed that Mr Merlo had a genuine belief, based on reasonable grounds, that this was going to occur. No one would seriously suggest, and it was not contended to the contrary by the Authority, that being spat upon by an intoxicated and very disorderly member of the public would not only be a very unpleasant experience, but may also constitute an obvious risk to the health and safety of an officer.

Did Mr Merlo issue the POI with a verbal warning about his intention to deploy OC spray? If not, was it impracticable to do so?

30 Mr Merlo's evidence was that he warned A several times of his intention to deploy OC spray. Transit Officer Warr's evidence was that she did not hear such a warning. However, she had turned around and was walking away from Mr Merlo and A. She may not have been close enough to hear anything said to A by Mr Merlo. Notably, Revenue Officer Jakovlev, when interviewed during the investigation, at p 20 of the Report, referred to Mr Merlo saying something to A, but he was not sure what it was. Having regard to all of the evidence I accept Mr Merlo's version of events that he did warn A that he would use his OC spray before he deployed it. Simply because there was no precise corroboration of Mr Merlo's version of events in this regard, does not preclude the acceptance on balance, of his evidence, having regard to the totality of material before the Commission.

Once Mr Merlo had drawn his OC spray, did he conceal it from the POI's view?

31 Mr Merlo did not conceal the OC spray when he withdrew it from its pouch. Having reviewed the CCTV footage, and as revealed in the evidence, it is clear that A was aware that Mr Merlo had his hand on his OC spray canister pouch. A pointed to it and clearly saw it. Once drawn, the OC canister was visible.

Did Mr Merlo deploy OC spray at the POI solely for the purpose of keeping the POI from coming on to PTA property?

32 From all of the evidence I am satisfied that Mr Merlo did not deploy his OC spray at A solely for the purpose of preventing A coming onto Authority property. Whilst there was some evidence about this issue given during the course of the proceedings, and reference to it in the Investigation Report, I am satisfied on balance that the predominant reason for Mr Merlo deploying his OC spray was his genuine belief, on reasonable grounds, that A was about to spit upon him.

Was Mr Merlo's use of OC spray on the POI authorised by section 3.17.3 of the Transit Officer Manual?

33 Section 3.17.3 of the Manual provides as follows:

> 3.17.3 The PTA will supply either Defence Industries Mk3 X2 OC spray or Sabre Red Crossfire Mk3 OC spray to authorised personnel and these spray may only be deployed under the following guidelines:
>
> - For the personal protection (self defence) of the Security Officer or any other person where there is an imminent and immediate danger to safety, health and well-being.
> - That the use of the OC spray is ceased when the threat to the safety, health and well-being of the Security Officer or any other person subsides.
> - The use of force is justified commensurate with the force applied to the victim.
> - A verbal warning must be give of the intention to deploy OC spray unless it is impracticable to do so.
> - If OC spray is drawn, it must not be concealed but is displayed in an overt manner.
> - OC spray is not to be deployed within the confines of a railcar.
> - After care (decontamination) must be provided to persons who have been directly sprayed or received a secondary exposure of OC spray.

34 Having regard to the foregoing, I am satisfied on balance that Mr Merlo's deployment of OC spray on A during the incident did not contravene s 3.17.3 of the Manual

Did Mr Merlo use excessive force by deploying OC spray at the POI?

35 Use of force is set out at s 7.10 of the Manual. It is in the following terms:

> 7.10 Use of force
>
> Security Officers have been authorised to utilise any reasonable force in order to remove a person from PTA property or to affect an arrest. Although sect 58 of the *PTA Act 2003* does not directly authorise the use of force in effecting an arrest; however, sect 231 of the *Criminal Code* states *'It* is *lawful for a person who* is *engaged in the lawful execution of any sentence, process, or warrant, or in making any arrest, and for any person lawfully*

assisting him, to use such force as *may be reasonably necessary to overcome any force used in resisting such execution or arrest.'*

7.10.1 In any circumstances where the use of force is justified; the minimal amount of force required to establish control should be utilised and once achieved, lower force options are to be employed at the earliest opportunity.

