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INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2017] WASCA 86

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH -v- PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA [2017] WASCA 86
CORAM	**:**	BUSS J MURPHY J KENNETH MARTIN J
HEARD	**:**	21 NOVEMBER 2016
DELIVERED	**:**	2 MAY 2017
FILE NO/S	**:**	IAC 1 of 2016
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Appellant AND PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent
ON APPEAL FROM:		
Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	J H SMITH AP A R BEECH CC P E SCOTT ASC
Citation	**:**	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA v THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH [2016] WAIRC 236
File No	**:**	FBA 18 of 2015

Catchwords:

Industrial law - Termination of employment - Unfair dismissal - Primary remedy - Reinstatement - Alternative option of re-employment - Capped compensation payment as further alternative - Impracticability of reinstatement or re-employment as remedy - Reversal of reinstatement decision of Commissioner - Full Bench assesses that reinstatement and re-employment are both impracticable - Asserted error of law by Full Bench in construction or interpretation of statute - Meaning of 'impracticable' -

Statutory interpretation of that term in the context of reinstatement or re-employment of unfairly dismissed employee - Distinction between error of law in construction or interpretation of statute in contrast to an application of law to underlying facts - No error of law in construction or interpretation of statute - Application of law to facts by Full Bench outside jurisdictional parameters of Industrial Appeal Court

Legislation:

Fair Work Act 2009 (Cth), s 390(3)(a)

Industrial Relations Act 1979 (WA), s 23A and s 90(1)(b)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr C Fogliani & Ms B Gruber
Respondent	:	Mr G T W Tannin SC & Mr D Anderson

Solicitors:

Appellant	:	W G McNally Jones Staff Lawyers
Respondent	:	State Solicitor for Western Australia

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

Abbott-Etherington v Houghton Motors Pty Ltd (1995) 63 IR 394

Attorney General for Western Australia v Her Honour Judge Schoombee [2012] WASCA 29

BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers [2006] WASCA 49; (2006) 151 IR 361

Blyth Chemicals Ltd v Bushnell [1933] HCA 8; (1933) 49 CLR 66

Commonwealth Bank of Australia v Barker [2014] HCA 32; (2014) 253 CLR 169

Concept Nominees Pty Ltd v The Minister for Mines (Unreported, WASC, Library No 930678, 9 December 1993)

Jayne v National Coal Board [1963] 2 All ER 220

Landsheer v Morris Corporation (WA) Pty Ltd [2014] WASCA 186

Liddell v Lembke (t/a Cheryl's Unisex Salon) (1994) 1 IRCR 466; (1994) 56 IR 447

Malik v Bank of Credit & Commerce International SA (in liq) [1998] AC 20; 3 All ER 1

Moss v Smith (1850) 19 LJCP 225

Nguyen & Le v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter [2014] FWCFB 7198

Nicolson v Heaven & Earth Gallery Pty Ltd (1994) 1 IRCR 199; (1994) 57 IR 50

Patterson v Newcrest Mining Ltd (1996) 68 IR 419

Perkins v Grace Worldwide (Aust) Pty Ltd (1997) 72 IR 186

Public Transport Authority for Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch [2015] WASCA 150 (S)

Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch [2016] WAIRC 00236; (2016) 96 WAIG 408

Singh v Commonwealth of Australia [2004] HCA 43; (2004) 222 CLR 322

Tenix Defence Pty Ltd v Galea (Unreported, AIRC, Library No PR928494, 11 March 2003)

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 01367; (2015) 95 WAIG 1

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 00824; (2014) 94 WAIG 1462

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2015] WAIRC 00229; (2015) 95 WAIG 371

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2015] WAIRC 00936; (2015) 95 WAIG 1605

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2015] WAIRC 01094; (2016) 96 WAIG 71

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2015] WAIRC 01107; (2015) 96 WAIG 76

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1 BUSS & MURPHY JJ**: The appellant (the Union) is an organisation of employees and the respondent (the PTA) is an employer.**

2 Janet Vimpany is a member of the Union.

3 Ms Vimpany was employed by the PTA as a passenger ticketing assistant on the PTA's Joondalup railway line.

4 The PTA unfairly dismissed Ms Vimpany from her employment.

5 A majority of the Full Bench of the Western Australian Industrial Relations Commission (the WAIRC) held that it was impracticable for the PTA to reinstate or re-employ Ms Vimpany. See ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch*** [2016] WAIRC 00236; (2016) 96 WAIG 408 (Smith AP & Scott ASC; Beech CC dissenting).

6 The Union has appealed to this court against the majority's decision.

7 We would dismiss the appeal. Our reasons are as follows.

The background facts and circumstances

8 Ms Vimpany was employed by the PTA between 31 July 2006 and 8 October 2014.

9 On 8 October 2014, the PTA dismissed Ms Vimpany from her employment on the ground that the PTA believed that Ms Vimpany had deliberately and dishonestly provided false accounts of the conduct of her supervisor, David Hammon, towards her.

10 On 27 October 2014, the Union made an unfair dismissal application to the WAIRC in relation to Ms Vimpany's dismissal.

11 Commissioner Mayman heard and dismissed the unfair dismissal application.

12 On 5 June 2015, the Union appealed against Commissioner Mayman's decision to the Full Bench of the WAIRC. The Full Bench allowed the appeal. It found that the PTA had unfairly dismissed Ms Vimpany. The Full Court remitted the matter to Commissioner Harrison to determine the issue of remedy.

13 Commissioner Harrison found that it was not impracticable for Ms Vimpany to be reinstated to her position as a passenger ticketing assistant. The Commissioner ordered the PTA:

(a) to reinstate Ms Vimpany to her former position;

(b) to reinstate Ms Vimpany's accrued entitlements and recognise her service as being continuous; and

(c) to pay Ms Vimpany compensation for all of the remuneration that she had lost between 8 October 2014 and the date of her reinstatement.

14 On 23 December 2015, the PTA appealed against Commissioner Harrison's decision to the Full Bench of the WAIRC. As we have mentioned, the Full Bench held, by a majority, that it was impracticable for the PTA to reinstate or re-employ Ms Vimpany and that Commissioner Harrison had erred in finding otherwise.

The right of appeal to this court

15 Section 90(1)(b) of the *Industrial Relations Act 1979* (WA) (the Act) provides, relevantly, that an appeal lies to this court from any decision of the Full Bench 'on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act … in the course of making the decision appealed against … but upon no other ground'.

The ground of appeal

16 The sole ground of appeal alleges, relevantly, that the majority of the Full Bench erred in law in their construction or interpretation of the word 'impracticable' in s 23A of the Act in the course of making their decision.

Section 23A of the Act

17 Section 23A of the Act provides, relevantly:

(1) The Commission may make an order under this section if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair.

(2) In determining whether the dismissal of an employee was harsh, oppressive or unfair the Commission shall have regard to whether the employee -

(a) at the time of the dismissal, was employed for a period of probation agreed between the employer and employee in writing or otherwise; and

(b) had been so employed for a period of less than 3 months.

(3) The Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.

(4) If the Commission considers that *reinstatement would be impracticable*, the Commission may order the employer to re-employ the employee in another position that the Commission considers -

(a) the employer has available; and

(b) is suitable.

(5) The Commission may, in addition to making an order under subsection (3) or (4), make either or both of the following orders -

(a) an order it considers necessary to maintain the continuity of the employee's employment;

(b) an order to the employer to pay to the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal.

(6) If, and only if, the Commission considers *reinstatement or re-employment would be impracticable*, the Commission may, subject to subsections (7) and (8), order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal. (emphasis added)

The majority's reasons for decision

18 The majority summarised the essence of the PTA's case as follows:

> The 'heart' of the PTA's case was that because of Ms Vimpany's belief about what occurred in the second altercation during the incident on 27 April 2013 and her opinion of the conduct of the PTA in its investigative process was not only unreliable but that she had formed the opinion that other employees including Mr Hammon had perjured themselves and had conspired against her, the PTA could not have the necessary level of trust and confidence in Ms Vimpany to enable the employment relationship to be restored [109].

19 The majority added that 'the issue was and is whether the PTA's opinion is objectively reliable' [109].

20 The majority noted that the Full Bench had not previously considered the proper construction and application of s 23A as currently enacted [92].

21 The majority then examined a number of cases decided in other jurisdictions in relation to statutory provisions with at least some similarity to s 23A. In particular, the majority referred, with apparent approval, to the following propositions which the majority discerned from their examination of those other cases:

(a) 'a relevant factor in determining whether reinstatement is impracticable may be (depending upon the facts of a particular matter) whether a proper working relationship can be established and [the] level of trust between an employer and a claimant required for a continuing relationship of employer and employee' [93];

(b) 'where an issue of trust and confidence is a relevant issue, to determine [that] reinstatement is impracticable it must be found that the employer has a genuine and credible distrust and lack of confidence in the employee' [93];

(c) 'the issue of trust and confidence, in the context of practicability, [may be] tested by reference to whether the loss of trust and confidence is soundly and rationally based' [94];

(d) 'forming an opinion that reinstatement is impracticable can encompass factors other than the level of trust and confidence that an employer may have in an employee': '[f]or example, the claimant's position may have been legitimately abolished, or the claimant's personal circumstances may have changed post-termination of employment, such as he or she may have moved to live in another location' [95];

(e) '[p]racticable means more than possible': '[f]or example … where re-engagement of … unfairly dismissed employees, although possible, would [lead] to industrial strife … re-engagement [may not be] practicable: [f]urther, loss of the necessary mutual trust and confidence between employer and employee may render re-employment impracticable' [96];

(f) the notion of 'trust and confidence', in this context, is concerned with 'that which is essential to make an employment relationship workable' [102];

(g) '[w]hether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement': '[e]ach case must be decided on its own facts, including the nature of the employment concerned': '[a]n allegation that there has been a loss of trust and confidence must be soundly and rationally based': '[t]he fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate' [105]; and

(h) '[u]ltimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive' [105].

22 The majority then summarised the principles which, in their view, applied 'to an exercise of discretion when considering whether [under s 23A] to order reinstatement of a claimant where a relevant circumstance is a claim by the employer that there has been a loss of trust and confidence in the claimant':

(a) Reinstatement is the primary remedy afforded by s 23A. If reinstatement of a claimant who has been harshly, oppressively or unfairly dismissed is impracticable, the Commission is to consider whether another position is available and suitable for the claimant to be re-employed. If reinstatement or re-employment is impracticable, the Commission may order the employer pay compensation.

(b) The onus is on the employer to establish credible reasons why reinstatement of the claimant is impracticable.

(c) *Trust and confidence can be a relevant factor to consider when considering whether reinstatement is impracticable. Whether it is a relevant factor will depend upon the factual circumstances of a particular matter. Trust and confidence is not the sole criterion or even a necessary one in determining whether reinstatement is impracticable.*

(d) *For reinstatement to be impracticable on grounds of trust and confidence, some embarrassment or doubt by the employer, friction between the claimant, the employer and/or other employees is not sufficient to make the relationship unviable.*

(e) The reluctance of an employer to shift from the view of the claimant's conduct, despite an assessment by the Commission that the conduct in question had not been made out, does not provide a sound basis to conclude that the necessary level of trust and confidence is irreparably damaged or destroyed.

(f) The employer's opinion about whether there is a necessary level of trust and confidence must be genuine, credible and rationally based. The necessity of an appropriate level of trust and confidence to restore an employment relationship will depend upon not only the attitude of the claimant towards the employer and/or any other relevant employees and the employer to the claimant, but also whether the attitudes expressed have a reliable foundation and the nature and function of the duties of the employee.

(g) The level of sufficient trust and confidence in an employment relationship will vary depending upon the circumstances of a particular matter.

(h) The assessment of whether there is a sufficient and cogent loss of trust and confidence is a matter for the Commission to determine. The degree of trust and confidence an employer could be said to reasonably expect of one category of employee may be higher or lower than another.

(i) The question to be determined by the Commission is whether there can be, in the circumstances, a sufficient level of trust and confidence restored to make the employment relationship between the employer and the claimant viable and productive [106]. (emphasis added)

23 The majority said that there were two issues before Commissioner Harrison. First, whether the PTA's opinion about the appropriate level of trust and confidence required of a passenger ticketing assistant and its opinion that it did not have this level of trust and confidence in Ms Vimpany was genuine, credible and rationally based [111]. Secondly, whether the necessary level of trust and confidence in Ms Vimpany could be restored so that, objectively, the Commissioner could form the opinion with confidence that Ms Vimpany, if reinstated, would properly carry out her duties and appropriately interact with her supervisors in the future [111].

24 The majority were of the opinion that Commission Harrison had erred in the exercise of her discretion under s 23A of the Act. She was mistaken as to the facts before her and, also, she failed to take into account material considerations she was bound to consider [122].

25 The majority decided that it was open to the Full Bench to vary the decision of Commissioner Harrison and to exercise its own discretion in substitution for the discretion exercised at first instance in that the Full Bench had before it sufficient uncontested material [122] - [123].

26 The majority made these findings:

(a) the PTA's opinion that it did not have the necessary level of trust and confidence in Ms Vimpany to provide accurate and reliable reports of events, especially in relation to enforcement matters, was genuine, credible and reliable so as to raise doubt as to the future viability of an employment relationship between the PTA and Ms Vimpany [126];

(b) a 'relatively high level of trust and confidence' is required in relation to a passenger ticketing assistant to make the employment relationship between the PTA and the passenger ticketing officer 'viable and productive' [127];

(c) in the circumstances, the PTA had satisfied its onus to prove reinstatement of Ms Vimpany as a passenger ticketing assistant was 'impracticable' [128]; and

(d) the re-employment of Ms Vimpany in other positions with the PTA was also 'impracticable' because Ms Vimpany's beliefs were sufficiently serious to be destructive of the necessary trust and confidence the PTA was reasonably entitled to hold in its officers [129].

The merits of the ground of appeal

27 The meaning of the word 'impracticable' in a statutory provision depends, to a significant extent, on the statutory context, but it ordinarily connotes that which is not reasonably feasible or not reasonably capable of being put into practice, done or accomplished. See *Shorter Oxford English Dictionary* (6th ed, 2007) 2310; *Macquarie Dictionary* (5th ed, 2009) 1305.

28 The Act does not define 'impracticable' for the purposes of s 23A or otherwise.

29 The word 'impracticable' in s 23A takes colour from the statutory context; namely, the making of a determination by the Commission as to whether it is 'impracticable' to order that an employer, who has harshly, oppressively or unfairly dismissed an employee, reinstate the employee to his or her former position or re-employ the employee in another position.

30 The word 'impracticable' in s 23A, in the applicable context, connotes that reinstatement or re-employment by the employer of the employee is not reasonably feasible or reasonably capable of being accomplished on the facts and in the circumstances of the particular case.

31 In the present case, we are not persuaded that the majority of the Full Bench erred in their construction or interpretation of the word 'impracticable' in s 23A in the course of making their decision.

32 In our opinion, it is apparent, on a fair reading of the majority's reasons as a whole, that:

(a) the majority, in substance, construed or interpreted the word 'impracticable' in s 23A to require an inquiry as to whether reinstatement or re-employment by the PTA of Ms Vimpany was not reasonably feasible or reasonably capable of being accomplished on the facts and in the circumstances of the case;

(b) the majority held, correctly, that the presence or absence of trust and confidence between an employer and an employee is relevant in determining whether reinstatement or re-employment is 'impracticable' and that the level of sufficient trust and confidence will vary depending upon the facts and circumstances of the particular case; and

(c) the majority identified, correctly, the factors that were relevant in the present case in determining whether it was 'impracticable' for the PTA to reinstate or re-employ Ms Vimpany.

33 The majority's focus was on whether the reinstatement or re-employment by the PTA of Ms Vimpany was 'impracticable' because a sufficient level of trust and confidence did not exist between the PTA and Ms Vimpany to make an employment relationship between them viable and productive. The majority's focus was appropriate having regard to the facts and circumstances of the particular case and to the manner in which the PTA and the Union had run their cases and put their submissions.

34 The ground of appeal is without merit.

Conclusion

35 We would dismiss the appeal.

KENNETH MARTIN J:

Introduction

36 The applicant, The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the Union) seeks to appeal to this court, representing the interests of its member, Ms Vimpany. The Union seeks for the court to reverse a decision of the Full Bench of the Western Australian Industrial Relations Commission (the WAIRC) delivered on 20 April 2016.[1] The Full Bench's decision reversed a first instance determination by Commissioner J L Harrison.[2] The respondent to this appeal is the Public Transport Authority of Western Australia (the PTA).

37 In the wake of an earlier determination by the WAIRC as to Ms Vimpany's unfair dismissal by the PTA, Commissioner Harrison had ordered Ms Vimpany's reinstatement as a passenger ticketing assistant. The Full Bench, by majority, then reversed that decision. It concluded by reference to the terms of s 23A(4) and s 23A(6) of the *Industrial Relations Act 1979* (WA) (the IR Act) that Ms Vimpany's reinstatement or her re-employment would be 'impracticable'.

38 The Full Bench plurality, Smith AP and Scott ASC, in joint reasons concluded, in effect, that certain beliefs held by Ms Vimpany, concerning alleged acts of perjury or a conspiracy she believed to have been perpetuated against her by PTA personnel, went to the heart of the future viability of any further employment relationship with the PTA. They concluded that the substantial damage to, or the destruction of the required levels of trust and confidence in the employment relationship between Ms Vimpany and the PTA were so great that it was 'impracticable' for her to be reinstated to her former position.

39 Additionally, the plurality concluded that it would be 'impracticable' for Ms Vimpany to be re-employed in other positions within the PTA, an alternative sought by the Union. Again, the Full Bench plurality held this to be 'impracticable' given Ms Vimpany's beliefs, which were expressed

as 'sufficiently serious to be destructive of the necessary trust and confidence the PTA is reasonably entitled to hold in its officers'.[3]

40 The other member of the Full Bench, Beech CC, took a different view. He considered that Ms Vimpany could, and should, be reinstated to her former position as a passenger ticketing assistant.[4]

41 The Union filed one ground of appeal challenging the Full Bench's decision. The ground essentially contends that the Full Bench plurality erred in law by adopting an erroneous construction or interpretation of the term 'impracticable' as that word is used in s 23A of the IR Act, as regards assessing their (negative) assessments towards the prospects of Ms Vimpany's potential reinstatement or, alternatively, of her re-employment with the PTA.

Chronology of events

42 It is necessary to recount some of the procedural history underlying what followed after an incident in Ms Vimpany's employment relationship with the PTA. I will undertake this task utilising significant parts of the chronology provided by the PTA concerning the underlying events which are now, essentially, uncontroversial.

#	Date	Description of event
1	27.04.13	Ms Vimpany, who was then employed by the PTA as a passenger ticketing assistant, was involved in an incident at work. There was contact between Ms Vimpany and her supervisor, Mr David Hammon. Mr Hammon informed Ms Vimpany and another passenger ticketing assistant with whom she was working that they would need to complete their shift rather than, as had apparently been authorised by another supervisor, being allowed to leave early that day. There was further contact at the end of the shift, when Ms Vimpany and Mr Hammon spoke about the earlier instruction and some apparent levels of offence that it had caused to the two women. Ms Vimpany was alleged to have abused Mr Hammon by threatening behaviour.
2	23.09.13	The PTA alleged Ms Vimpany had knowingly given false accounts of the incident between herself and Mr Hammon on 27 April 2013.
3	17.10.13	Ms Vimpany was reprimanded over her conduct in relation to the 27 April 2013 incident by the PTA.
4	11.02.14	By application filed in the WAIRC, the Union challenged some findings relating to Ms Vimpany's conduct on 27 April 2013. It sought to have the WAIRC interrupt the disciplinary proceedings against her (CR 3 of 2014).
5	01.08.14	Commissioner Kenner dismissed the Union's challenge against findings relating to Ms Vimpany's conduct in the incident (CR 3 of 2014).[5]

[1] ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch*** [2016] WAIRC 00236; (2016) 96 WAIG 408.

[2] ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2015] WAIRC 01107; (2015) 96 WAIG 76.

[3] ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch*** [2016] WAIRC 236; (2016) 96 WAIG 408 [129].

[4] ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch*** [2016] WAIRC 236; (2016) 96 WAIG 408 [145] - [146].

6	07.10.14	The PTA informed Ms Vimpany that the allegations against her have been made out and terminated her employment as a consequence.
7	27.10.14	The decision to terminate Ms Vimpany's employment was challenged by the Union on Ms Vimpany's behalf by application made to the WAIRC (CR 32 of 2014).
8	19.12.14	The Union appealed part of Commissioner Kenner's decision to the Full Bench of the WAIRC (FBA 11 of 2014). The Full Bench dismissed that appeal.[6]
9	13.03.15	Concerning the decision to terminate Ms Vimpany's employment, Commissioner Mayman dismissed the unfair dismissal application - finding Ms Vimpany's dismissal was not harsh or unfair (CR 32 of 2014).[7]
10	12.10.15	An appeal against Commissioner Mayman's decision by the Union to the Full Bench (FBA 6 of 2015) was upheld. The appeal was allowed. The Full Bench remitted the unfair dismissal application back to the WAIRC for further hearing and for a determination as to the appropriate relief for Ms Vimpany, in the face of the unfair dismissal determination.[8]
11	18.12.15	Commissioner Harrison ordered the reinstatement of Ms Vimpany (CR 32 of 2014).[9]
12	23.12.15	The PTA appealed Commissioner Harrison's reinstatement decision to the Full Bench (FBA 18 of 2015).[10]
13	22.02.16	The Full Bench by majority upheld that appeal and set aside the orders of Commissioner Harrison which had ordered Ms Vimpany's reinstatement. The majority also rejected the alternative remedy of ordering Ms Vimpany's re-employment to another position with the PTA.[11] I elaborate upon the content of the reasons of the Full Bench comprising Smith AP, Beech CC and Scott ASC further in these reasons.