7.10.2 Excessive use of force can be defined as:

- Any force when none is needed;
- More force than is needed in a particular situation;
- Any force or level of force continuing after the necessity for that use has ended;
- Knowingly wrongful use(s) of force; or
- Well intentioned mistakes that result in undesired use of force.

7.10.3 The use of a Defensive Push:

- The use of a defensive push against a person is only lawful when that person is approaching officers or members of the public in an aggressive manner and they are in close proximity. The use of pushing or shoving to an offender in order to remove them from PTA property is not a defensive push and as such is unlawful.
- If the member of public is standing flat footed and an officer steps forward towards that person, thus instigating physical contact, then this can be classified as an assault and any reaction from the person towards the officer could be defended by citing "Provocation". This could result in the case against the offender being dismissed for any offences committed.
- To use a defensive push against a person to move them away from an officer is not a physical strike or push to that persons chest area; but is effected by way of an outstretched arm, allowing the person to move no closer than an arm's length from the officer. Where-ever possible, the officer should also take one step rear-ward in order to open a safe distance, between the officer and the person.

7.10.4 The use of a Forward Leg Sweep:

- The Forward Leg Sweep when utilised to place a person face down onto the ground in order to restrain that person is an uncontrolled take-down method that consistently results in injuries to the subject and to Security Officers.
- This technique is not part of the PTA's Intercept-Stabilise-Resolve Training package and therefore is not to be utilised.

7.10.5 In accordance with Section 3.13 of this Manual - Reporting of accidents and incidents, in any occurrence where force has been used (including the arrest of a person under an Outstanding Warrant), an Action/Incident Report (PTA form 4030-700-029) accompanied by a CCTV Imagery Request form (PTA form 4030-700-032) must be submitted.

36 In relation to this issue, having regard to the foregoing conclusions I do not consider that Mr Merlo used excessive force by deploying his OC spray at A on the night in question. There was some argument during the course of the hearing as to whether s 7.10 of the Manual had any application to the circumstance of a deployment of OC spray. This is because the preamble in s 7.10 refers to Security Officers of the Authority being authorised to use "reasonable force in order to remove a person from PTA property or to affect an arrest." Neither circumstance applied to this incident. The OC spray deployment was not used for the purposes of either effecting an arrest or removing A from Authority property.

37 Despite arguments to the contrary, which in my view take a rather technical view of the Manual in circumstances where it should be seen as a guide to transit officers, I am not persuaded that the "use of force" principles set out in s 7.10 of the Manual do not apply to OC spray. OC Spray is clearly a use of force option. It is available to security officers as an alternative to the use of concussive force, such as a tactical baton, where concussive force may not be appropriate. It is a lower level force option and in my view should be seen as such in the hierarchy of force options available to security officers.

38 Irrespective of this however, I am not persuaded on the evidence that having regard to all of the circumstances, Mr Merlo used excessive force against A. Mr Merlo apprehended a threat to his person which could have had significant adverse health effects on him. It was a judgment made in a split second where he was confronted with appalling conduct by an intoxicated individual, making threats to both Mr Merlo and others in circumstances where Mr Merlo had every reason to believe the threat to spit would be carried out. The circumstances need to be assessed in light of what actually occurred.

Did Mr Merlo admit to using excessive force by deploying OC spray at the POI?

39 In the letter from Mr Italiano of 8 June 2016 on p 2, reference is made to Mr Merlo admitting that he engaged in breaches of discipline on 7 November 2015. In relation to the question of admitting to the use of excessive force by deploying his OC spray at A, the statements made by Mr Merlo during the course of the investigation and prior to his dismissal, must be seen in context. Questions were put to Mr Merlo by the investigators during his recorded interview. In particular, at p 32 of the Investigation Report, Mr Merlo was asked whether he thought he had used force that was reasonable and within "policy and guidelines". Mr Merlo responded to the effect that "yeah, I thought it was but obviously I'm wrong because I am here." In my opinion that does not constitute an admission as to the use of excessive force. It was acknowledgement by Mr Merlo that his employer obviously had a different view.