The Union's arguments to this Court

43 The Union essentially contends as regards the word 'impracticable', as used within s 23A(4) and s 23A(6) of the IR Act, that the Full Bench erred, by either misinterpreting or misconstruing the correct meaning of that word, in determining and upholding the appeal against Commissioner Harrison's first instance reinstatement determination favouring Ms Vimpany.

44 The same alleged error of applying an erroneous meaning of the word 'impracticable' in s 23A would appear to be contended to have also undermined the Full Bench plurality's re-exercise of discretion upon this issue, in substitution for the discretion exercised by Commissioner Harrison at first instance.

45 The nature of the Full Bench plurality's alleged error of law, by adopting an asserted misconstruction or misinterpretation of the word 'impracticable' as that word is used within s 23A(4) or s 23A(6), is elaborated upon by the Union within four accompanying particulars to the ground of appeal. Greater elaboration is then found within the Union's written submissions provided to this court dated 26 July 2016. The submissions of counsel for the Union at the hearing of the appeal on 21 November 2016 expanded the basis of the challenge raised by the sole ground of appeal. As will be seen, however, there are some inconsistencies in the Union's position as it is assessed across those three different sources of elaboration. It will be necessary to discretely consider these three sources of arguments advanced by the Union towards it showing an error of law made by the Full Bench falling within the scope of s 90(1)(b) of the IR Act.

46 The usual jurisdictional question arises at the outset of the present arguments - concerning whether or not the ground of challenge sought to be advanced does, in truth, ventilate an error in the construction or interpretation of an Act of Parliament. Or, as the PTA strongly submits, is this appeal ground, upon examination, only seeking to cavil over what manifests as just a routine instance of the members of the Full Bench applying well settled statutory law, but merely reaching differing conclusions in their applications of that law to underlying facts - a scenario which would lie outside this court's jurisdiction under s 90(1)(b).

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[5] ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2014] WAIRC 00824; (2014) 94 WAIG 1462.

[6] ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2014] WAIRC 01367; (2015) 95 WAIG 1.

[7] ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2015] WAIRC 00229; (2015) 95 WAIG 371.

[8] ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2015] WAIRC 00936; (2015) 95 WAIG 1605.

[9] ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2015] WAIRC 01094; (2016) 96 WAIG 71.

[10] ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry of Employees, West Australian Branch*** [2016] WAIRC 00236; (2016) 96 WAIG 408.

[11] ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch*** [2016] WAIRC 00236; (2016) 96 WAIG 408.

47 As I will explain at the end of these reasons, it has been said on more than one occasion, by reference to s 90(1) of the IR Act that there can be no appeal to this court if a Full Bench has 'merely applied the law which it has correctly understood, to the facts of an individual case'.

48 The PTA's written outline of submissions contends that this court's jurisdiction has not been legitimately engaged in the attempted appeal. But it goes further to submit that, even if jurisdiction was properly engaged, the joint evaluations of Smith AP and Scott ASC, as the majority of the Full Bench, towards the underlying facts in their joint reasons, concluding as to the ultimately assessed impracticability of Ms Vimpany's reinstatement or her re-employment, are demonstrably correct and should not be disturbed.

49 At the outset, it is necessary to scrutinise the terms of s 23A of the IR Act. This section provides a hierarchy of potential remedies for an employee following an assessment that the employee (as was the case here for Ms Vimpany) has been unfairly dismissed by their employer on a basis that was 'harsh, oppressive or unfair' (s 23A(1)).

The word 'impracticable' as it manifests in s 23A(4) and s 23A(6) of the IR Act

50 The Union's ground of appeal contends that the Full Bench (plurality) erred in law in the construction or interpretation of the term 'impracticable' in s 23A of the IR Act in the course of making their decision in FBA 18 of 2015.[12] The ground as articulated continues:

> The error made by the Full Bench has caused the appellant's member, Ms Janet Vimpany, to suffer an injustice in that it has denied her a remedy under s 23A(3) and s 23A(5) of the Act, or alternatively, s 23A(4) and s 23A(5) of the *Industrial Relations Act 1979*.

51 It is necessary to turn to the content of s 23A of the IR Act.

52 The legislative history surrounding s 23A was extensively canvassed by Smith AP and Scott ASC in their joint reasons at [82] - [91]. It is unnecessary to repeat all that history here, other than to note that s 23A was introduced by the *Industrial Relations Amendment Act 1993* (WA) (Act No 15 of 1993). It was then amended by s 42 of the *Industrial Legislation Amendment Act 1995* (WA) (Act No 1 of 1995). At that time the word 'impracticable' was introduced. Smith AP and Scott ASC observed:

> This amendment expressly required the Commission to form an opinion that reinstatement was 'impracticable' as a pre-condition to an award of compensation [90].

53 Section 23A was then amended in 1997 by the *Labour Relations Amendment Act 1997* (WA). It now manifests in pt 2, div 2 of the IR Act under the heading, 'Unfair dismissal claims, Commission's powers on'.

54 Section 23A relevantly provides:

> (1) The Commission may make an order under this section if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair.
>
> (2) In determining whether the dismissal of an employee was harsh, oppressive or unfair the Commission shall have regard to whether the employee -
>
> (a) at the time of the dismissal, was employed for a period of probation agreed between the employer and employee in writing or otherwise; and
>
> (b) had been so employed for a period of less than three months.
>
> (3) The Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.
>
> (4) If the Commission considers that reinstatement would be **impracticable**, the Commission may order the employer to re-employ the employee in another position that the Commission considers -
>
> (a) the employer has available; and
>
> (b) is suitable.
>
> (5) The Commission may, in addition to making an order under subsection (3) or (4) make either or both of the following orders -
>
> (a) an order it considers necessary to maintain the continuity of the employee's employment;
>
> (b) an order that the employer pay the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal.
>
> (6) If, and only if, the Commission considers reinstatement or re-employment would be **impracticable**, the Commission may, subject to subsections (7) and (8) order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal.
>
> …

[12] ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry of Employees, West Australian Branch*** [2016] WAIRC 00236; (2016) 96 WAIG 408.

(10) For the avoidance of doubt, an order under subsection (6) may permit the employer concerned to pay the compensation required in instalments specified in the order.

…

(12) The Commission may make any ancillary or incidental order that the Commission thinks necessary for giving effect to any order made under this section.

55 (In the above extracts, I have highlighted in bold the word 'impracticable', where it is seen to be used twice in s 23A(4) and then in s 23A(6).)

56 The word 'impracticable' manifests initially under s 23A(4), in a context of assessing an employee's possible reinstatement (under s 23A(3)) to their former position to be impracticable, by reference to the lesser remedy option of potentially ordering the employer to instead 're-employ' the employee in another position - in effect, as a lesser tier remedy than that of ordering a reinstatement to the employee's former position.

57 The second use of the word 'impracticable' is found in s 23A(6). This time, the word is seen deployed in a context of the apparent legislative emphasis that emanates from the emphatic precatory phrase '[i]f and only if' it is assessed that the remedies of reinstatement or re-employment are both impracticable. This second use is in a context of the path towards the lowest tier remedy of compensation for the unfairly dismissed employee for loss or injury caused by their (unfair) dismissal.

58 The present context of the Union's argument is that the Full Bench plurality erred in their construction or interpretation of the word 'impracticable', towards assessing Ms Vimpany's presenting circumstances as regards her potential reinstatement to her former position as a passenger ticketing assistant, or her re-employment to another position with the PTA.

59 I should note at an early point that the word 'impracticable' is not found to be expressly defined within the IR Act. It is therefore a word which must take its meaning from the overall surrounding text and context of its location within s 23A in pt 2 div 2 of the IR Act and from an objective assessment of the legislative purpose of the provision as a whole.

The Full Bench's reasons

60 It is necessary, given the nature of the challenges sought to be advanced against the plurality's reasons by the Union on this appeal, to set out at length a number of passages taken from the joint reasons of Smith AP and Scott ASC. In particular, I will collect what is said at [104], [105], [106](a) - (f), [109], [110], [113], [116] - [129] and [131] of the joint reasons and then in the reasons of Beech CC at [132], [136] and [142] - [144].

61 I commence at [104] of the joint reasons where Smith AP and Scott ASC rendered a series of observations whilst canvassing a series of decisions in the national industrial relations context, dealing with the practicality of the remedy of reinstatement for the unfairly dismissed employee. They said:

> 104 The Full Bench in ***Nguyen*** at [24] also considered the observation of Gray J in ***Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd*** [2000] FCA 627 [42] that with the emergence of corporate employers, the importance of trust and confidence in the employment relationship has diminished. The Full Bench in ***Nguyen*** at [25] adopted the remarks made by Gostencnik DP in ***Colson v Barwon Heath*** [2013] FWC 8734 about the point being made by Gray J. In ***Colson*** Gostencnik DP observed [21] - [22]:
>
> > I do not take his Honour's commences to mean that trust and confidence as an element of the employment relationship is no longer important. It is merely recognition that in many cases it will be important to have regard to the totality of the employment, and that in the case of a corporate employer, the loss of trust and confidence in the employee will be by a manager or managers of the corporate employer. But as his Honour observed, in such cases the 'critical question must be what effect, if any, a loss of trust by the manager in an employee is likely to have on the operation of the workplace concerned' [2000] FCA 627. It is important to understand that his Honour's observations were made in the context of an interlocutory application while His Honour was considering 'balance of convenience' arguments against reinstatement on an interlocutory basis. His Honour's observations about the effect of the shift from a personal to a corporate employment relationship were made as an introduction to his conclusion that the respondent did not provide any evidence on the 'critical question' as identified. So much is clear from the following passage:
> >
> > > … It might be more significance, for instance, to know the name of Mr Voss's immediate supervisor and to know the attitude of that person towards him. If the immediate supervisor had no trust in Mr Voss, it might also be relevant to know whether it would be possible to place Mr Voss in another part of the workplace, under another supervisor, who did have such trust. It would also be relevant to know what effect any lack of trust by any manager or supervisor in a particular employee might have on the conduct of operations in the workplace. There is no evidence on these matters.
> > >
> > > [43] Resort to an assertion that trust and confidence in a particular person have been lost cannot be a magic formula for resisting the

> compulsory reinstatement in employment of the particular person [2000] FCA 627.
>
> In my view, his Honour is merely saying that it is not enough to simply assert that trust and confidence in an employee has been lost. Where this is relied upon then there must be evidence from the relevant managers holding that view and an assessment must be made as to the effect of the loss of trust and confidence on the operations of the workplace. In short, all of the circumstances must be taken into account. This seems evident and is hardly controversial.

105 The Full Bench in ***Nguyen*** then distilled the following principles from the decided cases concerning the impact of trust and confidence on the question whether reinstatement is appropriate [27] - [28]:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement (***Tenix Defence Pty Ltd v Galea*** [2003] AIRC (11 March 2003), [7] - [8]).
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts (***Perkins v Grace Worldwide (Aust) Pty Ltd*** (1997) 72 IR 186, 191).
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion (***Perkins v Grace Worldwide (Aust) Pty Ltd*** (1997) 72 IR 186, 191).
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed (***Perkins v Grace Worldwide (Aust) Pty Ltd*** (1997) 72 IR 186, 191).
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate (***Perkins v Grace Worldwide (Aust) Pty Ltd*** (1997) 72 IR 186, 191).

Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party.

62 Having considered those lines of Australian authority, Smith AP and Scott ASC moved to summarise the position for Western Australia in these terms as regards the remedy of reinstatement - where the employer contends there has been a loss of trust and confidence:

> 106 In our opinion, when regard is had to s 23A of the Act, the statutory scheme to provide remedies to a claimant who has been harshly, oppressively or unfairly dismissed and the decided cases the following principles should apply to an exercise of discretion when considering whether to order reinstatement of a claimant where a relevant circumstance is a claim by the employer that there has been a loss of trust and confidence in the claimant:
>
> (a) Reinstatement is the primary remedy afforded by s 23A. If reinstatement of a claimant who has been harshly, oppressively or unfairly dismissed is impracticable, the Commission is to consider whether another position is available and suitable for the claimant to be re-employed. If reinstatement or re-employment is impracticable, the Commission may order the employer pay compensation.
>
> (b) The onus is on the employer to establish credible reasons why reinstatement of the claimant is impracticable.
>
> (c) Trust and confidence can be a relevant factor to consider when considering whether reinstatement is impracticable. Whether it is a relevant factor will depend upon the factual circumstances of a particular matter. Trust and confidence is not the sole criterion or even a necessary one in determining whether reinstatement is impracticable.
>
> (d) For reinstatement to be impracticable on grounds of trust and confidence, some embarrassment or doubt by the employer, friction between the claimant, the employer and/or other employees is not sufficient to make the relationship unviable.

(e) The reluctance of an employer to shift from the view of the claimant's conduct, despite an assessment by the Commission that the conduct in question had not been made out, does not provide a sound basis to conclude that the necessary level of trust and confidence is irreparably damaged or destroyed.

(f) The employer's opinion about whether there is a necessary level of trust and confidence must be genuine, credible and rationally based. The necessity of an appropriate level of trust and confidence to restore an employment relationship will depend upon not only the attitude of the claimant towards the employer and/or any other relevant employees and the employer to the claimant, but also whether the attitudes expressed have a reliable foundation and the nature and function of the duties of the employee.

63 Having extracted those principles, Smith AP and Scott ASC advanced to evaluate their application towards Ms Vimpany, in the context of evaluating whether there had been any level of error by Commissioner Harrison in ordering Ms Vimpany's reinstatement, as the PTA had argued. They said this:

109 The 'heart' of the PTA's case was that because of Ms Vimpany's belief about what occurred in the second altercation during the incident on 27 April 2013 and her opinion of the conduct of the PTA in its investigation process was not only unreliable but that she had formed the opinion that other employees including Mr Hammon had perjured themselves and had conspired against her, the PTA could not have the necessary level of trust and confidence in Ms Vimpany to enable the employment relationship to be restored. Thus, the issue was and is whether the PTA's opinion is objectively reliable. This is not a matter for cross-examination of the opinion of Ms Vimpany. It was a matter for the Commission to determine.

110 When considering whether reinstatement of a claimant is impracticable on grounds of trust and confidence as set out above, an assessment of the nature and level of trust and confidence in an employee by an employer should be considered.

…

113 In this matter, Harrison C found that it was not impracticable that Ms Vimpany be reinstated to her former position and found that when Ms Vimpany returns to work trust can be restored between Ms Vimpany and the PTA. Her reasons why she formed this opinion were, apart from the issues related to the incident on 27 April 2013:

(a) Prior to the incident, Ms Vimpany had a lengthy, impeccable and uneventful employment history.

(b) During Ms Vimpany's entire period of employment her performance was unblemished, exemplary, she was of good character, trustworthy and interacted positively with her colleagues.

(c) Ms Vimpany's trustworthiness has not been called into question pre and post the incident. This indicates that potential enforcement proceedings will not be compromised.

(d) A lack of complaints about Ms Vimpany wanting to return to her former position indicates a willingness by Ms Vimpany's supervisors and colleagues to work positively with Ms Vimpany.

…

116 When regard is had to all of the evidence before Harrison C it is clear that she erred in that she mistook some of the material facts which, in our respectful opinion, led her to fail to have regard to material matters.

117 Whilst, the finding that during Ms Vimpany's entire employment, except for the incident, her performance was unblemished, exemplary, she was of good character, trustworthy and interacted positively with her colleagues is a finding that was open and is a relevant circumstance that was to be given significant weight, there was before Harrison C relevant material circumstances, the effect of which were mistaken by her.

118 Commissioner Harrison erred in finding that Ms Vimpany's trustworthiness had not been called into question post the incident which indicates that potential enforcement proceedings will not be compromised. This finding of fact and inference drawn from this finding is inconsistent with the uncontested fact that, at all material times, Ms Vimpany has and continues to maintain that during the incident in question she was not the aggressor. She believes Mr Hammon entered her personal space, yelled and screamed at her. Further, that she still believes this to be the case despite not only the PTA's investigation processes finding otherwise, but also in the face of findings made by Kenner C who rejected her entire version of events. Commissioner Kenner also found that the evidence given by Ms Vimpany in proceedings before him was 'less than frank'. Ms Vimpany's unwavering beliefs about her version of events are a relevant material circumstance. Her beliefs are not only long and strongly held by her, it cannot be said that in the face of those findings made by Kenner C in CR 3 of 2014 that her beliefs have any rational basis.

119 The fact that Ms Vimpany's views have no reliable or credible basis is not a matter that was considered by Harrison C. Nor did Harrison C make any assessment of the level of trust and confidence that the PTA should be able to expect of a passenger ticketing officer.

120 Whilst no finding of dishonesty has been made against Ms Vimpany, the findings made by Kenner C properly raise a legitimate concern by the PTA of Ms Vimpany's reliability to recount and record events which is a requirement of the duties of a passenger ticketing assistant.

121 We do not agree that a positive inference that the lack of complaints about Ms Vimpany returning to work in her former position could be drawn to indicate a willingness by Ms Vimpany's colleagues and supervisors to work positively with her. Whilst some of her colleagues gave highly favourable character evidence and their high regard for Ms Vimpany is an important consideration for which considerable weight should be given, the finding ignores Ms Vimpany's long held and recently restated beliefs about Mr Hammon and the other employees of the PTA that she accuses of perjury and conspiracy. In the face of such serious allegations by Ms Vimpany it does not follow that an inference can be drawn that those persons could work positively with Ms Vimpany.

122 For those reasons, we are of the opinion that Harrison C erred in the exercise of her discretion. Not only did she mistake the facts before her, but she also failed to take into account material considerations.

64 Having concluded that Commissioner Harrison had erred in principle in the respects related, it then fell to Smith AP and Scott ASC to decide how to proceed. They chose, as was clearly open to them and particularly in light of the extensive procedural history of the dispute, to decide themselves what was the appropriate remedy for Ms Vimpany, given the facts. They continued at [122]:

> In these circumstances, it is open to the Full Bench to vary the decision of the Commission at first instance and exercise its own discretion in substitution of the discretion at first instance where it has before it sufficient uncontested material.

123 In our opinion, the Full Bench has before it such material. Ms Vimpany's stated beliefs are without contest. Whilst most employment relationships are capable of sustaining some doubts that go to trust and confidence, the circumstances raised by Ms Vimpany's stated beliefs of perjury and conspiracy goes to the heart of the employment relationship. These beliefs, together with the potential for her not to provide accurate reports of events that may occur in the heat of the moment, when a requirement to do so is material to the duties of a passenger ticketing assistant, raise circumstances beyond the usual strained relationships between an employee and employer following re-engagement after litigation between them.

124 Ms Vimpany's firm belief that not only Mr Hammon and other employees who witnessed the incident in question, but also persons who investigated her conduct and made disciplinary findings against her, engaged in a conspiracy to dismiss her indicates such longstanding substantial acrimony by Ms Vimpany to those persons could be said to constitute substantial damage to, or destruction of trust and confidence between Ms Vimpany and the PTA. Against that circumstance is the opinions of Ms Vimpany's colleagues who gave character evidence in her favour.

125 Whilst the opinions of Ms Vimpany's fellow employees gave highly favourable character evidence in her favour, the weight of their evidence is, in our opinion, outweighed by Ms Vimpany's beliefs. Nor does the fact that no other supervisors gave evidence that they could not work with Ms Vimpany have much weight. Against that circumstance is the evidence that if Ms Vimpany is reinstated to the Joondalup line Ms Vimpany could have contact with Mr Hammon and the other employees of the PTA that she has accused of perjury and conspiring against her, when working during special events. Although she contended that she wishes to re-establish good working relationships and put the past behind her, this evidence was contradicted by her in cross-examination when it emerged that her long held beliefs were still strongly held by her. Also of importance, is the circumstance that her allegation of conspiracy relates to all persons who participated in the disciplinary process against her. Even if these circumstances can be said to be outweighed by the fact that Ms Vimpany continued to work as a passenger ticketing assistant for 17 months after the incident competently and without any conflict, the question remains whether Ms Vimpany can be trusted to provide accurate recording of events in her enforcement duties is an issue that goes to the necessary trust and confidence the PTA can [reasonably] expect of its passenger ticketing assistants.

126 In light of Ms Vimpany's longstanding and recently restated inaccurate beliefs about what occurred during the incident in question, the opinion of the PTA that it does not have the necessary level of trust and confidence in Ms Vimpany to provide accurate and reliable reports of events, particularly in relation to enforcement matters, this opinion can be said to be genuine, credible and reliable so as to raise doubt as to the future viability of an employment relationship between Ms Vimpany and the PTA.

127 As set out in [112] of these reasons, the level of trust and confidence required by a passenger ticketing assistant requires a high level of integrity and accurate reporting of events addressing

> fare evasion. Consequently, we are satisfied that a relatively high level of trust and confidence is required of such an officer to make the employment relationship between the PTA and a passenger ticketing officer viable and productive.
>
> 128 In these circumstances, we are satisfied that the PTA has satisfied its onus to prove reinstatement of Ms Vimpany as a passenger ticketing assistant is impracticable.

65 Having concluded the remedy of reinstatement under s 23A(3) was impracticable in presenting circumstances, Smith AP and Scott ASC then proceeded to evaluate the lesser tier remedy of re-employment towards Ms Vimpany. They said:

> 129 We are also satisfied that re-employment of Ms Vimpany is impracticable to the other positions sought by the union in these proceedings because Ms Vimpany's beliefs are sufficiently serious to be destructive of the necessary trust and confidence the PTA is reasonably entitled to hold in its officers. In any event, the evidence before Harrison C could not sufficiently support a finding that the PTA has other positions that were available and suitable. Mr Luff's evidence, when questioned about whether Ms Vimpany could be re-employed as a customer service officer, was that they were at that time recruiting for one customer service assistant, but it was a promotional position (that attracted a higher level of pay than a customer ticketing assistant), for which Ms Vimpany would not be considered for such a position as she did not meet the essential criteria, as she had not undertaken a course in safe working accreditation: ts 183 - 184.

66 Ultimately, Smith AP and Scott ASC concluded:

> 131 In light of these reasons for decision, we are of the opinion that an order should be made to uphold the appeal and that an order should be made to vary the decision by making an order that the PTA pay Ms Vimpany an amount of compensation for loss or injury caused by the dismissal. Prior to making the order, the parties should be heard as to the quantum of compensation that should be paid to Ms Vimpany.

67 Beech CC gave brief separate reasons. Unlike Smith AP and Scott ASC, he would have dismissed the appeal. Relevantly, however, Beech CC appeared to endorse the underlying principles of the remedies of reinstatement and re-employment that had been collected and synthesised in the joint reasons. He said:

> 132 I have read in advance the reasons for decision of Her Honour the Acting President and adopt the background to this matter she has set out. I agree with those reasons except her finding that Harrison C failed to have regard to material matters. I shortly state my reasons why I would dismiss the appeal.

68 Beech CC then moved to his assessment of the underlying facts. He said:

> 136 The fact that Ms Vimpany maintains her view that she was not the aggressor in the incident, despite the PTA's investigation and the finding of Kenner C, cannot be viewed in isolation from the circumstances. The PTA dismissed her because it believed that she had knowingly given false accounts, and had made a false allegation, regarding the events of 27 April 2013. It can be inferred that the PTA did not have sufficient trust and confidence in her because of its belief.
>
> …
>
> 142 Loss of trust and confidence is the most common argument advanced in support of the proposition that reinstatement is inappropriate, as the Full Bench of the Fair Work Commission stated in ***Nguyen***. It is important to recognise that the exercise of the power in s 23A of the Act to reinstate an unfairly dismissed employee is not focussed upon whether there has been a loss of trust and confidence such that it would not be feasible to re-establish the employment relationship. Rather it is upon the practicability of the reinstatement.
>
> 143 What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party: ***Perkins v Grace Worldwide (Aust) Pty Ltd*** (191).
>
> 144 Each case must be decided on its own facts, including the nature of the employment concerned. The evidence that Ms Vimpany worked with her supervisors and other employees as a passenger ticketing assistant without incident and in a professional manner for 17 months after the incident on 27 April 2013, and while holding the opinion she has, is in my experience a unique situation.

69 As seen, Beech CC, albeit in dissent towards the end result (see [132]), in fact agreed with all but a small component of the joint reasons. In particular, the principles comprehensively collected in [106] in the joint reasons were not controversial. This is an important consideration given that the Union's challenge ultimately directs a strong attack upon the formulation of principles found in [106] of the joint reasons which I have now set out.

The Union's particulars to the ground of appeal

70 I turn first to the particulars provided to the sole ground of appeal.

71 The first three particulars are directed at the Full Bench plurality's reasons towards the rejected scenario of Ms Vimpany's potential 'reinstatement' to her former position as a passenger ticketing assistant.

72 Particular D is seen to be directed at the lesser alternative remedy of re-employment. That scenario was also rejected by the Full Bench plurality as equally impracticable in this employment relationship.

73 The particulars as provided by the Union were:

A. The correct construction of section 23A required the Full Bench to start from the position that reinstatement is the primary remedy to be ordered if an employee has been found to have been unfairly dismissed. The Full Bench erred by not proceeding from the basis that there is a clear legislative bias towards it using reinstatement when an employee has been found to have been unfairly dismissed.

B. The term 'impracticable', as it appears in section 23A, ought to have been interpreted according to its plain and ordinary meaning. The Full Bench erred by not looking at the plain meaning of the word 'impracticable' but instead treating the word as a technical one.

C. In order to be satisfied that reinstatement or re-employment was 'impracticable', the Full Bench had to be satisfied that the relationship between the employer and the employee was so bad, poisoned and broken down that it would be impracticable to order reinstatement. The Full Bench erred by instead treating the word 'impracticable' as being able to capture circumstances where there is a mere possibility that the parties may not be able to work together in the future (see pars [125] - [126] of the Full Bench's reasons for decision).

D. The Full Bench found at [129] of their reasons for decision that re-employment would be impracticable because

(i) re-employment into a Customer Service Assistant role would result in Ms Vimpany receiving a higher rate of pay; and

(ii) the Public Transport Authority would need to provide Ms Vimpany with an additional week of training in order for her to be able to perform the role.

Neither of those two circumstances fit within the plain meaning of the word 'impracticable'. It is axiomatic from those findings that the Full Bench erred in their interpretation of the word 'impracticable'.

As can be seen these so-called particulars are essentially argumentative in their character - rather than providing any greater detail to the sole ground. Nevertheless, they provide a starting position of insight to the alleged error.

Observations upon particulars to the ground of appeal

74 It is not easy to identify from the particulars where precisely within the joint reasons of the Full Bench there manifests an alleged error of law - by way of the asserted misconstruction or misinterpretation of the word 'impracticable'. The Union's arguments deployed in the particulars, largely proceed by taking issue with the end conclusion as to an impracticability in the remedies of reinstatement or of a re-employment for Ms Vimpany. They then seem to work back from that starting premise to assert that there must have been an error(s) of law of a jurisdictional character to support an appeal to this court.

75 I need to discuss more specifically at this point particulars A, B and C, as regards their elaborations towards the Union's ground of appeal.

Particular A

76 A reference in particular A to the Full Bench not proceeding from the basis of a 'clear legislative bias' towards reinstatement, in the face of an accepted wrongful dismissal, raises an issue of some problematic nomenclature, as regards the remedy of reinstatement.

77 The thrust of particular A is seen to be directed towards highlighting the asserted paramountcy of the reinstatement remedy - but not really pointing out where there has been some misunderstanding of the word 'impracticable' displayed by the Full Bench - as regards the plurality's exercise of discretion to not order that remedy.

78 As now seen, the joint reasons of Smith AP and Scott ASC, at [106](a), (b), (d), (e) and (f), render it absolutely explicit that reinstatement is the primary remedy for an unfair dismissal under s 23A - as, indeed, it is. Smith AP and Scott ASC at those points clearly recognise that reinstatement is ranked as the first tier remedy for consideration above re-employment before the lowest tier remedy - of compensation to the unfairly dismissed employee.

79 Smith AP and Scott ASC correctly observe as well that the onus is on an employer to establish why a reinstatement is impracticable for some credible reason. They also observe, again with respect, correctly that a particular employer's strongly held views regarding a deficiency of trust and confidence in the employment relationship, which the employer believes cannot be restored, would not be enough. The employer's concerns cannot be sufficiently grounded just upon an employer's expressed embarrassment, doubts, or expressed workplace friction concerns. None of that would suffice. But Smith AP and Scott ASC clearly recognise in their joint reasons that the employer's views about a necessary level of trust and confidence in the employee need to be shown to be genuine, credible and rationally based.

80 Implicitly, particular A looks to suggest the observations of Smith AP and Scott ASC did not go far enough. From the Union's perspective, they seem to submit that Smith AP and Scott ASC needed to go further, to also acknowledge a 'clear legislative bias towards … reinstatement' under s 23A.

81 However, the Union's advocated terminology of 'legislative bias' is a gloss upon the terms of this legislation. Section 23A does not use that expression.

Particular B

82 By this particular the Union seems to contend that the word 'impracticable', as used in s 23A(4) and s 23A(6), is to be afforded a plain and ordinary meaning. So much may be accepted. But what does the submission pragmatically amount to in context?

83 In the statutory context of s 23A(4) and s 23A(6), the word 'impracticable' is used as an adverb, applied conjunctionally with the active concepts of a possible reinstatement of the employee or, alternatively, a possible re-employment of the wrongfully dismissed employee to another position.

84 It is the intrinsic character of a descriptive word, such as 'impracticable', that it demands an underlying and accompanying factual context for the word to deliver some practical utility in a context of underlying facts. The nature of the word cries out for a context of fact in order to be sensibly evaluated. To say that something is 'impracticable' without more only poses the question - what is it that is said to be impracticable?

85 The contention of particular B is that the Full Bench plurality erred by treating the word 'impracticable' as a 'technical one', instead of giving it its plain meaning.

86 The Union's contention necessarily calls for an identification of **where** within the joint reasons of Smith AP and Scott ASC that this erroneous approach is found to manifest. The omission is not addressed, there or later.

87 At this point, the real nature of the appellate grievance begins to emerge, essentially as the raising of arguments over rival evaluations made towards underlying facts reached by different members of the Full Bench.

88 That assessment is reinforced in the dissenting reasons of Beech CC, to which I have now referred. Beech CC would have upheld Commissioner Harrison's first instance reinstatement orders for Ms Vimpany. But even Beech CC in reaching his dissenting evaluation of the facts, between [142] - [144], acknowledged the bespoken factual assessment undertaken towards Ms Vimpany's underlying circumstances that was required in assessing whether or not a reinstatement was impracticable. Beech CC had said:

> [142] … Rather it is upon the practicability of reinstatement.
>
> [143] What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party: ***Perkins v Grace Worldwide (Aust) Pty Ltd*** (1997) 72 IR 186, 191.
>
> [144] Each case must be decided on its own facts, including the nature of the employment concerned …

Particular C

89 This particular is seen to display the Union's advocated necessary standard of 'so bad, poisoned and broken down', as regards evaluating the state of the employment relationship.

90 The standard is suggested by the Union as regards the asserted level of required satisfaction for the Full Bench before rejecting reinstatement as a remedy, concerning the unsatisfactory state of the employment 'relationship' between employer and employee, and inferentially that this was a higher standard than that (erroneously) used by Smith AP and Scott ASC in reaching their negative assessments towards Ms Vimpany's reinstatement or her re-employment.

91 The originating source of this advocated standard, which is not found in s 23A itself, will be discussed. For the present, however, it is enough to observe that the advocated standard is directed at the state of the '**relationship**' between an employer and employee as a factual standard. It is not, significantly in my view, directed at showing up any error of interpretation or construction, as regards asserting the true meaning of the word 'impracticable' as it is used in s 23A.

92 The asserted error of the Full Bench plurality, articulated under particular C, suggests an alleged misdirection of focus - erroneously towards circumstances where there is only a 'mere possibility' that the parties (the employer and the employee) may not be able to work together in the future. That challenge is seen to be directed at [125] - [126] of the joint reasons of Smith AP and Scott ASC. However, as we have now seen in those joint reasons, the phrase 'mere possibility' is not found to be used within those two paragraphs in the plurality's reasons.

93 The Union's argument that the word 'impracticable' was (mis)understood in that way, as regards the verb 'reinstate', does not easily emerge from an overall reading of what are presented as, essentially, rather orthodox factual observations seen within [125] - [126] of the joint reasons, as set out earlier.

94 There was a significant elaboration in the Union's position as regards the contentions of these particulars under a written outline of submissions of 26 July 2016 - to which I next turn.

The Union's written outline of submissions of 27 July 2016

95 The Union's written submissions, under a heading 'The correct construction of s 23A of the Act', provided (page 7) a lengthy extract from statements made to the Legislative Council by the Hon Nicholas Griffiths concerning the *Labour Relations Reform Act 2002* (WA).

96 The submissions refer to an extract from the Hansard for the Legislative Council of 20 June 2002 (pages 11747c - 11774a) (see the Union's submissions, footnote 48). Further references to statements made in the Legislative Council by Mr Griffiths (the Minister in charge of the Bill) follow.

97 Extracts from these statements by the Honourable Minister reveal that his remarks made before the Committee of the Legislative Council are the root source of the phrase I noted used in particular C of the Union's ground of appeal -

concerning the necessary state of the (employment) relationship needing to be so 'bad, poisoned and broken down' that it would be impracticable to order reinstatement. The Hansard material shows the remarks of Mr Griffiths were made during a committee session held in the Legislative Council for the Labour Relations Reform Bill 2002 (WA). They are not from a second reading speech of the Minister concerning that Bill.

98 The Union's written submissions (at par 29) contend:

> Griffiths' statement shows that there is a strong legislative bias towards reinstatement orders being made where an employee has been found to have been unfairly dismissed. The legislative bias adds a **gloss** to the meaning of the word 'impracticable'. The effect of that gloss is that the standard of proof required to demonstrate impracticability is a high one. A finding that reinstatement is impracticable should only occur in the most exceptional of cases. (my emphasis in bold)

99 But the submission of the Union contending for this 'gloss' to be given to the meaning of the word 'impracticable' is almost immediately contradicted in the ensuing paragraphs of the written submissions. The Union's submissions at par 30 say:

> The word 'impracticable' should be given its plain meaning.

100 The Union's written submissions advance to canvass and contend for the use of two dictionary meanings for the word.

101 First, from the Macquarie Concise Dictionary (6th ed), the word 'impracticable' is noted by the Union to be defined as:

> 1. not practicable; that cannot be put into practice with the available means (*an impracticable plan*).
>
> 2. unsuitable for practical use or purposes, as a device, material, etc.

102 A second dictionary meaning invoked at par 32 of the submissions (taken from the Australian Concise Oxford Dictionary (5th ed)) states:

> a. Impossible in practice; and
>
> b. (of a person or thing) unmanageable.

103 On the face of it, the two dictionary definitions of 'impracticable', as they are invoked by the Union, contend towards adopting a natural and ordinary meaning of the word 'impracticable'. This serves to highlight a key point I have already made, namely that the word 'impracticable', by its very nature, necessarily requires an associated underlying factual context in order for the word to achieve, in that given context, a functional utility of meaning.

104 The Union's written submissions at par 33 advance to refer to an extract from a decision of Commissioner O'Sullivan QC, rendered whilst his Honour was sitting as a Commissioner of the Supreme Court in December 1993. This was his decision in ***Concept Nominees Pty Ltd v The Minister for Mines***.[13] His Honour observed, obviously in a different underlying context, that:

> It is clear that the word 'impracticable' is a word of wide import, not limited to the concept of physical impossibility.

105 So much may be readily accepted.

106 Commissioner O'Sullivan QC then referred to ***Jayne v National Coal Board***.[14] In that English case Veale J had observed:

> 'Impracticability' is a conception different from that of 'impossibility'; the latter is absolute, the former introduces at all events some degree of the reason and involves at all events some regard for practice.

107 Commissioner O'Sullivan QC also referred to observations by Maule J in ***Moss v Smith***,[15] to the same end. All that may also be accepted.

108 Obviously, the word 'impracticable' as it is used in s 23A does not mean 'impossible' (using the guidance provided by the dictionary meanings and from the case authorities cited).

109 But a basis for a suggestion by the Union that some 'gloss' needs to be applied to the meaning of the word 'impracticable' as it is used within s 23A, arising out of the content of some remarks of a Minister in the Legislative Council during a committee discussion on a Bill, is a misconceived proposition.

110 An emerging tension between the Union's submissions can now be seen. First, they submit that a legislative 'bias' needs to be added by way of gloss to the meaning of the word 'impracticable', but also, in the next breath, an inconsistent contention that the word 'impracticable' in s 23A carries its plain dictionary meaning. The later position, on my assessment, is correct. The former position is an unsupported assertion that should be dismissed and put to one side as a distracting diversion from the tasks at hand.

111 At this point, I must digress to isolate out of the Union's written submissions some more arguments it has directed against a use in the plurality's reasons of a decision of the former Industrial Relations Court of Australia, ***Perkins v Grace***

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[13] ***Concept Nominees Pty Ltd v The Minister for Mines*** (Unreported, WASC, Library No 930678, 9 December 1993).

[14] ***Jayne v National Coal Board*** [1963] 2 All ER 220 [223].

[15] ***Moss v Smith*** (1850) 19 LJCP 225, 228.

Worldwide (Aust) Pty Ltd.[16] It is necessary to examine that decision in greater detail before looking at the Union's assessment regarding how the decision was misapplied by the Full Bench as regards Ms Vimpany.

Perkins

112 In ***Perkins***, the word 'impracticable' was deployed as a potential 'block' against the ordering of the reinstatement of an unfairly dismissed employee. The Industrial Relations Court of Australia, comprised of Wilcox CJ, Marshall and North JJ, gave extensive consideration to the meaning of the word 'impracticable' which was used in the former *Industrial Relations Act 1988* (Cth) s 170EE(2). Although in different terms to s 23A, the decision in ***Perkins*** provides valuable insights towards the meaning of the word 'impracticable' in an employment law context.

113 Within s 170EE(2) the term 'impracticable' had been used then in the federal industrial relations sphere as a constraint against deploying the remedy of reinstatement for an employee who had been unfairly dismissed.

114 After ***Perkins*** in 1997, the relevant Commonwealth legislative industrial employment legislation altered. The adverb used in the Commonwealth legislation, vis-à-vis the verb 'reinstatement' of an employee, changed. The new word used in the federal sphere became 'inappropriate' instead of 'impracticable': see s 170CH(3) of the *Workplace Relations Act 1996* (Cth) post 31 December 1996 and s 170CH(6).

115 The *Workplace Relations Act* was then replaced. The current Commonwealth legislation, namely s 390(3)(a) of the *Fair Work Act 2009* (Cth), continues to use the term 'inappropriate'.

116 In ***Perkins***, the Industrial Relations Court of Australia discussed a number of cases which had considered the meaning of the word 'impracticable' in the Commonwealth industrial relations legislative context of repercussions of an employee's unfair dismissal. The decisions canvassed included ***Liddell v Lembke (t/a Cheryl's Unisex Salon)***,[17] ***Abbott-Etherington v Houghton Motors Pty Ltd***,[18] ***Patterson v Newcrest Mining Ltd***[19] and ***Nicolson v Heaven & Earth Gallery Pty Ltd***.[20]

117 Wilcox CJ, Marshall and North JJ in ***Perkins*** (189 - 190) referred to and approved of earlier observations made by Wilcox CJ in ***Nicolson***. The Chief Justice said:

> It is important to note that Parliament stopped short of requiring that, for general compensation to be available, reinstatement be impossible. The word 'impracticable' requires and permits the Court to take into account all the circumstances of the case, relating to both the employer and employee and to evaluate the practicality of a reinstatement order in a commonsense way. If a reinstatement order is likely to impose unacceptable problems or embarrassment, or seriously affect productivity, or harmony within the employer's business, it may be 'impracticable' to order reinstatement, notwithstanding that the job remains available [210].

118 Whilst it is clear that the Commonwealth industrial relations legislative regime has sustained considerable changes since 1994, the approved observations in ***Perkins*** are still used in that sphere when addressing whether or not a reinstatement is an appropriate remedy for an unfair dismissal event, in the Commonwealth regime.

119 The continuing relevance of the observations in ***Perkins*** towards the word 'impracticable' was relatively recently reaffirmed by the Full Bench of the Commonwealth Fair Work Commission in ***Nguyen & Le v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter***.[21] ***Nguyen*** was a decision of Ross J (President), Gostencnik DP and Wilson C, delivered in October 2014.

120 Shortly stated, issues over whether or not a reinstatement or, indeed, a re-employment is impracticable or otherwise, in the underlying circumstances of a particular employee's unfair dismissal from their employment are still to be answered in the Commonwealth industrial relations sphere as they are in this state's industrial relations regime, by the court or tribunal undertaking a bespoken evaluation of the underlying facts as they manifest for each particular employment dismissal situation.

121 As was observed in ***Perkins***:

> Each case must be decided on its own merits … In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case [191].

122 With those observations concerning the status and contemporary relevance of ***Perkins***, I can return to the balance of the Union's written submissions.

The Union's written submissions as to a misapplication of *Perkins* by the Full Bench plurality

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[16] ***Perkins v Grace Worldwide (Aust) Pty Ltd*** (1997) 72 IR 186.

[17] ***Liddell v Lembke (t/a Cheryl's Unisex Salon)*** (1994) 1 IRCR 466; (1994) 56 IR 447, 466 (Wilcox CJ, Keely & Gray JJ).