40 Secondly, in Mr Merlo's letter of 21 May 2016 to Mr Italiano (Tab 12 exhibit A1) in response to Mr Italiano's proposed course of action, Mr Merlo commented on his actions. He referred to "the benefit of hindsight". That being that A baulked and prepared to spit at Mr Merlo but did not actually spit. Had Mr Merlo known this he would not have deployed his OC spray. Importantly, Mr Merlo goes on to say in the same paragraph "However, at the time, I believed that (name omitted) was going to spit at me. This is the only underlying reason I deployed my OC spray." Mr Merlo then further said "I did not intend to be heavy handed with (name omitted). I reacted instinctively in the split second I had to make a decision in response to his threats." Mr Merlo went on to indicate to Mr Italiano that having taken advice from his supervisors and others, he would have handled the incident better, in particular by increasing the distance between himself and a potential offender.

41 Taken in context I do not consider these statements made by Mr Merlo to constitute admissions that excessive force was used by him. Mr Merlo's actions and conduct must be judged in light of the circumstances that presented themselves to him in the moments leading up to and after his deployment of OC spray on the night of 7 November 2015.

Did Mr Merlo breach section 3.17, 3.18 or 7.10 of the Transit Officer Operations Manual?

42 Mr Merlo did not breach s 3.17 of the Manual. Mr Italiano, to his credit, admitted that the allegation that Mr Merlo contravened s 3.18 of the Manual was erroneous and he did not do so. This was because there was no suggestion that A had committed an offence while on Authority property. I have already dealt with s 7.10 of the Manual regarding use of force. Mr Merlo did not breach it.

Was dismissal a proportionate and appropriate penalty for Mr Merlo's conduct?

43 Self-evidently, my answer to this question is, having regard to all of the circumstances, no.

44 Additionally, while it is the facts and circumstances of this particular incident that must be considered and weighed in the balance, some reference was made by the Union to other cases involving the deployment of OC spray that have led to disciplinary action (see Tab 29 exhibit A1). Some of these incidents led to disciplinary outcomes short of dismissal, including reprimands and demotion. One in particular was an incident in September 2015, where a Senior Transit Officer at the Edgewater Station deployed OC spray at a patron who was displaying his buttocks at the officers. This occurred only seconds after the deployment of OC spray to the face region of several offenders.

45 It also appears that the officer concerned chased the offenders away from the Station over an area not deemed to be Authority property, contrary to established procedures. Whilst great care must be exercised when looking at other incidents such as this, without the benefit of knowing all of the circumstances, self-evidently, the discharge of OC spray towards a person displaying their buttocks could not be regarded as the use of reasonable force or an action reasonably taken in self-defence. In this particular case the officer was demoted from a Senior Transit Officer to a Transit Officer position. Perhaps not surprisingly, Mr Italiano was taken to this incident in cross-examination. He described the officer in question as having a "colourful history". I do not place great weight on this comparative incident, but it is a matter that some regard can be had to when considering the Authority's response to Mr Merlo's conduct on the night in issue in this case.

46 I also take into account Mr Merlo's contrition after the incident. On the evidence, he was clearly remorseful as to what had occurred and sought advice from others as to how to better manage such a situation in the future.

Conclusion

47 Having regard to all of the circumstances of this case, I have concluded that the dismissal of Mr Merlo as a transit officer from his employment on 8 June 2016 was harsh oppressive and unfair. He should be demoted to the position of Transit Officer Level 3 with payment of remuneration lost and continuity of service for benefit purposes. Orders now issue.

2017 WAIRC 00071

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 13 FEBRUARY 2017
FILE NO/S	CR 9 OF 2016
CITATION NO.	2017 WAIRC 00071

Result	Application upheld
Representation	
Applicant	Mr C Fogliani of counsel
Respondent	Mr D Anderson of counsel

Declaration and Orders

HAVING HEARD Mr C Fogliani of counsel on behalf of the applicant and Mr D Anderson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

(1) DECLARES that the dismissal of Mr Stefano Merlo by the respondent on 8 June 2016 was harsh oppressive and unfair.