[18] ***Abbott-Etherington v Houghton Motors Pty Ltd*** (1995) 63 IR 394 (Marshall J).

[19] ***Patterson v Newcrest Mining Ltd*** (1996) 68 IR 419, 420 (Wilcox CJ).

[20] ***Nicolson v Heaven & Earth Gallery Pty Ltd*** (1994) 1 IRCR 199; (1994) 57 IR 50 (Wilcox CJ, von Doussa & North JJ).

[21] ***Nguyen & Le v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter*** [2014] FWCFB 7198.

123 The Union's written submissions advance to contend:

> 38. Smith AP and Scott ASC in paragraph [106] of their reasons for decision, set out the test that they believe the WAIRC should apply when determining whether reinstatement was impracticable where the employer had raised the issue of trust and confidence. The majority imported that test from the decision of the full bench of the Fair Work Commission in ***Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter*** (***Nguyen***).
>
> 39. The Full Bench of the Fair Work Commission in ***Nguyen*** set out their test for trust and confidence in circumstances where the statutory context required them to consider whether reinstatement was 'inappropriate'.

124 The Union's contention (under par 38 above) is that [106] of the joint reasons displays the importation of a test that was used by the Full Bench of the Fair Work Commission. Footnote 54 to the Union's submissions asserts: 'Compare paragraphs [105] and [106] of the reasons for decision'. But as has now been seen from the text of [106] of the joint reasons set out earlier, what was said was expressed in careful, elaborate and comprehensive terms. The sub-criteria in [106](a) - (f) present as a body of carefully assembled principles, directed at an exercise of a remedial discretion - whilst evaluating whether or not to order reinstatement of an unfairly dismissed claimant. Where one presenting circumstance is an assertion by the employer that there has been a disqualifying loss of trust and confidence in the unfairly dismissed employee, the discretion as regards the appropriate remedy must be exercised in a principled fashion and with care.

125 Scrutiny of the sub-principles identified at [106](a) - (f) reveals a level of similarity as between [106](c), when contrasted to the first bullet point from a quotation in the joint reasons from ***Nguyen*** - seen at the immediately preceding paragraph, [105], in the joint reasons. But that was not at all inappropriate. The proposition sourced from ***Nguyen*** is not out of place. The Union's wider proposition of 'wholesale importation' as contended for is not established if the full content of [106] and its sub-paragraphs is read fairly.

126 Overall, the multiple principles collected and expressed under [106] of the joint reasons, by my assessment, display a considered and accurate synthesis by Smith AP and Scott ASC of their preceding extensive consideration of case authority and precedent. By my assessment, [106] appropriately and accurately collects the legal principles concerning a discretionary deployment of the statutory power to reinstate an unfairly dismissed employee - in circumstances where the requisite future level of trust and confidence in the employee in a resumed employment relationship is a relevant issue bearing upon the overall exercise of the remedial power in context.

127 The six sub-criteria found at [106] of the joint reasons are seen to be a synthesis of principles extracted from the multiple case authorities canvassed between [79] and [105] of the joint reasons. Numerous authorities were earlier discussed, including ***Perkins*** and ***Nguyen***. But there was no confusion or conflation of redundant case authority in the joint reasons, as would appear to be suggested by the Union's written submissions. ***Nguyen*** was decided in 2014, in an evolved environment of Commonwealth industrial relations laws (where, as mentioned, the word 'inappropriate' is now used in the current legislation instead of the word 'impracticable' as the relevant brake against a utilisation of the remedy of reinstatement). That changed Commonwealth legislative environment was not a circumstance overlooked by Smith AP and Scott ASC. At [94] they clearly said '[t]he test for reinstatement at that time in the federal jurisdiction pursuant to the *Industrial Relations Act 1988* (Cth) was practicability'.

128 Notwithstanding the significant legislative changes in the Commonwealth industrial legislative sphere, ***Nguyen*** in 2014 still acknowledged the continuing relevance of the discussion undertaken concerning the impracticability of a potential reinstatement, as had been undertaken by the Industrial Relations Court of Australia in ***Perkins***, applying Wilcox CJ's observations from ***Nicolson***.

129 In ***Nguyen***, the Fair Work Commission (Full Bench) said:

> As the Full Bench of the AIRC observed in ***Australian Meat Holdings Pty Ltd v McLauchlan*** (1998) 84 IR 1 although ***Perkins*** was decided under the IR Act, the Court's observations reproduced above [concerning the effect of a loss of trust and confidence on the question of the practicability of reinstatement at page 191 - 192 of ***Perkins***] remain relevant to the question of whether reinstatement is appropriate in a particular case [22].

130 It may now be better appreciated that the references to ***Perkins*** and to ***Nguyen*** in the Full Bench plurality's reasons in [106] were not deployed out of place. They were not inappropriate, viewed in an overall context of the extensive synthesis of principle that was assembled at that point by the joint reasons.

Other challenges to the plurality's reasons

131 The Union's written submissions at pars 40 to 44 descend to an attempted factual dissection of the joint reasons, particularly concerning [125] and [126]. Some arguments raised appeared to be directed at expressing an overall dissatisfaction with the end outcome, as regards not ordering reinstatement and re-employment, rather than identifying error in the construction or interpretation of the meaning of the word 'impracticable' as that term is used in s 23A of the IR Act by the joint reasons. This challenge by the Union culminates as:

> 45. The consequence of Smith AP and Scott ASC applying the test from ***Nguyen*** (which was framed in the context of the word 'inappropriate') was that it lowered the otherwise high standard of proof that was required by the word 'impracticable' in s 23A of the Act.
>
> 46. The majority erred in its interpretation of the word 'impracticable'. That error caused them to find that an award of reinstatement was impracticable despite the relationship between the

> respondent and Ms Vimpany not having reached the threshold of 'so bad, poisoned and broken down that it would not be "practicable" to order reinstatement'. (emphasis added)
>
> 47. There was nothing unusual about the minority reasoning of Beech CC. Beech CC obviously appreciated that the evidentiary threshold to establish inappropriateness was higher than what was set by the majority through their application of the test in ***Nguyen***.

132 During verbal submissions by the Union's counsel at the appeal, an asserted error in the construction or interpretation towards the word 'impracticable' in the joint reasons emerged. As articulated, the challenge is seen as directed at the first bullet point of the extract from ***Nguyen*** (being the first bullet point cited in [105] of the joint reasons) and its deployment under the sub-criteria 106(c) in the joint reasons, where this had been stated:

> Trust and confidence can be a relevant factor to consider when considering whether reinstatement is impracticable. Whether it is a relevant factor will depend upon the factual circumstances of a particular matter. Trust and confidence is not the sole criterion or even a necessary one in determining whether reinstatement is impracticable.

133 This principle may be accepted to bear a close resemblance to the first bullet point proposition cited from ***Nguyen***. ***Nguyen***, in turn, linked this principle back to ***Tenix Defence Pty Ltd v Galea***[22] (see footnote 31 of ***Nguyen***).

134 But the Full Bench of the Fair Work Commission in ***Nguyen*** had crafted that proposition from a number of sources. In particular, observations upon a need for a level of trust and confidence in the employee, when measuring the practicability of reinstatement as a possible remedy, may be seen at [21] of ***Nguyen*** which sourced back to the decision in ***Perkins***. That was when s 170EE(2) of the *Industrial Relations Act 1988* (Cth) did use the word 'impracticable'. It is not a controversial proposition that the work done by that word as regards its relationship with the verb 'reinstatement' (or with 're-employment') should be assessed in the environment of the underlying presenting factual circumstances of a particular case.

135 Proposition [106](c) of the stated reasons of Smith AP and Scott ASC presents only as one sub-element, manifesting amongst the other propositions assembled within [106] of the joint reasons. As formulated, it is, in my assessment, entirely orthodox. So much is, in effect, acknowledged by the dissenting conclusion of Beech CC at [132] - agreeing with the plurality's reasons (save for the finding that Commissioner Harrison had failed to have regard to material matters).

136 In other words, the formulation of principles as was ultimately identified at [106](a) - (i) of the joint reasons was, in effect, unanimous by that Full Bench. The only controversial point for that Full Bench was an 'application' of the uncontroversially assembled principles to the underlying facts. That led Beech CC to his different conclusion. Reaching his end position, however, Beech CC said:

> Whether that standard is reached in any particular case must depend upon the circumstances of the particular case [143].

Re-employment submission

137 A last aspect of the Union's written submissions was directed towards the alternative remedy of re-employment to another position. This is linked back to particular D of the ground of the appeal. The challenge is directed against the content of [129] of the joint reasons - where the discretion of Smith AP and Scott ASC was re-exercised, as regards the second tier potential remedy of re-employment, once the first tier reinstatement remedy had been assessed as impracticable.

138 However, the content of the Union's arguments directed against considerations identified in the joint reasons in this respect, only display yet again what is, on analysis, the bare grievance against the application of law to facts, against the end outcome - rather than pointing out any real mistake or error of law in the reasons, arising from a misunderstanding of the term 'impracticable' within s 23A.

139 It remains to evaluate what were somewhat differently directed extra verbal submissions by counsel for the Union only advanced at the appeal hearing.

Further arguments by the Union's counsel at the hearing

140 Mr Fogliani, counsel for the Union, commenced his argument by stating that if the Full Bench was not assessed by the Court to have erred in its interpretation of the word 'impracticable' within s 23A, that this would not be the end of the matter. Mr Fogliani contended that there remained two further challenges addressing a distinct issue of construction, as he termed it.

141 This was a curious submission. As framed, s 90(1)(b) of the IR Act in relation to an appellant needing to show an alleged error as regards statute law does not, on its face, draw a distinction as between interpretation and the construction of legislation. In other words, the qualifying criterion to engage the appellate jurisdiction of the Industrial Relations Court of Australia is to show an error as regards the meaning of the legislation by the Full Bench. Mr Fogliani's submission to the effect that the concept of a statutory 'interpretation' is a process somehow said to be conceptually different to the concept of 'construction', remained an undeveloped assertion. There is no such distinction, in my view, as regards ascertaining a true legislative meaning.

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[22] ***Tenix Defence Pty Ltd v Galea*** (Unreported, AIRC, Library No PR928494, 11 March 2003) [7] - [8].

142 The next argument by Mr Fogliani was that the concept of trust and confidence (in the employment relationship) did not fall at all within the ambit of the term 'impracticability', as that term is used within s 23A (see ts 3). Plainly, by reference to many case authorities canvassed to date, this submission is also misconceived.

143 Mr Fogliani's third argument, put as his lesser alternative, was that if the notion of trust and confidence in an employment relationship were relevant to an assessment of impracticability, nevertheless the joint reasons of Smith AP and Scott ASC erred in relation to how they had evaluated 'the meaning of "trust and confidence"'.

144 This lesser preferred argument of counsel was tied to the assistance Mr Fogliani sought to gather from the ordinary meaning of the word 'impracticable', from the two dictionary definitions earlier mentioned - but then, also coupled by him to the extracts from the committee discussion in the Legislative Council collected in the Union's written submissions, which I have now discussed.

145 Mr Fogliani submitted (ts 4) that the Hansard material 'helps confirm the ordinary meaning of the word "impracticable"'. As now seen, that submission is immediately inconsistent with par 29 of the Union's written submissions, advocating for a contended 'gloss' to the meaning of that word.

146 At all events, I would assess the submitted Legislative Council committee discussion material concerning the Labour Relations Reform Bill 2002 (WA), to be of no assistance in the present task. In ***Attorney General for Western Australia v Her Honour Judge Schoombee***,[23] Martin CJ, with whom Newnes and Murphy JJA agreed, referred to observations of Gleeson CJ in ***Singh v Commonwealth of Australia***,[24] to this effect:

> [C]are must be taken to avoid scrutiny of parliamentary debates degenerating into 'an exercise in psychoanalysis of the individuals involved in the legislative process'.

Martin CJ continued:

> Although extrinsic materials which have been carefully considered and prepared by those involved in the drafting process (such as explanatory memoranda or the Second Reading speech) might be considered more reliable guides to legislative intention in the case of ambiguity than casual remarks made on the spur of the moment during parliamentary debate that may have a political imperative, there are nevertheless risks in placing too much reliance upon extrinsic materials of this kind: see ***Commissioner of Taxation v Anstis*** [2010] HCA 40; (2010) 241 CLR 443.

And:

> When regard is had to the materials relating to the passage of this legislation through Parliament, in this case, like many others, there are conflicting and contradictory indications which might be drawn from different portions of the materials …

147 The observations made towards the materials submitted in ***Attorney General for Western Australia v Her Honour Judge Schoombee*** (concerning the *Criminal Injuries Compensation Act 2003* (WA)), might equally have been directed towards the content of the 31 submitted pages of committee debate from the Legislative Council (20 June 2002, 11747c - 11774a) to which we are directed under Mr Fogliani's submissions. They are an equally unhelpful distraction.

Determination

148 The plain, ordinary meaning of the word 'impracticable', used in its present context within s 23A(4) and s 23A(6) of the IR Act, is necessarily tied to the underlying contextual circumstances of fact concerning Ms Vimpany's employment in the present case. This requires a bespoken factual evaluation regarding the assessed impracticability in overall context of Ms Vimpany's possible reinstatement, or her possible re-employment to another position with the PTA as a matter of discretion as to remedy. That was the nature of the exercise conducted by all members of the Full Bench. The observations of the Industrial Relations Court of Australia in ***Perkins*** concerning the meaning of the word 'impracticable' used within the framework of the then *Industrial Relations Act 1988* (Cth) remain instructive. The observations of Wilcox CJ from ***Nicolson*** (210) as approved by ***Perkins***, call for an evaluation as to the practicability of a reinstatement order in a 'common sense way'. The overwhelming logic of that approach has not diminished in 2017.

149 Mr Fogliani's point of construction sought to submit, as I understood his argument, that one of the sub-principles within [106] of the joint reasons, namely the proposition in [106](c), was wrong. This was said to follow on the basis that trust and confidence could never be a relevant factor to consider in evaluating whether reinstatement was impracticable. The submission must be rejected as untenable. I have already referred to the history of the derivation for the content of the proposition and a misconceived argument as to its importation from ***Nguyen***.

150 But in developing these challenges, Mr Fogliani then submitted:

> I suppose, the discussion or issue about 'impracticability' just to 'trust and confidence', where, as your Honour said earlier, it requires a broad consideration of everything, and we say that 'trust and confidence' shouldn't be part of that consideration, but if it is, based on previous decisions from different jurisdictions, well, it shouldn't have been the sole criterion of what the Full Bench was considering.
>
> Now, in this case that's all they considered within 'impracticability'. They only looked at 'trust and confidence' … By doing that, they misunderstood what the test required them to do, which is the broader consideration about, overall, was it impracticable to reinstate or re-employ Ms Vimpany (ts 8).

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[23] ***Attorney General for Western Australia v Her Honour Judge Schoombee*** [2012] WASCA 29.

[24] ***Singh v Commonwealth of Australia*** [2004] HCA 43; (2004) 222 CLR 322 [19].

151 Mr Fogliani's submission misrepresents the formulation of legal principles assembled under [106] in the joint reasons (with which Beech CC, albeit dissenting, had agreed). It is simply not open to read [106](c) of the joint reasons as somehow suggesting that the issue of a required level of trust and confidence in an employee by the employer, had been assessed by the Full Bench as the 'sole' factor in the evaluation towards whether a reinstatement was impracticable or not, in particular circumstances. In fact, [106](c), read fairly, states exactly the opposite to that proposition.

Commonwealth Bank of Australia v Barker

152 A further verbal submission advanced in the alternative by Mr Fogliani for the Union, was that if an employer's level of (subsisting) trust and confidence in the employee was accepted to be a live consideration, there had been a misunderstanding by the Full Bench of the concept.

153 The submission was supported by the invocation of a recent decision of the High Court of Australia, ***Commonwealth Bank of Australia v Barker***.[25] That decision saw the High Court's unanimous rejection of a contended implied term argued as being found in all employment contracts, as a matter of law. But the unanimously rejected implied term in ***Barker*** was to the effect:

> [N]either party will, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between them.

154 See also [15] of the reasons of French CJ, Bell and Keane JJ (182).

155 The Union's submission concerning ***Barker*** only emerged during Mr Fogliani's argument. He submitted:

> The problem with that finding is it undermines a key plank of what was said by the Full Court in ***Perkins***, which is saying, 'Well, it is an implied term because it's necessary in the employment relationship'; but the High Court pulling the plank out, saying, 'Well, no, we don't think that trust and confidence is necessary to make the employment relationship work', that totally undermines ***Perkins***. And while there's a big chain of authority that referred to ***Perkins*** right up to the High Court's decision in ***Commonwealth Bank v Barker***, since that decision it hasn't been reconsidered by a court whether or not trust and confidence as a relationship issue is something that's necessary.
>
> So this would be the first time since ***Commonwealth Bank v Barker*** where a court is going to have to consider whether or not trust and confidence is an element of the relationship, not of the contract, actually exists. Now, as we've seen from ***Nguyen***, ***Perkins*** has lived on in the Fair Work Commission, that we say that's not a court, so this court is not bound by that decision. The Fair Work Commission is in the administrative arm of government, not in the hierarchy of courts of the Commonwealth (ts 9).

156 But, with respect, the submission displays a misunderstanding of the ***Barker*** decision. In the first place, the nature of the contractual term sought to be implied as a matter of law in ***Barker*** was not, as was suggested, inconsistent with a recognition of an employee's duty of trust and confidence owed to an employer in the employment relationship.

157 The rejected implied term in ***Barker*** contended for what was an implied term of a wider and more mutual dimension. Kiefel J (as she was then) explained the distinction in ***Barker***:

> It is necessary in the first place to distinguish between an employee's duty of trust and confidence, which the law has for a long time implied in contracts of employment, and the term recognised in ***Malik***. The former is not concerned with the obligations on the part of an employer, but with obligations of fidelity on the part of an employee to his or her employer, breach of which may justify dismissal. The term of trust and confidence recognised in ***Malik***, on the other hand, imposes obligations on an employer not to engage in 'trust-destroying conduct' which may sound in damages if breached [63].

158 Her Honour then referred to an earlier decision in the High Court, ***Blyth Chemicals Ltd v Bushnell***,[26] observing:

> [T]he Court reiterated what had been said in ***Shepherd v Felt & Textiles of Australia Ltd*** (1931) 45 CLR 359, 370, 372 and 378 concerning the maintenance of confidence between employer and employee. Dixon and McTiernan JJ said that any conduct on the part of the employee which is incompatible with his duty, involves conflict between his interests and that duty or 'is destructive of the necessary confidence between employer and employee' is a ground of dismissal [65].

Kiefel J observed in ***Barker***:

> The duty of trust and confidence of which these cases speak is not some abstract concept. It refers to conduct, on the part of an employee, which is contrary to the interests of the employer and serious enough to have the effect that the employer could not reasonably be expected to have confidence in the employee. The duty reflects an essential aspect of the relationship between employer and employee. While trust and confidence is maintained, the relationship endures. In that sense, the employee's duty may be said to be directed to the maintenance of the relationship. Yet the law recognises that, where a point of no confidence is reached, it would be intolerable for the employer to continue with the relationship. In such a circumstance, termination of the employment is justified [66].

Her Honour continued:

> No decision of this Court has dealt with the question whether the term of trust and confidence recognised in ***Malik*** should be implied in employment contracts in Australia [67].

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[25] ***Commonwealth Bank of Australia v Barker*** [2014] HCA 32; (2014) 253 CLR 169.

[26] ***Blyth Chemicals Ltd v Bushnell*** [1933] HCA 8; (1933) 49 CLR 66, 72 - 73, 81 - 82.

Her Honour concluded:

> The words adopted in ***Malik*** as to the formulation of the terms of trust and confidence, to be applied in connection with the duties of employers, did not have their origin in decisions of the ordinary courts, but rather those of employment tribunals exercising statutory powers with respect to unfair dismissals [68].

159 The same fundamental distinction between the different terms is apparent in the joint reasons of French CJ, Bell and Keane JJ at [30] and [41].

160 All members of the High Court in ***Barker*** had rejected a contended implied term as had been propounded by reference to the House of Lords decision in ***Malik v Bank of Credit & Commerce International SA (in liq)***.[27]

161 Consequently, the implicit premise of Mr Fogliani's verbal submission towards, in effect, the 'game changing' significance of the High Court's rejection in ***Barker*** of that mutual implied term of trust and confidence, is misplaced. Nothing has relevantly changed. ***Barker*** has not detracted from any established underlying principles of employment law. There is nothing in ***Barker*** to suggest that the observations in ***Perkins***, as recently used by the Full Bench of the Fair Work Commission in ***Nguyen*** (see [22]) towards whether a non-reinstatement of an employee on the basis of a perceived lack of sufficient trust and confidence held by the employer in that unfairly dismissed employee, against a reinstatement or re-employment assessed as impracticable or not in a particular case, have lost any contemporary relevance.

Conclusion

162 Prior decisions in this court have canvassed the confined jurisdictional scope of s 90(1)(b) of the IR Act. In ***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers***,[28] Le Miere J discussed the limited ambit of the provision. His Honour had discussed prior case authority. His Honour observed:

> [109] Appealable questions of law may arise from the reasoning of the Full Bench on the way to its ultimate conclusion. If the Full Bench were, for example, to misinterpret the provisions of the Act, defining 'employee' or 'employer' in the course of deciding that Mr Brandis was not employed under a contract of employment with BHPB that would be an error of law in the construction or interpretation of the Act and would be appealable under s 90(1)(b).
>
> [110] An appeal cannot be made, however, on the ground that there has been an error in the construction or interpretation of the Act where the Full Bench has merely applied law which it has correctly understood to the facts of an individual case. It is for the Full Bench to weigh the relevant facts in the light of the applicable law.

163 In ***Landsheer v Morris Corporation (WA) Pty Ltd***,[29] I applied Le Miere J's observation at [53], concluding at [83] in those reasons:

> What unfolded before the Full Bench, essentially, saw an application of uncontroversial contractual law principles to the particular presenting facts before the Industrial Commissioner and then before the Full Bench.

Le Miere J agreed with those observations (see [32]). Buss J reached a similar conclusion (see [26] and [27] of his Honour's reasons).

164 I note as well the same constraining sentiments against jurisdiction were applied in a more recent decision ***Public Transport Authority for Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch***.[30]

165 Upon the present application, it is contended by the Union that the majority of the Full Bench erred by a construction or interpretation of the word 'impracticable' in s 23A and thereby erred in law. However, the close review of the majority's reasons now undertaken shows that there was no such misunderstanding or misinterpretation of the term 'impracticable', as that word is used within s 23A(4) or s 23A(6) of the IR Act.

166 What unfolded concerning Ms Vimpany before the Full Bench only reflects a day-to-day application of statute law, correctly understood and identified - then applied to Ms Vimpany's unique underlying facts. That is apparent from the joint reasons of Smith AP and Scott ASC and the reasons of Beech CC. The 2:1 difference of views in the Full Bench is hardly unusual given the word 'impracticable', as used in s 23A(4) and s 23A(6), is essentially an adverb requiring factual assessments and evaluations to be rendered in context, concerning a possible reinstatement or possible re-employment. The task commands the application of s 23A to an underlying assembly of diverse facts as they present in each unfair dismissal situation. This is a case specific exercise. The word 'impracticable' is not defined by the IR Act. It carries a natural and ordinary meaning from within the overall context of its deployment within s 23A and then, in the overall framework of pt 2 div 2 of the IR Act as a whole.

167 As now seen, the members of the Full Bench rendered explicit observations towards the inherently factual nature of the remedial exercise at hand concerning what was an exercise of their discretion towards selecting the appropriate remedy in the particular circumstances of a scenario of wrongful dismissal of that employee, Ms Vimpany.

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[27] ***Malik v Bank of Credit & Commerce International SA (in liq)*** [1998] AC 20; 3 All ER 1.

[28] ***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers*** [2006] WASCA 49; (2006) 151 IR 361.

[29] ***Landsheer v Morris Corporation (WA) Pty Ltd*** [2014] WASCA 186.

[30] ***Public Transport Authority for Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch*** [2015] WASCA 150 (S) [10], [13], [20].

168 The jurisdictional threshold to advance a challenge in this court against the majority decision of the Full Bench has not been surmounted. Consequently, the Union's appeal must be dismissed.

2017 WAIRC 00258

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 18 OF 2015

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPELLANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	BUSS J
	MURPHY J
	KENNETH MARTIN J
DATE	TUESDAY, 2 MAY 2017
FILE NO/S	IAC 1 OF 2016
CITATION NO.	2017 WAIRC 00258

Result	Appeal dismissed
Representation	
Appellant	Mr C Fogliani (counsel), W.G. McNally Jones Staff Lawyers
Respondent	Mr A L Mason (counsel), State Solicitor's Office

Order

It is ordered that:

The appeal is dismissed.

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

FULL BENCH—Appeals against decision of Commission—

2017 WAIRC 00262

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 33 OF 2016 GIVEN ON 16 NOVEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2017 WAIRC 00262
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER P E SCOTT
		COMMISSIONER T EMMANUEL
HEARD	**:**	MONDAY, 10 APRIL 2017
DELIVERED	**:**	FRIDAY, 12 MAY 2017
FILE NO.	**:**	FBA 9 OF 2016
BETWEEN	**:**	MATTHEW CROWLEY
		Appellant
		AND
		CHIEF EXECUTIVE OFFICER, DEPARTMENT OF COMMERCE
		Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Acting Senior Commissioner S J Kenner**
Citation	**:**	**[2016] WAIRC 00883; (2016) 96 WAIG 1651**
File No.	**:**	**APPL 33 of 2016**

CatchWords	:	Industrial Law (WA) - Referral of a decision made under *Public Sector (Redeployment and Redundancy) Regulations 2014* (WA) dismissed for want of jurisdiction as applicant not an employee at time the referral made and no standing to refer a decision where employee is terminated - Referral under s 29(1)(b)(ii) also dismissed for want of jurisdiction of a claim for money owed under a voluntary severance agreement on grounds s 80E(1) of *Industrial Relations Act 1979* (WA) confers exclusive jurisdiction in respect of industrial matters relating to a government officer - Principles of statutory construction considered - *expressum facit cessare tacitum* principle considered - When regard is had to s 101 of *Public Sector Management Act 1994* (WA) termination of employment in s 95(6) of the *Public Sector Management Act* is to be construed as including termination by employee - Jurisdiction of Public Service Arbitrator applies to a former government officer - Jurisdiction conferred by s 95 and s 96A of *Public Sector Management Act* ousts a referral made by an employee to invoke the general jurisdiction conferred by s 23(1) of the *Industrial Relations Act.*
Legislation	:	*Industrial Relations Act 1979* (WA) s 7(1), s 7(1a), div 2 of pt II, s 22A, s 23, s 23(1), s 23A, s 29(1)(a), s 29(1)(b)(ii), s 49, div 2 of pt IIA s 80C, s 80C(2), s 80E, s 80E(1), s 80E(2)(a), s 80E(6), s 80E(7), s 80E(7)(a), s 80F(2) *Public Sector Management Act 1994* (WA) s 6(2), s 29(1)(h), pt 6, s 94, s 94(1A), s 95A, s 95B, s 95, s 95(2), s 95(2)(b), s 95(5), s 95(6), s 96A, s 96A(2), s 96A(2)(b), s 96A(5), s 101, s 101(1), s 101(1)(b), s 101(2), s 101(2)(b), *Public Sector (Redeployment and Redundancy) Regulations 2014* (WA) pt 3, reg 13, reg 13(1)(a), reg 13(4), reg 16, reg 16(5), *Industrial Legislation Amendment Act 1995* (WA) s 49, *Labour Relations Reform Act 2002* (WA) s 185, *Conveyancing Act 1919* (NSW) s 88B *Strata Schemes Management Act 1996* (NSW) s 43 *Sentence Administration Act 1995* (WA) s 3 *Workforce Reform Act 2014* (WA) s 5, s 6, s 7, s 14, s 15
Result	:	Appeal dismissed
Representation:		
Appellant	:	No appearance
Respondent	:	Mr R Bathurst (of counsel)
Solicitors:		
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia [1932] HCA 9; (1932) 47 CLR 1

Chief Executive Officer, Department of Agriculture and Food v Ward [2008] WAIRC 00079; (2008) 88 WAIG 156

Director General Department of Justice v Civil Service Association of Western Australia Inc [2005] WASCA 244; (2005) 149 IR 160; (2005) 86 WAIG 231

McGillivray v Piper, Chief Executive Officer of the Ministry of Justice [2000] WASCA 245

Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom [2006] HCA 50; (2006) 228 CLR 566

Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32; (2011) 244 CLR 144

Re Wilcox; Ex parte Venture Industries Pty Ltd (1996) 66 FCR 511

The Civil Service Association of Western Australia Inc v Director-General, Department for Child Protection [2010] WAIRC 00206; (2010) 90 WAIG 214

The Director General of the Department of Justice v The Civil Service Association of Western Australia (Inc) [2004] WAIRC 13765; (2004) 85 WAIG 629

White v Betalli [2007] NSWCA 243

Case(s) also cited:

Australian, Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 00451 (4 June 20145)

Automatic Fire Sprinklers Pty Ltd v Watson 72 CLR 435

Bellamy v Chairman, Public Service Board (1986) 66 WAIG 1579

Commonwealth Bank of Australia v Garuda Aviation Pty Ltd [2013] WASCA 61; (2013) 45 WAR 92

Conway-Cook v Town of Kwinana [2001] WASCA 250

In De Braekt v Chief Executive Officer of the Department of Productivity and Labour Relations [2000] WAIRC 00162 (30 June 2000)

Matthews v Cool or Cosy Pty Ltd (2004) 84 WAIG 2152

Nelson v Public Transport Authority of Western Australia (2016) 96 WAIG 1567

The Civil Service Association of Western Australia Inc v Western Australian College of Teaching (2011) 91 WAIG 2391

Reasons for Decision

SMITH AP:

Background

1 This is an appeal instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the IR Act). The appeal is against an order made by the Commission on 16 November 2016 dismissing for want of jurisdiction an application ([2016] WAIRC 00883; (2016) 96 WAIG 1651):

(a) for a referral of a decision made under regulations referred to in s 94 or s 95A of the *Public Sector Management Act 1994* (WA) (the PSM Act) pursuant to s 95 and s 96A of the PSM Act; and

(b) to refer a claim pursuant to s 29(1)(b)(ii) of the IR Act of a contractual benefit, being an amount owed under a voluntary severance agreement and a claim for unpaid salary from 17 May 2016.

2 The appellant did not appear at the hearing of the appeal. He did, however, file a brief outline of written submissions in which he made it clear that he relied not only on the matters outlined but also on written submissions that he filed during the course of the hearing at first instance. On the day of the appeal, shortly before the hearing of the appeal was to commence, the appellant sent an email to the chambers of Acting President Smith. In an email directed to the associate he stated that he had other commitments that morning and would not be attending the hearing. He also advised he did not require an adjournment and was content to rely on his written submissions. The non-appearance of the appellant at his own appeal, who is counsel and practises as a barrister in Western Australia, was surprising and could be regarded as conduct lacking in courtesy. The respondent, however, did appear at the hearing of the appeal by counsel and the Full Bench proceeded to hear the respondent's arguments in the absence of the appellant.

3 The appellant, Mr Crowley, was employed by the respondent initially on a fixed term contract in 2009 and was permanently appointed to a position as General Counsel in the Office of the Director General, Department of Commerce on 13 June 2011.

4 In early February 2016, the appellant expressed an interest in taking a voluntary redundancy as it had been determined that his substantive position was to be abolished. There was some discussion between the parties about the content of his severance package. The appellant was of the view that his package should include an attraction and retention incentive payment that he had been receiving in an acting position. Representatives of the Department of Commerce considered this request and took the view that the incentive payment was not to be included in the appellant's severance package. In view of this, the appellant was asked whether he wished to proceed with a voluntary severance to which he replied that he did.

5 It was a condition of the appellant's acceptance of a voluntary severance offer that he resign from his employment with the Department of Commerce. The appellant accepted the offer of voluntary severance on 11 May 2016 and elected to resign, effective on 17 May 2016.

6 On 23 June 2016, the appellant filed an application for a referral of a decision made under the *Public Sector (Redeployment and Redundancy) Regulations 2014* (WA) (the Redeployment and Redundancy Regulations) which are regulations referred to in s 94 and s 95A of the PSM Act. In his application, the appellant claimed that the severance amount did not include 'an allowance for temporarily undertaking duties other than those of the substantive office, post or position of the relevant employee that has been paid continuously to the employee for the preceding 12 months' as required by reg 13(1)(a) of the Redeployment and Redundancy Regulations. The amount claimed by the appellant was $22,330.64, being a 20% attraction and retention bonus.

7 In an amended application dated 12 October 2016, the appellant claimed in the alternative that $22,330.64 was an amount that he was entitled to under his contract of employment for which he had standing to make an application pursuant to s 29(1)(b)(ii) of the IR Act in relation to which the Commission has independent jurisdiction to hear and determine pursuant to the power conferred by s 23 of the IR Act.

8 Thus, the appellant claimed he had standing to refer his claim for payment of attraction and retention bonus to the Commission either by a referral pursuant to s 94 or s 95A of the PSM Act or alternatively by a referral pursuant to s 29(1)(b)(ii) of the IR Act.

9 In the appellant's amended grounds of application, he also claimed that despite the irrevocable resignation he tendered as part of his acceptance of the voluntary severance offer, he remained employed and was entitled to his salary from 17 May 2016 up to the time of the hearing at first instance. In support of this claim he sought to argue that non-compliance with the Redeployment and Redundancy Regulations by the Department of Commerce rendered the termination of his employment a nullity.

10 Acting Senior Commissioner Kenner found the appellant had no standing to refer his claim under either s 95 or s 96A of the PSM Act. He found that:

(a) for a referral of a matter to the Commission under s 95(2)(b) of the PSM Act to be valid the jurisdictional fact that needs to be established is that the person aggrieved by the decision must be in an extant employment relationship with their employer at the time of the referral. As the appellant's employment had ceased on 17 May 2016, the appellant had no standing to refer the matter to the Commission. Furthermore, s 95(6) of the PSM Act denied standing to the appellant to refer the matter as the Commission does not have jurisdiction in respect of the purported referral of a s 94 decision, in circumstances where the employment of the employee concerned had already come to an end at the time of the referral; and

(b) section 96A(2)(b) of the PSM Act only extends to employees who have been 'registered' under the Redeployment and Redundancy Regulations, as that is defined in s 94(1A) of the PSM Act. As it was common ground that the appellant was not a registered employee, s 96A had no application to the circumstances of his case.

11 Acting Senior Commissioner Kenner also found that the appellant's claims were beyond the jurisdiction of the Commission to hear and determine under s 23 of the IR Act. In particular, he found that as the appellant was a 'government officer', all industrial matters in connection with such an officer fall exclusively within the jurisdiction of the Public Service Arbitrator, as is provided by s 80E(1) of the IR Act. The learned Acting Senior Commissioner also observed that the only exception to this general exclusive jurisdiction is claims of referrals made under s 95 and s 96A of the PSM Act. This construction was made clear by the terms of s 80E(7) which provides that despite s 80E(1) dealing with the exclusive jurisdiction of the Public Service Arbitrator in respect of industrial matters relating to a government officer, a Public Service Arbitrator does not have jurisdiction to deal with the matters of the kind sought to be raised by the appellant.

12 For these reasons, Kenner ASC found the appellant's claims in respect of the attraction and retention incentive and ongoing salary are beyond the Commission's jurisdiction under s 23 of the IR Act.

Grounds of appeal

13 The appellant's grounds of appeal are as follows:

1. The Commission erred in law in dismissing the claim advanced under s.29(1)(b)(ii) with s.23 of the *Industrial Relations Act 1979 (WA)* for want of jurisdiction by finding that the Public Service Arbitrator had 'exclusive jurisdiction' under s.80C [sic] of that Act on the basis that the Applicant was a 'government officer', when the Applicant was not a 'government officer' at the material time.

2. The Commission erred in law in its construction of 'termination' in subsection 95(2)(b) of the *Industrial Relations Act 1979 (WA)* [sic] as it applied to the Applicant's resignation under Part 3 of the *Public Sector (Redeployment and Redundancy) Regulations 2014 (WA)*.

Ground 2 of the appeal - jurisdiction of the Commission to hear and determine the appellant's referral of decision made under regulations referred to in s 94 of the PSM Act - Conclusion

14 Although ground 2 refers to s 95(2)(b) of the IR Act, it is clear from the submissions made by the parties that the appellant's ground is raised in relation to the construction of the term 'termination' in s 95(2)(b) of the PSM Act.

15 Section 95 of the PSM Act provides:

(1) In this section —

section 94 decision means a decision made or purported to be made under regulations referred to in section 94 (other than a decision which is a lawful order by virtue of section 94(4)).

(2) A section 94 decision may be referred to the Industrial Commission —

(a) under the *Industrial Relations Act 1979* section 29(1)(a); or

(b) by an employee aggrieved by the decision,

as if it were an industrial matter that could be so referred under that Act.

(3) A referral under subsection (2) must be made within the period after the making of the decision that is prescribed under section 108.

(4) The *Industrial Relations Act 1979* applies to and in relation to a section 94 decision referred under subsection (2) as if the decision were an industrial matter referred to the Industrial Commission in accordance with that Act.

(5) In exercising its jurisdiction in relation to a decision referred under subsection (2), the Industrial Commission must confine itself to determining whether or not regulations referred to in section 94 have been fairly and properly applied to or in relation to the employee concerned.

(6) The Industrial Commission does not have jurisdiction in respect of a section 94 decision if the employment of the employee concerned is terminated.

16 Section 96A of the PSM Act provides:

(1) A decision made or purported to be made under regulations referred to in section 95A to terminate the employment of an employee or any matter, question or dispute relating to the decision is not an industrial matter for the purposes of the *Industrial Relations Act 1979*.

(2) Despite subsection (1), a decision made or purported to be made under regulations referred to in section 95A(2), other than a decision to terminate the employment of an employee, may be referred to the Industrial Commission —

(a) under the *Industrial Relations Act 1979* section 29(1)(a); or

(b) by an employee or former employee aggrieved by the decision,

as if it were an industrial matter that could be so referred under that Act.

(3) A referral under subsection (2) must be made within the period after the making of the decision that is prescribed under section 108.

(4) The *Industrial Relations Act 1979* applies to and in relation to a decision referred under subsection (2) as if the decision were an industrial matter referred to the Industrial Commission in accordance with that Act.

(5) In exercising its jurisdiction in relation to a decision referred under subsection (2), the Industrial Commission —

(a) must confine itself to determining whether or not the employee concerned has been allowed the benefits to which the employee is entitled under the regulations referred to in section 95A(2)(b); and

(b) does not have jurisdiction to exercise its powers under the *Industrial Relations Act 1979* section 23A.

17 Pursuant to s 95(2)(b) of the PSM Act, a s 94 decision may be referred to the Commission. Section 95(6) provides that the Commission does not have jurisdiction in respect of a s 94 decision if the employment of the employee is terminated.

18 Section 96A(2) provides that a decision made or purported to be made under regulations referred to in s 95A (which provides for the termination and terms and conditions, including remuneration of a registered employee) other than a decision to terminate the employee may be referred to the Commission.

19 The appellant contends his employment was not 'terminated', that he resigned in conformity with pt 3 of the Redeployment and Redundancy Regulations. The consequence of this submission, if accepted, he says is that s 95(6) does not operate to prohibit his claims being referred pursuant to s 95(2) of the PSM Act.

20 The appellant argues that to construe the word 'termination' in s 95(6) of the PSM Act as capturing any kind of cessation of the employment relationship is not sound. In written submissions filed by the appellant in the proceedings at first instance he put a submission that the provisions of the PSM Act treat resignation and termination as discrete statutory concepts. In particular, he argued that:

(a) In the case of an offer of voluntary severance under pt 3 of the Redeployment and Redundancy Regulations, the decision as to the continuation or cessation of employment is not the employer's but solely the employee's. 'Termination' and 'resignation' are treated as conceptually and legally discrete concepts to which attach different legal consequences. The regulations describe a graduated chronological process of severance (voluntary resignation), redeployment and ultimately 'termination'.

(b) The term 'termination' is not defined in the PSM Act whereas the provisions of Redeployment and Redundancy Regulations do clothe the meaning of 'termination'.

(c) A decision to 'terminate' an employee's employment is conditional upon the employee having the status of 'registered' employee (for redeployment and retraining). An employee who is offered voluntary severance is not 'registered'.

(d) Section 95(6) is simply a companion to s 96A, foreclosing upon a person to whom s 95A applies from articulating a challenge under s 95.

21 In considering the appellant's argument, the starting point in construing any legislation is that an Act is to be read as a whole and separate sections of an Act should not be read out of context. It is also a rule of statutory construction that words in legislation are assumed to be used consistently.

22 The fundamental difficulty with the appellant's argument is that it ignores the effect of s 101 of the PSM Act. Section 101 provides:

(1) The maximum amount of compensation payable under this Act or any other written law in respect of the termination of the employment of an employee in the Public Sector by —

(a) the employing authority of a department or organisation; or

(b) the employee,

is an amount equal to the amount of the remuneration to which the employee is entitled for the period of one year ending immediately before the day on which that employment is terminated.

(2) Subsection (1) does not apply in relation to compensation payable under —

(a) the *Industrial Relations Act 1979* section 23A(6); or

(b) regulations referred to in section 94 or 95A if those regulations provide for a higher amount of compensation.

23 Whilst s 101(1) is not confined to the termination of employment on grounds of redundancy, the effect of s 101(1)(b) and s 101(2)(b) is that where an employer or an employee terminates the employment of an employee, the maximum amount of compensation payable under the Redeployment and Redundancy Regulations is not to exceed one year's remuneration, except where the Redeployment and Redundancy Regulations provide for a higher amount of compensation.