(2) ORDERS the respondent to reinstate Mr Merlo as a Transit Officer Level 3 in accordance with the Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2015.

(3) ORDERS that Mr Merlo be paid an amount in respect of remuneration lost from the date of his dismissal to the date of his reinstatement in accordance with the rate of pay, entitlements and benefits applicable to the position of a Transit Officer Level 3.

(4) ORDERS that Mr Merlo's service with the respondent otherwise be deemed continuous for all benefit purposes.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association/Community and Public Sector Union of Western Australia (Inc).	Executive Director Department of Transport	Kenner SC	PSAC 6/2015	17/02/2015	Dispute re proposed roster change	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00111

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIO GEORGIOU
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 1 MARCH 2017
FILE NO.	APPL 4 OF 2017
CITATION NO.	2017 WAIRC 00111

Result	Direction issued
Representation	(by written correspondence)
Appellant	Mr M Georgiou
Respondent	Mr N John, of counsel

Direction

WHEREAS on 4 January 2017 the appellant instituted an appeal pursuant to s 33P of the *Police Act 1892* (the Police Act) against the decision of the Commissioner of Police to take removal action on 6 December 2016; and

WHEREAS on 28 February 2017 the appellant requested an extension of time to at least 1 April 2017 in which to comply with reg 92 of the *Industrial Relations Commission Regulations 2005* (the IR Regulations); and

WHEREAS on 28 February 2017 the respondent advised that he does not object to the request being granted; and

WHEREAS the Commission is of the opinion that granting the request is expedient for the expeditious and just hearing and determination of the appeal.

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

1. THAT compliance with reg 92 of the IR Regulations by the appellant be by Monday, 3 April 2017.

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

2017 WAIRC 00077

APPEAL AGAINST DISCIPLINARY PENALTY AND DECISION ON 9 SEPTEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JONATHAN SHIELDS
	APPELLANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR D SHAW - BOARD MEMBER
	MR S GREGORY - BOARD MEMBER
DATE	WEDNESDAY, 15 FEBRUARY 2017
FILE NO.	PSAB 19 OF 2016
CITATION NO.	2017 WAIRC 00077
Result	Direction issued

Direction

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

1. THAT the parties file a statement of agreed facts and a bundle of agreed documents by 10 March 2017.
2. THAT the appellant file and serve outlines of evidence by 31 March 2017.
3. THAT the respondent file and serve outlines of evidence by 21 April 2017.
4. THAT the appellant file and serve an outline of written submissions by 12 May 2017.
5. THAT the respondent file and serve an outline of written submissions by 2 June 2017.
6. THAT this matter be listed for hearing not before 19 June 2017.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2017 WAIRC 00085

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GINO ANTONUCCI
	APPLICANT
	-v-
	ROMAN CATHOLIC BISHOP OF GERALDTON, ST LUKE'S COLLEGE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 21 FEBRUARY 2017
FILE NO/S	U 176 OF 2016
CITATION NO.	2017 WAIRC 00085

Result Order issued

Order

HAVING heard the applicant on his own behalf and Mr D McKenna (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 if the applicant intends to be represented, the applicant file and serve a Warrant to appear as agent or seek leave to be represented by a lawyer by 28 February 2017.
2. THAT the applicant file and serve outlines of evidence and written submissions by 21 March 2017.
3. THAT the respondent file and serve outlines of evidence and written submissions by 11 April 2017.
4. THAT the applicant, if he chooses to, file and serve a reply to the respondent's written submissions by 20 April 2017.
5. THAT this matter be set down for a 3-day hearing not before 8 May 2017.
6. THAT discovery be informal.
7. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority Railway Employees (Trades) Industrial Agreement 2017 AG 1/2017	9/03/2017	The Public Transport Authority Of Western Australia	The Automotive, Food, Metals, Engineering Printing & Kindred Industries Union of Workers - Western Australian Branch, Electrical Trades Union WA	Commissioner D J Matthews	Agreement registered
Shire of Bridgetown-Greenbushes Outside Works Staff Enterprise Bargaining Agreement 2016 AG 49/2016	3/03/2017	Western Australian Municipal, Road Boards, Parks and Racecourses Employees' Union of Workers, Perth	Shire of Bridgetown-Greenbushes	Commissioner D J Matthews	Agreement Registered
WA Health System Engineering and Building Services Industrial Agreement 2017 AG 2/2017	7/03/2017	The Health Service Providers established pursuant to section 32(1)(b) of the Health Services Act 2016	Electrical Trades Union of Western Australia The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers Construction, Forestry, Mining and Energy Union of Workers	Commissioner T Emmanuel	Agreement registered