24 Section 101, when read with s 95 and s 96A of the PSM Act, supports the construction given by the learned Acting Senior Commissioner that s 95(6) ([18]):

> [A]pplies equally irrespective of whether an employee's employment is terminated at the initiative of the employer or the employee. I do not accept the arguments made by Mr Crowley that the application of the provisions of the Regulations, in the case of a voluntary severance, and a resignation, should be construed as something other than the termination of an employee's employment for these purposes. There is nothing to suggest in the drafting of s 95(6) that it is predicated on a 'dismissal', in the sense of a termination at the initiative of an employer.

25 In any event, s 101 applies to a resignation on grounds of voluntary severance pursuant to an offer made to an employee under pt 3 of the Redeployment and Redundancy Regulations. Regulation 13(4) and reg 16 of the Redeployment and Redundancy Regulations apply to offers of voluntary severance. Regulation 13 provides, as required by s 101(1), that a severance payment paid to an employee (who resigns from his or her employment) is not to exceed 52 weeks' pay. Regulation 16 is authorised by

s 101(2). This regulation provides an exception to reg 13 where the Minister approves a targeted voluntary severance scheme. Pursuant to reg 16(5) the amount of a targeted voluntary severance scheme may exceed 52 weeks' pay.

26 When reg 13 and reg 16 are read together with s 101 and pt 6 of the PSM Act, the words 'if the employment of the employee concerned is terminated' in s 95(6) must be read to mean termination by an employer or an employee.

27 When this construction of s 95(6) is applied to the facts of this matter and the claim pleaded by the appellant, in particular when regard is had to the claim pleaded by the appellant which is a claim that reg 13(1)(a) of the Redeployment and Redundancy Regulations was not complied with, it is clear that the appellant 'terminated' his employment by accepting an offer of voluntary severance and resigning his employment. It follows therefore the learned Acting Senior Commissioner did not err in finding the appellant was barred from referring the s 94 decision pursuant to s 95(2) of the PSM Act.

28 For these reasons, I am of the opinion ground 2 of the appeal must fail.

Ground 1 of the appeal – exclusive jurisdiction of Public Service Arbitrator - Conclusion

29 The appellant in his outline of submissions argues in ground 1 that having found that at the time of the referral the appellant was not an employee as he had resigned effective from 17 May 2016, it was not open to dismiss his application invoking s 23 of the IR Act claim by reason of the purported 'exclusive jurisdiction' of the Public Service Arbitrator described in s 80E of the IR Act. The appellant's argument essentially is that the Commission in its general jurisdiction conferred by s 23(1) has jurisdiction to hear and determine his claims as standing is conferred upon him to bring these claims to the Commission in its general jurisdiction pursuant to s 29(1)(b)(ii) of the IR Act.

30 The appellant says that whilst the 'exclusivity' of the Public Service Arbitrator's jurisdiction is limited to matters relating to a government officer, he was not a 'government officer' within the meaning of that term as defined in s 80C of the IR Act when the denial of the contractual benefit occurred, nor when he invoked the Commission's jurisdiction by referral. In support of the argument that a contractual benefit was denied to him after his employment ceased the appellant relies upon the fact that he was not paid a voluntary severance benefit until after the effective date of his resignation.

31 The appellant says the decision in ***Chief Executive Officer, Department of Agriculture and Food v Ward*** [2008] WAIRC 00079; (2008) 88 WAIG 156 in which it was found that the Commission's general jurisdiction cannot be availed of by a government officer is distinguishable because that matter involved applicants (respondents in the appeal) who were 'government officers' as employees at the time of the referral, and beyond.

32 With respect, the appellant's arguments have no arguable basis at law. The scheme of the provisions of the IR Act are clear. Firstly, where an industrial matter is raised in any application before the Commission which 'relates to a government officer' the general jurisdiction of the Commission under s 23(1) of the IR Act is expressly excluded by s 80E(1) of the IR Act. The jurisdiction of the Public Service Arbitrator to deal with industrial matters relating to government officers is not confined to only enquiring into and dealing with industrial matters that relate to current employees. Secondly, even if the claims sought to be pursued by the appellant as contractual benefits referred pursuant to s 29(1)(b)(ii) of the IR Act, could be characterised as matters that do not arise within the exclusive jurisdiction of the Public Service Arbitrator, when the provisions of the PSM Act and the IR Act conferring jurisdiction to hear and determine a claim by a government officer that arise out of the application of regulations referred to in s 94 and s 95A of the PSM Act are considered, the appellant's claims must fail on grounds of want of jurisdiction.

(a) Jurisdiction of the Public Service Arbitrator not confined to current employment relationships

33 The general jurisdiction of the Commission found in s 23(1) of the IR Act is in div 2 of pt II of the IR Act which provides that, subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter.

34 An 'industrial matter' is defined to mean in s 7(1) of the IR Act:

> In this Act, unless the contrary intention appears —
>
> ***industrial matter*** means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
>
> (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;
>
> (c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;
>
> (ca) the relationship between employers and employees;
>
> (d) any established custom or usage of any industry, either generally or in the particular locality affected;
>
> (e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;
>
> (f) in respect of apprentices, these additional matters —
>
> (i) their wage rates and, subject to the *Vocational Education and Training Act 1996* Part 7 Division 2, other conditions of employment; and

(ii) the wages, allowances and other remuneration to be paid to them, including for time spent in performing their obligations under training contracts registered under the *Vocational Education and Training Act 1996* Part 7 Division 2, whether at their employers' workplaces or not; and

(iii) without limiting subparagraphs (i) and (ii), those other rights, duties and liabilities of them and their employers under such contracts that do not relate to the training and assessment they are to undergo, whether at their employers' workplaces or not;

(g) any matter relating to the collection of subscriptions to an organisation of employees with the agreement of the employee from whom the subscriptions are collected including —

(i) the restoration of a practice of collecting subscriptions to an organisation of employees where that practice has been stopped by an employer; or

(ii) the implementation of an agreement between an organisation of employees and an employer under which the employer agrees to collect subscriptions to the organisation;

[(h) deleted]

(i) any matter, whether falling within the preceding part of this interpretation or not, where —

(i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and

(ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;

and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute …

35 An industrial matter in respect of claims of contractual benefits was expressly extended beyond the cessation of an employment relationship by the enactment of s 7(1a) of the IR Act in 1995 by s 49 of the *Industrial Legislation Amendment Act 1995* (WA). Section 7(1a) provides:

A matter relating to —

(a) the dismissal of an employee by an employer; or

(b) the refusal or failure of an employer to allow an employee a benefit under his contract of service,

is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended.

36 Even prior to the enactment of s 7(1a) in 1995 it had been considered that the words 'conditions of employment including conditions which are to take effect after the termination of employment' in paragraph (b) of the definition of 'industrial matter' in s 7(1) invoked the jurisdiction of the Commission to hear and determine a claim which related to an industrial matter after the employment relationship ceased (see the discussion in ***The Civil Service Association of Western Australia Inc v Director-General, Department for Child Protection*** [2010] WAIRC 00206; (2010) 90 WAIG 214 [83] - [87] (Smith AP); [145] - [146] (Kenner C).

37 Since the addition of 'and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute …' (by the enactment of s 185 of the *Labour Relations Reform Act 2002* (WA)) to the definition of paragraph (i) of 'industrial matter' in s 7(1) of the IR Act, the definition of 'industrial matter' is even wider and includes a matter of an industrial nature which is not dependent upon a finding of a direct relationship with an employment relationship. President Sharkey made this point in ***The Director General of the Department of Justice v The Civil Service Association of Western Australia (Inc)*** [2004] WAIRC 13765; (2004) 85 WAIG 629 [32] - [33].

38 For this reason, ground 1 of the appeal is not made out and I am of the opinion an order should be made to dismiss the appeal. As ground 1 is narrowly drafted, and whilst it is not perhaps strictly necessary to consider whether the general power of the Commission conferred by s 23(1) of the IR Act can be invoked by a referral by a person who had been employed as a government officer at the time a decision was made or purported to be made under regulations made under s 94 or s 95A of the PSM Act, as this issue is canvassed by both parties in their submissions it is appropriate to express an opinion about this issue.

(b) Limitations on the general jurisdiction of the Commission to hear and determine claims by or on behalf of a government officer or a former government officer under s 23 of the IR Act

39 Section 23(1) of the IR Act provides:

Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter.

40 The conferral of exclusive jurisdiction in respect of industrial matters that relate to a 'government officer' is found in the express power in s 80E(1) of the IR Act which provides:

Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.

41 The ousting of the general jurisdiction of the Commission in s 23(1) of the IR Act by s 80E(1) by the exclusive jurisdiction of the constituent authorities, one of which is the Public Service Arbitrator, is put beyond doubt by the expressed intention in the definition of 'industrial matter' in div 2 by operation of s 22A of the IR Act. Section 22A and s 23(1) are both found in div 2 of pt II of the IR Act. Section 22A provides:

In this Division and Divisions 2A to 2G —

Commission means the Commission constituted otherwise than as a constituent authority;

industrial matter does not include a matter in respect of which, subject to Division 3, a constituent authority has exclusive jurisdiction under this Act.

42 It is not disputed by the appellant that whilst employed by the respondent he was employed as a 'government officer'. However, the appellant has no standing to refer his claims to the Public Service Arbitrator as the appellant's claims are not capable of characterisation of a claim of the kind described in s 80E(2)(a) of the IR Act. Pursuant to s 80F(2) of the IR Act a government officer may only refer a claim mentioned in s 80E(2)(a), that is a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer.

43 The learned Acting Senior Commissioner, in my opinion, was right to observe that the only exception to the exclusive jurisdiction of the Public Service Arbitrator to enquire into and deal with any industrial matter relating to government officers are claims referred to in s 80E(7) of the IR Act. Section 80E(7)(a) provides:

> Despite subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench the following —
>
> (a) any matter in respect of which a decision is, or may be, made under regulations referred to in the *Public Sector Management Act 1994* section 94 or 95A;

44 Whilst ground 1 of the appellant's grounds of appeal is narrowly confined solely to the issue whether he ceased to be a 'government officer' in respect of the claims he seeks to refer to the Commission, an argument could be raised that the effect of s 80E(7) is to vacate the field of the exclusive jurisdiction of the Public Service Arbitrator to hear and determine claims by a person who had been employed as a government officer that arise from a decision under pt 3 of the Redeployment and Redundancy Regulations which gives rise to a denied entitlement in a contract of employment.

45 The difficulty with this contention is that when regard is had to the specific scheme of review of decisions made or purported to be made under the Redeployment and Redundancy Regulations enacted in pt 6 of the PSM Act, the general jurisdiction of the Commission under s 23(1) as a matter referred pursuant to s 29(1)(b)(ii) of the IR Act cannot be enlivened.

46 Where a particular procedure is enacted to achieve something, the principle of statutory construction 'expressum facit cessare tacitum' applies. This principle means where a particular procedure is designed to achieve something other general procedures are thereby excluded. This principle is also known as the ***Anthony Hordern*** principle. In ***Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia*** [1932] HCA 9; (1932) 47 CLR 1, 7 Gavan Duffy CJ and Dixon J said:

> When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

47 In ***Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*** [2006] HCA 50; (2006) 228 CLR 566 Gummow and Hayne JJ referred to a number of leading authorities which set out the application of the ***Anthony Hordern*** principle. In their judgment, their Honours said [55] - [59]:

> *Anthony Hordern* ((1932) 47 CLR 1) concerned the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (the Conciliation and Arbitration Act) which apparently contained two powers for the making of an award with respect to union preferences. Section 40 empowered the Court of Conciliation and Arbitration by award to give preferential employment to members of unions over other persons, subject to certain conditions, including that such an award was to be made only 'other things being equal'. The power in s 40 was not expressly confined to the situation where there was an industrial dispute about preference. However a judge of the Court, acting under the general powers in ss 24(2) and 38(a) to hear and determine industrial disputes, made an order unconditionally requiring certain employers to give preference to union members in employing female workers. This Court by majority (Gavan Duffy CJ and Dixon J, McTiernan J, Starke and Evatt JJ dissenting) held that those general powers did not authorise the judge to make an award which 'ignored the exception[s]' ((1932) 47 CLR 1 at 8) contained in s 40. McTiernan J concluded as follows ((1932) 47 CLR 1 at 20):
>
> > 'Reading the Act as a whole, there does not appear to me to be any reason for holding that Parliament intended to give to the Court two powers, entirely different in scope, to order "preference." I do not think that the Legislature intended that, in a case in which preference was in dispute, the Court should be free to make any award it deemed fit and that the award might be entirely unconditional, whereas, in a case in which preference was not in dispute, the Court should be fettered and its award moulded by the provisions of s 40.'
>
> This is a rather more compendious expression of what was said by Gavan Duffy CJ and Dixon J in the passage set out earlier in these reasons. As a matter of construction (and not as one of implied repeal) there was only one power which could be relied upon to make awards giving preferential employment to union members.
>
> *The cases after Anthony Hordern*
>
> *R v Wallis (Wool Stores Case)* ((1949) 78 CLR 529) also concerned the power to make awards under the Conciliation and Arbitration Act. A union applied to a conciliation commissioner, charged with preventing and settling industrial disputes, for insertion of a compulsory unionism clause in an award. An employer sought prohibition on the basis that the commissioner had no power to make such an award because s 56 of the Act empowered the Court only to make awards giving preferential employment (as distinct from monopoly employment) to union members. Section 56 was the descendant of s 40, considered in *Anthony Hordern*. This Court made absolute the order nisi for prohibition. Dixon J described s 56 as a 'specific power, of a limited nature' ((1949) 78 CLR 529 at 552). Accordingly it was improper to infer in the general powers 'a much more comprehensive and drastic power upon the same subject matter or upon matters

ejusdem generis' ((1949) 78 CLR 529 at 553) than that contained in s 56. Dixon J expressed his conclusion as according ((1949) 78 CLR 529 at 550):

> 'with the general principles of interpretation embodied in the maxim expressum facit cessare tacitum and in the proposition that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.'

Leon Fink Holdings Pty Ltd v Australian Film Commission ((1979) 141 CLR 672) turned upon the powers of the Australian Film Development Corporation to make loans. Section 20 of the *Australian Film Development Corporation Act 1970* (Cth) provided that the functions of the Corporation were to 'encourage the making of Australian films and to encourage the distribution of Australian films both within and outside Australia'. Section 21(1)(a) of that Act provided that 'without limiting the generality of the foregoing' the Corporation had power to make loans 'to producers of Australian films'. The Corporation lent money to a borrower which was not a producer of Australian films 'to assist in the production' of an Australian film. Mason J referred to *Anthony Hordern* and held that, but for the presence of the words 'without limiting the generality of the foregoing' in s 21(1), the restrictions in that specific power to make loans would qualify the general power in s 20 ((1979) 141 CLR 672 at 678-680). However the presence of those words meant it was proper to regard s 21 as setting out particular examples of the general power in s 20. Again, the issue was one of construction of the two provisions in question.

Downey v Trans Waste Pty Ltd ((1991) 172 CLR 167) concerned the power of Victorian Conciliation and Arbitration Boards to refer certain matters to the Industrial Relations Commission. Section 44(4) of the *Industrial Relations Act 1979* (Vic) provided that a Board seized of an 'industrial dispute' might apply to the President for an order referring 'the matter of the dispute' to the Commission for hearing and determination. However s 44(7) provided that, in respect of matters referred by the Board, the Commission was to have all the powers of the Board under s 34. That section included certain restrictions of a privative nature affecting the way in which questions in an industrial dispute concerning unfair dismissal could be determined. Section 37(8) of the Act empowered the Board to apply to the President for an order referring any 'matter' before it to the Commission for hearing and determination. Although the meaning of industrial matter was broader than that of 'industrial dispute', there was no provision analogous to s 44(7) applicable in the case of referrals under s 37(8). Dawson J considered that s 44(4) excluded the more general s 37(8) where the industrial dispute concerned whether a dismissal was harsh, unjust or unreasonable ((1991) 172 CLR 167 at 180, 182-183). This was because, based upon a detailed consideration of the statutory history, it was proper to infer that the Commission was not intended to exercise a jurisdiction free from the limitations that would have been imposed upon the Board in determining a dispute of that kind.

Anthony Hordern and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the 'same power' (*Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7), or are with respect to the same subject matter (*Wool Stores Case* (1949) 78 CLR 529 at 550), or whether the general power encroaches upon the subject matter exhaustively governed by the special power (*Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678; *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Livestock Corporation [No 2]* (1980) 44 FLR 455 at 468-469). However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions.

48 It was observed in ***Re Wilcox; Ex parte Venture Industries Pty Ltd*** (1996) 66 FCR 511, 530 - 531 by the Full Court of the Federal Court that this maxim has little, if any, applicability to powers expressly conferred in separate enactments. A better view may be if the subject matter of both powers is the same and the specific power is intended to be exhaustive, the ***Anthony Hordern*** principle applies. In ***White v Betalli*** [2007] NSWCA 243 the question before the Court of Appeal was whether the application of the principle in ***Anthony Hordern*** meant the power to create easements and restrictive covenants in s 88B of the *Conveyancing Act 1919* (NSW) precluded the use of s 43 of the *Strata Schemes Management Act 1996* (NSW) to make a by-law creating a right in the nature of an easement. In her judgment, McColl JA made the following obiter observations about the ***Anthony Hordern*** principle and whether the principle can be applied to powers found in different legislative instruments [174] - [175]:

> The *Anthony Hordern* principle is a manifestation of the maxim *expressum facit cessare tacitum* (when there is express mention of certain things, then anything not mentioned is excluded: *Nystrom* (at [54])). In *Wilcox, Judge of the Federal Court, Re; Ex parte Venture Industries Pty Ltd* (1996) 66 FCR 511 (at 64) the Full Federal Court (Black CJ, Cooper and Merkel JJ) said the maxim was usually applied to reconcile or read down by implication a general power which was inconsistent with a specific power in the same instrument or enactment and had little, if any, applicability to powers expressly conferred in separate enactments, even, apparently, if they were part of the same legislative scheme. It has been said that there appears to be no reason for this qualification: Pearce & Geddes, *Statutory Interpretation in Australia* 6th ed at 4.31.
>
> As Gummow and Hayne JJ demonstrated in *Nystrom* (at [56] – [59]) in their analysis of the post-*Anthony Hordern* cases, the question whether the maxim applies turns on the construction of the provisions in question …

49 In ***Plaintiff M70/2011 v Minister for Immigration and Citizenship*** [2011] HCA 32; (2011) 244 CLR 144 French CJ pointed out that this principle of construction, like all principles, must be applied to the particular text, context and purpose of the statute to be construed [50]. Justice Gummow and Hayne J made a similar observation in ***Nystrom*** [54] when their Honours said that:

> [W]hilst 'rules' or principles of construction may offer reassurance, they are no substitute for consideration of the whole of the particular text, the construction of which is disputed, and of its subject, scope and purpose.

50 Even if regard is not had to the ***Anthony Hordern*** principle, to construe the jurisdiction of the Commission to hear and determine a claim referred pursuant to s 95 or s 96A of the PSM Act in respect of which a decision is or may be made under regulations referred to in s 94 or s 95A of the PSM Act, regard must be had to the text of pt 6 of the PSM Act and any other relevant provisions of the PSM Act that expressly deal with the jurisdiction conferred on the Commission or deal with, or provide for, conditions that apply to redundancy of government officers. Further, the subject, scope and purpose of those provisions must be considered together with the scope and purpose of s 23(1) of the IR Act and other relevant provisions that expressly deal with the jurisdiction of the Commission and the constituent authorities to deal with such matters arising under the PSM Act.

51 In this matter, this task of construction is required to determine whether such claims can be referred to the Commission by an employee pursuant to s 29(1)(b)(ii) of the IR Act.

52 Whilst the PSM Act and IR Act are separate enactments, and the IR Act deals with industrial matters relating to persons employed in private and public sector industries in Western Australia and whereas the PSM Act provides only for the administration, management and employment of persons in the public sector, it is intended that both Acts be read together.

53 Section 6(2) of the PSM Act provides:

> Except to the extent to which a provision of this Act specifies otherwise, the *Industrial Relations Act 1979* applies to and in relation to matters dealt with by this Act.

54 There are many provisions of the PSM Act that refer to either the general provisions of the IR Act or to specific provisions. For example, a provision that makes reference to the IR Act is found in s 29(1)(h) of the PSM Act which provide chief executive officers are required to classify and determine the remuneration of employees and their offices and posts in accordance with any binding award, order or industrial agreement under the IR Act. Such a general provision is, however, not relevant to the disposition of the issues raised in this appeal, but illustrates the general interrelationship between the two Acts.

55 The provisions of pt 6 of the PSM Act in respect of redeployment and redundancy raise a more specific application of particular provisions of the IR Act. When these provisions are considered as a whole and when read with s 6(2) of the PSM Act and s 80C(2) of the IR Act it is clear that these provisions of the PSM Act are to be read as if incorporated into div 2, pt IIA (Constituent Authorities) of the IR Act. Section 80C(2) of the IR Act provides that div 2 of pt IIA shall be read in conjunction with the PSM Act. The effect of this provision is to require the incorporated Act (the PSM Act) to be read as written into the incorporating Act and to read the provisions together (as if in div 2, pt IIA of the IR Act).