NOTICES—Appointments—

2017 WAIRC 00129

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner DJ Matthews to be an additional Public Service Arbitrator for a period of one year from the 21st day of March, 2017.

Dated the 3rd day of March, 2017.

L.S. (Sgd.) P.E. SCOTT

CHIEF COMMISSIONER P.E. SCOTT

2017 WAIRC 00130

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner T Emmanuel to be an additional Public Service Arbitrator for a period of one year from the 8th day of March, 2017.

Dated the 3rd day of March, 2017.

L.S. (Sgd.) P.E. SCOTT

CHIEF COMMISSIONER P.E. SCOTT

PUBLIC SERVICE APPEAL BOARD—

2017 WAIRC 00089

APPEAL AGAINST THE PERFORMANCE REVIEW PROCESS UNDERTAKEN AND THE DECISION MADE ON 19 JULY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRENDAN GLYNN
	APPELLANT
	-v-
	DEPARTMENT STATE DEVELOPMENT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR G RICHARDS - BOARD MEMBER
	MS L GENONI - BOARD MEMBER
DATE	THURSDAY, 23 FEBRUARY 2017
FILE NO	PSAB 15 OF 2016
CITATION NO.	2017 WAIRC 00089

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

Order

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

THAT the appeal be and is hereby discontinued by leave.

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

2016 WAIRC 00720

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 14 MARCH 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR CURRAN NICOLAI, YOUTH CUSTODIAL OFFICER
	APPELLANT
	-v-
	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR G RICHARDS - BOARD MEMBER
	MR R FARRELL - BOARD MEMBER
DATE	MONDAY, 22 AUGUST 2016
FILE NO	PSAB 3 OF 2016
CITATION NO.	2016 WAIRC 00720

Result	Direction issued
Representation	
Appellant	Ms J O'Keefe
Respondent	Ms I Rizmanoska and with her Mr N Cinquina

Direction

HAVING heard Ms J O'Keefe on behalf of the appellant and Ms I Rizmanoska and with her Mr N Cinquina on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the respondent reply to the appellant's request for production of documents by no later than 29 August 2016.

(2) THAT the appellant file and serve an outline of the witness evidence upon which he intends to rely by no later than 21 days prior to the date of the hearing.

(3) THAT the respondent file and serve an outline of the witness evidence upon which it intends to rely by no later than 14 days prior to the date of hearing.

(4) THAT the appeal be listed for hearing for five days on dates to be fixed.

(5) THAT the parties have liberty to apply on short notice.

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

2016 WAIRC 00818

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 14 MARCH 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR CURRAN NICOLAI, YOUTH CUSTODIAL OFFICER
	APPELLANT
	-v-
	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR G RICHARDS - BOARD MEMBER
	MR R FARRELL - BOARD MEMBER
DATE	WEDNESDAY, 12 OCTOBER 2016
FILE NO	PSAB 3 OF 2016
CITATION NO.	2016 WAIRC 00818

Result	Order issued
Representation	
Appellant	Ms J O'Keefe
Respondent	Ms C Taggart of counsel

Order

HAVING heard Ms J O'Keefe on behalf of the appellant and Ms C Taggart of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the respondent provide to the appellant by no later than 1 November 2016 a list of training records of the appellant identified by the respondent to that time.

(2) THAT otherwise the appellant's application for discovery and production of documents be and is hereby dismissed.

(3) THAT all references to minors in the proceedings and the reasons for decision of the Appeal Board will be anonymised.

(4) THAT the hearing of the appeal be and is hereby adjourned until 20 - 24 February 2017 inclusive and the hearing dates of 25 – 28 October 2016 inclusive be and are hereby vacated.

(5) THAT the parties have liberty to apply on short notice.

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

2017 WAIRC 00079

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 14 MARCH 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR CURRAN NICOLAI, YOUTH CUSTODIAL OFFICER
	APPELLANT
	-v-
	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR G RICHARDS - BOARD MEMBER
	MR R FARRELL - BOARD MEMBER
DATE	THURSDAY, 16 FEBRUARY 2017
FILE NO	PSAB 3 OF 2016
CITATION NO.	2017 WAIRC 00079

Result	Discontinued by leave
Representation	
Appellant	Ms K Hagan of counsel
Respondent	Ms C Taggart of counsel

Order

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

(1) THAT the appeal be and is hereby discontinued by leave.

(2) THAT the hearing dates of 20 – 24 February 2017 inclusive be and are hereby vacated.

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

2016 WAIRC 00802

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 1 JUNE 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANGELA RODRIGUES
	APPELLANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN MR G SUTHERLAND - BOARD MEMBER MS C PORTER - BOARD MEMBER
DATE	MONDAY, 10 OCTOBER 2016
FILE NO	PSAB 14 OF 2016
CITATION NO.	2016 WAIRC 00802

Result	Order issued
Representation	
Appellant	Mr G Stubbs of counsel
Respondent	Mr F Bajrovic

Order

HAVING heard Mr G Stubbs of counsel on behalf of the appellant and Ms F Bajrovic on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the time for the filing of the notice of appeal in the herein proceedings be and is hereby extended to 1 August 2016.

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

2017 WAIRC 00100

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 1 JUNE 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANGELA RODRIGUES
	APPELLANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN MR G SUTHERLAND - BOARD MEMBER MS C PORTER - BOARD MEMBER
DATE	MONDAY, 27 FEBRUARY 2017
FILE NO	PSAB 14 OF 2016
CITATION NO.	2017 WAIRC 00100

Result	Discontinued by leave
Representation	
Appellant	Mr S Butcher of counsel
Respondent	Mr R Andretich of counsel

Order

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

THAT the appeal be and is hereby discontinued by leave.

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

PUBLIC SECTOR MANAGEMENT ACT 1994—Notation of—

The following were matters before the Commission under the Public Sector Management Act 1994.

Application Number	Parties		Commissioner	Matter	Dates	Result
APPL 6/2016	Paul Edward Chorley	Department of Transport	Emmanuel C	Referral to Commission under Public Sector Management Act 1994	21/04/2016	Discontinued

VOCATIONAL EDUCATION AND TRAINING ACT 1996—Appeals dealt with—

2017 WAIRC 00096

APPEAL AGAINST THE DECISION TO TERMINATE TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL FRYER
	APPELLANT
	-v-
	EXECUTIVE OFFICER, DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 24 FEBRUARY 2017
FILE NO/S	APA 8 OF 2016
CITATION NO.	2017 WAIRC 00096

Result Application dismissed

Order

WHEREAS this is an appeal pursuant to s 60G of the *Vocational Education and Training Act 1996* (WA);

AND WHEREAS on 15 December 2016, the appellant informed the Commission by email that he no longer wished to continue with his appeal;

AND WHEREAS on 16 December 2016, Registry emailed the appellant with information about how to file a Notice of withdrawal or discontinuance;

AND WHEREAS on 18 January 2017 and 30 January 2017, the Commission followed up with appellant, by email and telephone respectively, about his Notice of withdrawal or discontinuance;

AND WHEREAS the appellant has not contacted the Commission and has not filed a Notice of withdrawal or discontinuance;

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

THAT this application be, and is hereby dismissed.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.