56 In ***McGillivray v Piper, Chief Executive Officer of the Ministry of Justice*** [2000] WASCA 245 Anderson J explained the effect of similar words used in s 3 of the *Sentence Administration Act 1995* (WA) which provided 'This Act is to be read with the *Sentencing Act 1995*'. His Honour said [24] - [26]:

> The effect is that the provisions of the *Sentence Administration Act* and the provisions of the *Sentencing Act* are to be read together as if they were one enactment. Each of the provisions of the two Act [sic] must be construed as if they were included in the one Act: Pearce & Geddes, Statutory Interpretation in Australia 4th ed par 7.26; ***Georgoussis v The Medical Board of Victoria*** [1957] VR 671 especially at 675; ***The Canada Southern Railway Company v The International Bridge Company*** [1883] 8 AC 723; ***Cadbury-Fry-Pascall Proprietary Limited v The Federal Commissioner of Taxation*** (1944) 70 CLR 362, especially per Williams J at 388; ***Phillips v Parnaby*** [1934] 2 KB 299; ***City of Bayswater v Minister for Family and Children's Services & Ors*** [2000] WASCA 151.
>
> Thus, the *Sentence Administration Act* is to be read as if it contained s 3(3)(a) of the *Sentencing Act* and terms such as 'being punished' in s 3(3) of the *Sentencing Act* are to be construed accordingly as also are provisions such as the excepting provision in s 3(3)(a) of the *Sentencing Act*.
>
> The qualification to the rule that the two Acts must be construed as if they were moulded into the one enactment is that if the requirement that two Acts be read together is contained in the later of the two Acts and there is a manifest discrepancy between the provisions of the two Acts, the later Act may be construed as repealing the earlier Act: ***Canada Southern Railway Co v International Bridge Co*** (*supra*) per Lord Hewitt CJ at 303; ***Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal*** (1984) 54 ALR 57; Pearce & Geddes (*loc cit*).

57 When regard is had to the provisions of the PSM Act and the IR Act in this matter it cannot be said that there is a manifest discrepancy or any discrepancy between the two Acts.

58 The scheme enacted in pt 6 of the PSM Act is that regulations concerning redeployment and redundancy of public sector employees (including government officers) are authorised to be made under s 94 of the PSM Act in respect of a broad range of matters including:

(a) redeployment of employees to offices, posts or positions inside and outside the public sector;

(b) the situation where a government undertaking or the production of goods or services is to be sold or disposed of is to be replaced by the production or provision of goods and services to persons outside the public sector;

(c) registration of surplus employees;

(d) retraining of employees; and

(e) voluntary severance by resignation of an employee.

59 By operation of s 95A of the PSM Act regulations may be made to provide for the termination of employment of a registered employee and the terms and conditions (including remuneration) that are to apply to a registered employee whose employment is terminated under the regulations. Section 95A was enacted by s 14 of the *Workforce Reform Act 2014* (WA).

60 Pursuant to s 95B, the provisions of pt 6 of the PSM Act and the regulations referred to in s 94 prevail, to the extent of any inconsistency, over any provision in an award, industrial agreement or order made under the IR Act and the regulations referred to in s 94 prevail, to the extent of any inconsistency, over the terms and conditions of a contract of employment.

61 Both s 95 and s 96A were enacted by the *Workforce Reform Act* (s 15). At the same time these provisions were enacted, the *Workforce Reform Act* amended s 80E of the IR Act in s 5 by inserting a new s 80E(7) which among other matters provides that despite s 80E(1) and s 80E(6), a Public Service Arbitrator does not have jurisdiction to enquire into or deal with any matter in respect of which a decision is, or may be, made under regulations referred to in s 94 or s 95A of the PSM Act. Similar amendments were made to the jurisdiction of the Public Service Appeal Board and the Railways Classification Board (s 6 and s 7 of *Workforce Reform Act*).

62 It is well established that (but for the effect of the recently enacted s 80E(7)) the effect of s 80E(1) of the IR Act is to exclude government officers from making any claim (including a claim for denied contractual benefits) in the general jurisdiction of the Commission conferred by s 23(1) of the IR Act: ***Director General Department of Justice v Civil Service Association of Western Australia Inc*** [2005] WASCA 244; (2005) 149 IR 160; (2005) 86 WAIG 231 [27] (***Jones***) and ***Chief Executive Officer, Department of Agriculture and Food v Ward*** [2008] WAIRC 00079; (2008) 88 WAIG 156 [92] (Ritter AP), [170] (Beech CC), [190] (Wood C agreeing with Ritter AP). However, it is not the case that the jurisdiction of the Public Service Arbitrator under s 80E(1) can include claims of contractual benefits referred pursuant to s 29(1)(b)(ii) of the IR Act. The apparent obiter observation by me to the contrary in ***Director General of Health v Health Services Union of Western Australia (Union of Workers)*** [2011] WAIRC 00332; (2011) 91 WAIG 865 is a misstatement as the word 'not' was inadvertently omitted after the word 'can' in the first line of [71] of my reasons. Without the word 'not' the sentence does not make sense and is contrary to the finding made in ***Ward***. The first sentence in [71] of ***Ward*** should have read:

> Whilst the general jurisdiction of the Public Service Arbitrator under s 80E(1) can**[not]** include claims under s 29(1)(b)(ii) of the Act: *Chief Executive Officer, Department of Agriculture and Food v Ward & Wall [No 1]* [2008] WAIRC 00079; (2008) 88 WAIG 156 [92] (Ritter AP), the application before the Public Service Arbitrator in this matter is not a claim under s 29(1)(b)(ii) of the Act, as it is not a claim made by an employee (my emphasis in bold).

63 The powers of the Public Service Arbitrator are very wide. Yet the expression 'exclusive jurisdiction' in s 80E(1) was likely intended to do no more than exclude the general jurisdiction of the Commission pursuant to s 23 of the IR Act, to inquire into and deal with industrial matters generally: ***Jones*** [27] (Wheeler and Le Miere JJ). Whilst the amendment to the definition of industrial matter in s 7(1) of the IR Act by s 22A of the IR Act was not referred to in ***Jones***, the operation of s 22A supports this construction of s 80E(1) of the IR Act.

64 However, the effect of s 80E(7) is to exclude from the 'exclusive jurisdiction' of the Public Service Arbitrator decisions made, or decisions that may be made, under regulations referred to in s 94 or s 95A of the PSM Act.

65 When s 94, s 95A, s 95 and s 96A of the PSM Act are read together with pt IIA of the IR Act, in particular in this matter with the jurisdiction of the Public Service Arbitrator conferred by s 80E of the IR Act, the effect of these provisions is that the 'decisions' defined in s 94 and s 95A can only be referred in the manner and pursuant to the limitations prescribed in s 95 and s 96A of the PSM Act.

66 Both s 95(2) and s 96A(2) expressly prescribe that a decision may be referred under s 29(1)(a) of the IR Act (by an employer, an organisation or the Minister) or by an employee aggrieved by the decision as if the s 94 and s 95A(2) decision were an industrial matter. By an express reference to s 29(1)(a) of the IR Act but not s 29(1)(b)(ii) of the IR Act and having regard to the scope and purpose of s 95 and s 96A of the PSM Act which provides a limited right of review of decisions made under regulations referred to in s 94 and s 95A of the PSM Act, it is clear that the right of an employee to refer an industrial matter pursuant to s 29(1)(b)(ii) the Commission under s 23(1) of the IR Act is excluded.

67 To construe these provisions in the manner contended by the appellant would enable public sector employees in the position of the appellant to avoid the limitations expressed in s 95(5) and s 95(6) and s 96A(2) and s 96A(5) of the PSM Act to review the decisions sought to be impugned. These limitations are when a referral is made under:

(a) section 95(2) of the PSM Act, pursuant to s 95(5) the Commission is required to confine itself to determining whether the Redeployment and Redundancy Regulations have been fairly and properly applied to or in relation to the employee. Further, s 95(6) excludes the jurisdiction conferred by s 95 in respect of a Redeployment and Redundancy Regulations decision if the employment of the employee is terminated; and

(b) section 96A of the PSM Act, pursuant to s 96A(2) the referral of a s 95A decision to terminate the employment of the registered employee cannot be the subject of the referral. When a decision has or is purported to be made to terminate the employment of a registered employee, pursuant to s 96A(5) the Commission must confine itself to determining whether the employee concerned has been allowed the benefits to which the employee is entitled under the Redeployment and Redundancy Regulations and the Commission is prohibited from exercising its powers under s 23A of the IR Act. (Section 23A contains the powers the Commission may exercise if it determines that the dismissal of an employee was harsh, oppressive or unfair).

68 The power conferred on the Commission by s 23(1) to hear and determine an industrial matter referred pursuant to s 29(1)(b)(ii) of the IR Act is a general power which is not subject to any limitations that attach to the powers of the Commission provided for in s 95 and s 96A of the PSM Act. If the appellant's submissions are accepted, the effect would be to enable the appellant and other public sector employees in the position of the appellant to use the general power in s 23(1) of the IR Act to encroach unencumbered upon the subject matter exhaustively conferred by the specific powers conferred to review a s 94 PSM Act decision or a s 95A PSM Act decision pursuant to s 95 and s 96A of the PSM Act.

69 When regard is had to s 80E(7)(a) of the IR Act, when read with s 95 and s 96A of the PSM Act, as required by s 80C(2) of the IR Act, there is only one power conferred to hear and determine a claim by a government officer, including a former government officer, that he or she has not been paid a severance payment in accordance with the requirements of the

Redeployment and Redundancy Regulations. The sole power of the Commission to hear and determine such a claim and the power of a government officer to refer such a claim is confined to a referral made pursuant to s 95 or s 96A of the PSM Act.

SCOTT C.C.

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

EMMANUEL C

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

2017 WAIRC 00263

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW CROWLEY
	APPELLANT
	-and-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF COMMERCE
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 12 MAY 2017
FILE NO.	FBA 9 OF 2016
CITATION NO.	2017 WAIRC 00263

Result	Appeal dismissed
Appearances	
Appellant	No appearance
Respondent	Mr R Bathurst (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 10 April 2017, and reasons for decision having been delivered on 12 May 2017, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Application for Alteration of Rules—

2017 WAIRC 00251

APPLICATION PURSUANT TO SECTION 62 - ALTERATION OF REGISTERED RULES - RULE 5.2.2

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2017 WAIRC 00251
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		COMMISSIONER T EMMANUEL
		COMMISSIONER D J MATTHEWS
HEARD	**:**	FRIDAY, 10 MARCH 2017
DELIVERED	**:**	FRIDAY, 5 MAY 2017
FILE NO.	**:**	FBM 3 OF 2016
BETWEEN	**:**	ASSOCIATION OF INDEPENDENT SCHOOLS OF WESTERN AUSTRALIA (INC)
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	:	Industrial Law (WA) - Application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) for the Full Bench to authorise registration of alterations to registered rules - Qualification for membership rule - Statutory criteria satisfied - Application granted
Legislation	:	*Industrial Relations Act 1979* (WA) s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(4)(e), s 55(5), s 56(1), s 62(2), s 62(3), s 62(3)(b), s 62(4) *School Education Act 1999* (WA) s 160, s 161
Result	:	Application granted
Representation:		
Counsel:		
Applicant	:	Mr I Curlewis
Solicitors:		
Applicant	:	Lavan

Case(s) referred to in reasons:

Fitzgerald v Masters [1956] HCA 53; (1956) 95 CLR 420

Mullen v Gisborne [2010] WAIRC 00176; (2010) 90 WAIG 241

Re Association of Independent Schools of Western Australia (Inc) [2010] WAIRC 01208; (2010) 90 WAIG 1852

Re The Electrical and Communications Association of Western Australia (Union of Employers) [2007] WAIRC 01193; (2007) 87 WAIG 2899

Warwick Cinema Syndicate Pty Ltd v Man Kan [2011] WASC 37

Reasons for Decision

THE FULL BENCH:

Introduction

1 This application was filed on 20 October 2016 by the Association of Independent Schools of Western Australia (Inc) and is made pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act). The applicant, as a registered association, seeks the authorisation of the Full Bench for the Registrar to register an alteration to its qualification for membership rule. The alteration the applicant proposes is to r 5.2.2 of its rules to extend its categories of admission as an independent school member to a school that provides full-time tuition to the completion of Pre-Primary education. The applicant seeks this alteration because the Department of Education Services which regulates the registration of non-government schools now considers and regulates Pre-Primary as the first year of primary education rather than Year 1. This change was implemented by the Department from 1 January 2013. As the proposed alteration to r 5 seeks to alter the qualifications of persons for membership, r 5 cannot be registered by the Registrar unless registration of the alteration is authorised by the Full Bench.

The applicant's rules about alterations

2 Pursuant to s 62(4) of the Act, the requirements of s 55(4) of the Act must be satisfied before the Full Bench can approve a rule alteration application to alter the eligibility rules of an organisation. Section 55(4) of the Act provides that the Full Bench shall refuse an application by an organisation under this section unless it is satisfied that:

(a) the application has been authorised in accordance with the rules of the organisation; and

(b) reasonable steps have been taken to adequately inform the members —

(i) of the intention of the organisation to apply for registration; and

(ii) of the proposed rules of the organisation; and

(iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,

and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection; and

(c) in relation to the members of the organisation —

(i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or

(ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;

and

(d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and

(e) rules of the organisation relating to elections for office —

(i) provide that the election shall be by secret ballot; and

(ii) conform with the requirements of section 56(1),

and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

3 Section 55(4) requires the Full Bench to refuse an application unless it is satisfied of the matters set out in subparagraphs (a) to (e). The use of 'shall' imports a requirement to refuse the application unless there is satisfaction in the terms described: ***Re The Electrical and Communications Association of Western Australia (Union of Employers)*** [2007] WAIRC 01193; (2007) 87 WAIG 2899 [36]. Thus, compliance with s 55(4) of the Act requires strict compliance. There is no discretion to approve an application under s 55(4) of the Act unless the requirements are met.

4 The first requirement is that pursuant to s 55(4)(a) of the Act the Full Bench is required to refuse the rule alteration application unless it has been authorised by the organisation in accordance with its rules. The authority to alter the rules of the applicant is found in r 27 of the rules of the applicant. Rule 27 provides:

> 27.1 No amendment of this Constitution shall be made unless approved by the Independent School Members in General Meeting of which not less than twenty one (21) days' notice has been given specifying the reasons for such amendment.
>
> 27.2 Such notice shall be sent to each Independent School Member at its registered address.
>
> 27.3 No amendment shall be effective until the Registrar has given the Association a certificate that the amendment has been registered by the Commission.

5 The applicant contends that notice of the amendment can be given pursuant to the means for specifying notice under r 28 of the rules. Rule 28 provides:

> 28.1 The Association may give notice to a Member:-
>
> 28.1.1 personally;
>
> 28.1.2 by sending it to the Member at the registered address of the Member by post.
>
> 28.1.3 by sending it to the Member by electronic mail to the electronic mail address of the Member.
>
> 28.2 A notice (including a notice of meeting) or any other communication which is sent by post shall be deemed to be served on the day following that on which the notice or other communication is posted.
>
> 28.3 The non-receipt of a notice by a Member, or the accidental omission to give notice to any Member, shall not render the proceedings at any meeting invalid.

The evidence – r 27 notices sent by email

6 Valerie Gould, the executive director of the applicant, made a statutory declaration on 22 September 2016 in which she states that the applicant gave notice on 4 April 2016 to its 153 member schools and four affiliate members by electronic email transmission to the email addresses for each member school recorded in the applicant's member register, of the intention to hold its annual general meeting on 25 May 2016 and its intention to make amendments to the rules of the association at the annual general meeting. Attached to the email notice sent on 4 April 2016 was sent a notice of the annual general meeting and a notice of intention to make amendments to the rules marked up with the proposed changes. The notice of intention to amend the rules explained the reasons for amending r 5.2.2 of the rules of the applicant as follows:

> The change to this clause has become necessary because the Department of Education Services now considers and regulates Pre-Primary as the first year of primary education rather than Year 1. This change was implemented by the Department from 1 January 2013.

7 Prior to hearing this application on 10 March 2017, a letter dated 30 January 2017 was sent to the applicant's solicitors in which it was stated:

> The members of the Full Bench have reviewed your client's application and advise that at the hearing of this matter on 10 March 2017 they wish to hear evidence and submissions about whether the notice setting out the proposed changes and the reasons for altering the rules were sent to each Independent School Member at 'its registered address' as required by r 27.2 of the rules of the Association of Independent Schools of Western Australia (Inc). In particular, the Full Bench wishes to hear evidence as to what constitutes and is contained in the register of addresses of your client's members.
>
> The Full Bench has noted in your letter to Deputy Registrar Hutchinson dated 20 December 2016 that you correctly point out that the Full Bench in its reasons for decision delivered on 7 December 2010 found that notification by email to members complied with the requirements of the rules of your client: [2010] WAIRC 01208; (2010) 90 WAIG 1852. At the time the application in that matter was heard and determined, r 30 [sic] simply required that notice be sent 'to each member at its address' and r 31 [sic] provided for notice to be given personally, by post to the registered address of the member or by electronic mail to the electronic mail address of the member. However, subsequent to the 2010 decision of the Full Bench, the rules of your client were amended. On 14 December 2010, the Registrar registered alterations to the rules which included an amendment to r 27 (formerly r 30) [sic] which requires notice to be sent to each member at 'its registered address'.
>
> The members of the Full Bench also note that r 28 of the current rules is in substance identical to the former r 31 [sic] and advises that at the hearing of this matter it also wishes to hear a submission as to the effect of r 28.1 and r 28.3 of the rules.

8 In response to the matters raised in the letter, the applicant's solicitors filed a statement made on 2 March 2017 by Ms Gould (exhibit B). In her statement, Ms Gould stated:

> 4 In my capacity as Executive Director of AISWA I maintain pursuant to clause 6 of the AISWA Constitution, a register of current members of AISWA. I also publish the list of members also once a year in a booklet. The

current booklet is titled 'AISWA Member Schools 2016-2017' and a hard copy is available for inspection should the Full Bench require.

…

7 The electronic register contains details for each member under two separate 'tabs'. The first 'Address Tab' contains:

7.1 the name of member;

7.2 an email electronic address or addresses of the member;

7.3 the physical address or addresses at which the member operates;

7.4 the postal address of the member;

7.5 the telephone number or numbers of the member.

8 The second 'Communications Preference Tab' contains the various emails addresses for communications with the members, namely their electronic mail addresses.

…

10 AISWA communicates with its members almost entirely by email at their stipulated electronic email address or addresses. AISWA may communicate as the need may arise by telephone or by attending the address where the member operates. In the case of schools, that is at the campus or campus where a particular school provides educational services to students.

11 Many of AISWA's members are in country areas spread between Esperance in the south and community schools in areas north of the 25th parallel up to the Pilbara. Many of AISWA's members do not receive regular postal deliveries or a postal delivery service which is reliable. Sending such communications by post would be ineffectual.

12 Most members of AISWA will close down during school holidays or extended long weekends. Whilst AISWA endeavours to communicate with its members during term times, there are important communications that need to be sent to members during the school holidays. Examples of such communications are those from the Minister or the Department of Education Services that must be passed on to members.

13 Without exception, the tried and tested and most reliable method by which AISWA has communicated with its members and which its members require, is by email. That system has been in place for many years as the internet has been in place and AISWA's members have become more reliant on email communications.

14 As is evident from annexures 'VG1' to 'VG4', members provide their email addresses for all communications. It is those addresses which AISWA and its members have used as the electronic address or addresses on the register for all written communications with members. From AISWA's perspective, an electronic mail address in the register is the address at which each member is registered and more specifically, the 'electronic mail address' as provided for under clause 28.1.3 of AISWA's Constitution.

9 Pursuant to r 8.5, the quorum at any general meeting shall be 10% of the total number of independent school members. Rule 8.1 provides that the annual general meeting of the association shall be held each year before the end of May at such time, place and date as shall be determined by the board. At least 21 days' notice of such a meeting shall be given to all members.

10 The minutes of the annual general meeting held on 25 May 2016 record that and Ms Gould's statutory declaration made on 22 September 2016 evidences that 26 persons representing 23 member schools attended the annual general meeting and resolved unanimously by all 23 member schools entitled to vote at the meeting that in r 5.2.2 the words 'Year 1' should be deleted within the brackets and substituted in their place the words 'Pre-Primary' within the brackets. However, the statement by Ms Gould that 26 persons attended the annual general meeting representing 23 member schools is not correct. The signed attendance register records that 23 persons attended representing 20 independent school members. Although 26 persons attended, two persons attended on behalf of Scotch College, two persons attended on behalf of St Mary's College and two persons attended on behalf of John Wollaston Anglican Community College. When those records are taken into account, it is clear that only 20 independent school members were represented at the annual general meeting.

11 The attendance register of the annual general meeting on 25 May 2016 also records that:

(a) two persons from the applicant attended; and

(b) four persons from two affiliated members were present. Of those, one person was from the Anglican Schools Commission and three persons were from the Free Reformed School Association.

12 Pursuant to r 5.6, an affiliated organisation member is not entitled to vote at any meeting.

13 Notwithstanding the error in Ms Gould's statutory declaration made on 22 September 2016, the attendance register and the minutes of the annual general meeting held on 25 May 2016 evidence that a quorum was present when the resolutions were passed, as only 15 independent school members were required to attend and cast a vote at the meeting.

Notices informing members of right to object

14 The minutes of the annual general meeting held on 25 May 2016 record that it was resolved unanimously by the members present at the meeting that:

The Executive Director of AISWA be and is hereby authorised to make such application or applications as are needed to the Western Australian Industrial Relations Commission or the Full Bench pursuant to the Industrial Relations

Commission Regulations 2005 for approval of the changes to the Constitution in accordance with paragraphs (a) to (p) of Resolution 1.

The Executive Director be and is hereby authorised to instruct solicitors to appear before the Commission and do all things necessary to give effect to Resolutions 1 and 2.

Dr O'Connell reminded members that they may object to the making of the application or to the alteration of the rules by forwarding a written objection to the Registrar of the Western Australian Industrial Relations Commission at 111 St George's Terrace, Perth WA 6000, within 21 days' of the Member receiving advice.

Members will be informed in writing of the decision to make an application to the WAIRC to alter the rules and of their right to forward a written objection to the Registrar of the WAIRC to the making of an application and/or to the changes authorised at this meeting within 21 days' of receiving the written notice.

15 In a statutory declaration made by Ms Gould on 19 December 2016 she states that:

(a) On 20 October 2016, the applicant filed with the Commission FBM 3 of 2016 to the Full Bench and APPL 61 of 2016 to the Registrar. The applications seek approval of alterations to the rules by respectively the Full Bench and the Registrar.

(b) Subsequent to the filing of the applications, the applicant gave notice on 4 November 2016 to all its member schools and affiliate members of the filing of the applications. The notice to members on 4 November 2016 was sent by electronic mail at the email address or addresses of each member held by the applicant as the registered address of that member.

(c) In that notice, the applicant advised its members that should they wish to object to the making of the applications to the Full Bench or the Registrar, the member should do so by filing a notice of objection with the Registrar of the Commission within 21 days.

(d) The email transmission on 4 November 2016 was sent to 153 member schools and three affiliate members. The change in the number of recipients since April 2016 occurred because since April one affiliate member became a full member of the applicant and one previous member school had ceased operations.

16 Attached to Ms Gould's statutory declaration and attached to the email which was sent on 4 November 2016 was a notice from Ms Gould in which each of the resolutions passed relating to the change of rules at the annual general meeting on 25 May 2016 were set out. In her notice Ms Gould also advised the members that because one aspect of the proposed new rules relates to the change of the wording of the requirement for admission as a member under r 5 by the addition of 'Pre-Primary', that aspect of the proposed new rule is required to be determined by application to the Full Bench of the Commission and the remainder of the other alterations would be determined by application to the Registrar of the Commission. The notice also advised the members that two applications had been made for approval of the changes to the rules by application made on 20 October 2016. The notice also attached a copy of the rules with marked-up changes approved at the annual general meeting on 25 May 2016 and advised each member if they now wish to object to the making of the application to the Full Bench of the Commission and/or the application to the Registrar of the Commission they should do so by filing a notice of objection (Form 13) with the Registrar of the Commission within 21 days of receipt of this notice.

Relevant history of amendments to r 27 – alteration of constitution

17 In 2010, the applicant took steps to modernise its rules by rewriting its entire constitution which was subsequently registered as a substitute new set of rules.

18 Prior to the registration of new rules, r 29 of the applicant prescribed the procedure to be followed to alter the rules of the applicant. Rule 29 provided:

29.1 The Council may from time to time amend any provisions of this Constitution.

29.2 No amendment of this Constitution shall be made unless approved by the Council in general meeting of which not less than twenty one (21) days' notice has been given specifying the reasons for such amendment.

29.3 Such notice shall be sent to each Member at its address marked for the attention of the Member's Representatives.

29.4 Such amendment shall not be effective until the Registrar has given the Association a certificate that the alteration has been registered.

19 In 2010, as the new rules proposed an alteration to the qualifications of persons for membership, the new r 5 which sets out the categories of members came before the Full Bench for authorisation in FBM 12 of 2010. After hearing counsel for the applicant, Mr I Curlewis, the Full Bench made an order authorising registration of the new r 5. In its reasons for decision the Full Bench found it was satisfied that the applicant had complied with its rules by sending all notices to its 155 member schools by electronic mail transmission to the email addresses for each member school recorded in the applicant's register of members: ***Re Association of Independent Schools of Western Australia (Inc)*** [2010] WAIRC 01208; (2010) 90 WAIG 1852. It is notable that when that application was determined, r 29.3 of the applicant's rules simply required that each member be sent a notice at 'its address' and that r 30.1 to r 30.3 specified the means for giving notice in the same terms as current r 28.

20 In the notice sent by electronic mail on 19 July 2010 of a general meeting of the council to all members the reasons given to members for the substitution of a new constitution (rules) was as follows:

A copy of the proposed new Constitution identified by the words *'AISWA NEWCON'* is attached to and forms part of this Notice. The reasons for the substitution of the new Constitution are to

- make clear the role of the Board of AISWA as the body responsible for the governing and direction of AISWA in accordance with AISWA's objectives,

- remove all reference to the Council in the Constitution because its status in the Constitution has ceased to serve any practical purpose in the governance of AISWA,
- modernise the composition, election to and tenure of the Board of AISWA, Education Policy Committee and Legal and Governance Committee,
- introduce a new category of membership called Affiliated Organisation to permit membership to an organisation with Advance Determination for school registration or an allied education service provider, and
- correct various grammatical and textual inconsistencies throughout the current Constitution.

21 The explanation given to members for the alteration to r 27 was that 'Members of the Association will approve an alteration to the new Constitution at a General Meeting'. Thus, it appears clear that no attention was drawn in the explanation given to members in 2010 that notices to alter the rules of the applicant were now to be sent to a member's 'registered address'.

22 However, when the current text of r 27 is compared with the previous r 29, it emerges that the changes in the text in 2010 were as follows:

(a) whereas council had the power to amend the provisions of the rules, the power was to henceforth reside with the members at a general meeting; and

(b) notice specifying the reasons for amendment was to be sent to each member 'at its address' is now to be sent 'at its registered address'.

Applicant's submissions – sending notice by electronic mail to members

23 Rule 5.2 of the rules of the applicant requires that for admission as an independent school member of the applicant, the school must be registered under s 160 of the *School Education Act 1999* (WA).

24 As stated by Ms Gould in her statement made on 2 March 2017, pursuant to r 6, the applicant is required to maintain a register of members.

25 A submission is made on behalf of the applicant that the requirement of an independent school to be registered as a non-government school under the *School Education Act* (which results in the address of a registered school being kept in a register by the chief executive officer of the Department of Education Services pursuant to s 161 of the *School Education Act*), the address in that register should not be construed as the 'registered address' of a member in r 27 of the rules. The Department of Education Services' register is a register of schools licensed to provide services as a non-government school and is a separate register to the register of members.

26 The applicant says that the word 'address' in r 27 should be constructed as the address or addresses kept by the applicant pursuant to r 6 of the rules. In particular, it is argued on behalf of the applicant that when r 27 and r 28 are read together, notices required to be sent pursuant to r 27 can be sent either:

(a) by post to members at their registered address which is their postal address; or

(b) to a member's electronic address which is also a registered address as the register kept pursuant to r 6 contains the addresses of the physical location of each school, the school postal address and one or two electronic mail addresses.

27 This construction, the applicant says, is consistent with its longstanding practice to send all communications required to be sent in accordance with the requirements of rules by electronic mail.

28 It is also argued that the word 'registered' in r 27 should not be given any meaning as it does not add to the meaning of 'address'. When Mr Curlewis put this submission as counsel on behalf of the applicant he informed the Full Bench that he is a member of the applicant's Board and that he with the assistance of others drafted the 2010 amendments to the rules. When asked about the amendments to r 29 which became r 27 in the current rules, Mr Curlewis said that the 2010 notice to members setting out the explanation of the changes to the rules reflected the change that was intended to be made and that was all future amendments to the rules were to be approved by the independent school members at a general meeting instead of the council and that no other changes to the now r 27 were intended to be made. Thus, it was put on behalf of the applicant the addition of the word 'registered' in r 27 was an error in drafting.

29 Mr Curlewis also put a submission in the alternative that if r 27, when read with r 28, is construed as only authorising service by post by the operation of the recent insertion of the word 'registered' before address, the applicant is entitled to rely upon the savings provision in r 28.3.

30 Thus, it is argued it is open to the Full Bench to find that when regard is had to the evidence of Ms Gould it was an accidental omission by the applicant not to send the notice to the independent school members on 4 April 2016 to their registered addresses by post. The grounds of the accidental omission are said to be a mistaken view by the applicant that compliance with r 27 was authorised by giving notice by the means specified in r 28.1.3, that is, by sending the notices to the electronic mail address of each independent school member. If this argument is accepted it is said that it follows that the resolutions passed by the 23 member schools at the annual general meeting on 25 May 2016 were validly made.

Conclusion

31 The first issue to be determined is whether the sending of notices by electronic mail to independent school members of the applicant is authorised by r 27.

32 In ***Mullen v Gisborne*** [2010] WAIRC 00176; (2010) 90 WAIG 241, Acting President Smith set out the well-established principles of interpretation of rules of a registered organisation as follows [128] - [130]:

It is established at law that the rules of an organisation should not be interpreted strictly and literally but broadly. In *Hospital Salaried Officers Association of Western Australia (Union of Workers) v Minister for Health* (1981) 61 WAIG 616, Brinsden J said:

> The rules of a registered union of workers can only be changed in the manner prescribed by the statute, and the rules as registered from time to time are final and the only expression of them. That seems to me to be the only point in the case. It says nothing about the necessity to interpret the rules of a union strictly and literally but simply makes the point that the rules alone are to be looked at and not any collateral undertaking. Subsequent conduct of the parties may only be considered if such rules are in truth ambiguous and then only to resolve the ambiguity.
>
> Generally speaking the correct approach to the interpretation of a union rule is to interpret it in the same manner as any otherr [sic] document. It must be remembered however that union rules are not necessarily drafted by skilled draftsmen. It is therefore necessary I think in construing a union rule not to place too literal adherence to the strict technical meaning of words but to view the matter broadly in an endeavour to give it a meaning consistent with the intention of the draftsman of the rule. This approach has been endorsed in relation to awards: see Geo A. Bond & Co. Ltd. (In Liq.) v. McKenzie (1929) A.R. 499 at 503-4 referred to in Federal Industrial Law by Mills and Sorrell 5th Ed at p.522. I also said much the same thing in the unreported decision of Bradley v. The Homes of Peace 1005/1978, judgment delivered 21st December, 1978 at p.13-14 (618).

Whilst Brinsden J made these observations in 1981, the approach to the interpretation of rules of registered organisations has remained unchanged. In *Stacey*, Ritter AP observed [92] - [93]:

> A similar approach has been adopted by the High Court in the construction of union eligibility rules. In *Re Anti-Cancer Council of Victoria; Ex Parte State Public Services Federation* (1992) 175 CLR 442 at 448, Mason CJ, Brennan and Gaudron JJ said it '*is well settled that union eligibility rules are to be interpreted liberally and according to their ordinary and popular meaning*'. Their Honours cited a number of decisions in support of this proposition including *The Queen v Isaac*; *Ex Parte Transport Workers' Union* (1985) 159 CLR 323 decision, where Wilson J at 340 said:-
>
> > '*In construing the eligibility clause in the constitution of an organization, it is necessary to bear in mind the nature of the instrument in which the words appear and the purposes that it is intended to serve. The rule now in question bears ample indication on its face that it has been prepared without the assistance of a skilled draftsman. It has been amended from time to time, probably in response to the exigencies attending the industrial affairs of the union and without regard to the effect of the amendment on the internal consistency of the clause as a whole. It follows that the words of the rule should be given a wide meaning and interpreted according to their ordinary or popular denotation rather than by reference to some narrow or formal construction: Reg. v Cohen; Ex parte Motor Accidents Insurance Board ; Reg. v McKenzie; Ex parte Actors and Announcers Equity. Nevertheless, notwithstanding this generosity of approach, the meaning of the words remains a legal question to be determined by the application of the ordinary rules which govern the construction of written documents: Reg. v Aird; Ex parte Australian Workers' Union; McKenzie.*' (Footnotes omitted)
>
> French J in *Re Election for Office in Transport Workers' Union of Australia, Western Australian Branch* (1992) 40 IR 245 at 253 said that the "*preferred approach to the construction of union rules which requires them to be construed not technically or narrowly but broadly and liberally and not "subjected to the same meticulous scrutiny as a deed carefully prepared by lawyers.*"". His Honour cited *R v Holmes*; *Ex Parte Public Service Association (NSW)* (1977) 140 CLR 63 per Gibbs J at 73 and *Re An Election in the Australian Collieries Staff Association (NSW Branch)* (1990) 26 FCR 499 per Lockhart J at 502. The reasons of French J were cited with approval by Mansfield J in *Thomas v Hanson* [2001] FCA 539 at [20]. Authorities cited by the applicant set out a similar method of approach. (*Delron Cleaning Pty Ltd T/A Delron Hospitality Management* (2004) 84 WAIG 2527 at [40] and *FMWU v GW Smith and KJ Rose* (1988) 68 WAIG 1010.

In construing the rules of a union a Court or Tribunal may have regard to prior amendments to the rules. In *Community and Public Sector Union v EDS Australia* (2003) 129 IR 7 it was accepted that the words of an eligibility clause should be given a wide meaning, being interpreted to the ordinary and popular denotation and for regard being had to the history of amendments to a rules [62]; [74] (see the discussion in *Electrical Trades Union of Australia* (Bowen CJ, Evatt and Deane JJ) (82 - 83)). Notwithstanding that it is permissible to have regard to any relevant history of amendments to the rules of an organisation and to the fact that the rules are usually drawn by union officials who are not trained in the drafting of legal instruments, the question of the meaning of the terms used in a rule remains a legal question (*R v Aird; ex parte Australian Workers' Union* (1973) 129 CLR 654, 659 (Barwick CJ).

33 Allowing for the principle that union rules are to be interpreted broadly and liberally, together with the principle that a document is to be read as a whole, the term 'registered address' in r 27 must mean an address contained within the register kept pursuant to r 6 of the rules. It does not necessarily follow, however, that the term includes each of the categories of 'address' in the register as the term 'registered address' is used in r 28.1.2 to only refer to service by post.

34 Prior to the 2010 substitution of the rules, it was sufficient to send a notice to each independent school member at its 'address' by electronic mail as service in such a way raised no inconsistency between means of service of notices in r 31 (now r 28) and r 30 (now r 27).

35 When regard is had to this history, together with the evidence that for many years notice has been effected by electronic mail, it is apparent from the record of reasons given to the members in 2010 for the 2010 alterations to the rules that in 2010 there

was no intention to revert from a modern era of communication of service of notices to a slower and less efficient means of communication via a past era of exclusive service by post.

36 Consequently, the Full Bench accepts the inclusion of the word 'registered' in r 27 in the 2010 rule variations to be a drafting error, which has led to an inconsistency between r 27 and r 28. In these circumstances, it is open to read r 27.2 by omitting or reading down the word 'registered'. In doing so, the principle of construction that words may be supplied, omitted or corrected to mean all classes of addresses of independent school members recorded in the register required by r 6 to avoid absurdity or inconsistency in the construction of a document can be relied upon: ***Fitzgerald v Masters*** [1956] HCA 53; (1956) 95 CLR 420, 426 (Dixon CJ and Fullagar J). In ***Warwick Cinema Syndicate Pty Ltd v Man Kan*** [2011] WASC 37, Corboy J observed [16] - [17]:

> In ***Fitzgerald v Masters*** [1956] HCA 53; (1956) 95 CLR 420, a contract for the sale of an interest in land contained several provisions relevant to the sale and then specified (by cl 8) that 'the usual conditions of sale in use or approved by the Real Estate Institute of New South Wales relating to sales by private contract of land held under the *Crown Land Act* shall so far as they are *inconsistent* herewith be deemed to be embodied herein' (emphasis added).
>
> Dixon CJ and Fullagar J stated at 426 - 427:
>
> > There is a superficial difficulty in cl 8, because it purports to incorporate a set of conditions so far as they are *in*consistent with what has been specifically agreed upon. No real difficulty, however, is created. Words may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency. Here it would be indeed absurd to suppose that the parties, having expressed their agreement on a number of special and essential matters, should intend to incorporate by reference terms inconsistent with what they had specially agreed upon. What they must clearly have intended is to incorporate a set of general conditions except so far as they were inconsistent with what they had specially agreed upon, and cl 8 must be read as if it said 'consistent' or 'not inconsistent'. (original emphasis)

37 When r 27.2 is read by the omission of the word 'registered' no inconsistency between r 27 and r 28 arises so that r 27.2 authorises the sending of notices given pursuant to r 27.1 by any of the means specified in r 28, which includes the sending of a notice by electronic mail. Without the omission of the word 'registered' in r 27.2 a clear inconsistency with the intended operation of r 28 arises. Thus, once the word 'registered' in r 27.2 is read as omitted, the Full Bench is satisfied that the notice given on 4 April 2016 was authorised in accordance with the rules of the applicant.

38 Turning to the notice given on 4 November 2016, whereas a notice given pursuant to r 27 is only required to be given to independent school members (and does not require notice to be given to affiliate members), pursuant to s 62(3) of the Act, reasonable notice must be given to all members of any proposed alteration and the reasons therefor and the members must be given a reasonable opportunity to object.

39 Having reviewed the register of members published for 2016-2017, after hearing oral submissions on behalf of the applicant it appeared to the members of the Full Bench that the Bunbury Regional Community College who is an affiliate member had not been provided with notice of the matters specified in s 62(3)(b) as that member had no electronic mail address recorded in the annual register of members published for 2016-2017 (exhibit A). Consequently, on 17 March 2017, the following email was sent to the applicant's solicitors from the associate to the Acting President:

> Section 62(3) of the *Industrial Relations Act 1979* requires that reasonable steps be taken to adequately inform the members:
>
> (a) of the proposal for alteration and the reasons therefor; and
>
> (b) that the members or any of them may object to the proposed alteration by forwarding a written objection to the Registrar.
>
> In light of this provision the Full Bench requests that you take instructions from your client and advise whether the Affiliate Member, Bunbury Regional Community College, was at any time sent a copy of the Notice of 4 April 2016 and/or the Notice of 4 November 2016, and, if so, when and by what means.
>
> If your client wishes to make any submission about the requirements of s 62(3), could you please provide the submission with the requested information within seven days.

40 In response, the applicant's solicitors filed a further statutory declaration made by Ms Gould on 20 April 2017. In this statutory declaration Ms Gould set out the following steps that were taken to inform the Bunbury Regional Community College of the proposed alterations to the rules and to give notice of their right to object to the alterations:

(a) On 31 March 2017, a letter from Ms Gould was sent by email to Ms Posy Barnes, the chief executive officer, JSW Training and Community Services. The letter set out each of the resolutions passed at the annual general meeting of the council on 25 May 2016, together with a copy of the rules marked up with the proposed alterations approved at the council meeting.

(b) The letter was sent to Ms Barnes as she is recorded as the contact person for Bunbury Regional Community College in the applicant's records for all communications.

(c) The letter was not sent by mail as the Bunbury Regional Community College does not at the present time have a physical address, nor formal authority under the *School Education Act* as it does not at this time operate as a school.

(d) In the letter sent by email on 31 March 2017, Ms Gould advised the Bunbury Regional Community College that it could object to the passing of the resolutions and the making of the application to the Full Bench by filing a notice of objection within 21 days of the receipt of the notice.

(e) At 7.00pm on 31 March 2017, Ms Barnes sent an email to Ms Gould in which she stated that she approved of the amendments to the rules.

41 When regard is had to the matters set out in the statutory declaration of Ms Gould made on 20 April 2017, together with the evidence set out in her statutory declarations made on 22 September 2016 and 19 December 2016 and her statement made on 2 March 2017 (exhibit B), the Full Bench is satisfied that:

(a) the application has been authorised in accordance with the rules of the applicant;

(b) reasonable steps have been taken to adequately inform the members of the intention of the applicant to apply for the registration of the proposed alteration to r 5 of the rules;

(c) each member had been provided with a notice that set out the proposed variation to r 5 and the reasons for the variation; and

(d) each member had been given notice that they could object to the variation of the rule by forwarding a written objection to the Registrar within 21 days of the receipt of notice of the proposed alteration to r 5.

42 The Full Bench is also satisfied that the members of the applicant have been afforded a reasonable opportunity to make an objection and it notes that no member of the applicant has objected to the making of this application or to the proposed alteration of r 5.

43 For these reasons, the Full Bench is satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act were complied with. The Full Bench is also satisfied the requirements of s 55(5) do not arise as no issue of overlapping coverage of members arises.

44 Section 55(4)(e) and s 56(1) of the Act relate to procedural rules for election for office, including secret ballots. The applicant's rules currently provide for procedures required by the provisions of the Act and the alteration sought to r 5 does not deal with the matters specified in these provisions.

45 For these reasons, the Full Bench is of the opinion that an order should be made to authorise the Registrar to register the alteration of the rules of the applicant as published in the Western Australian Industrial Gazette on 25 January 2017 ((2017) 97 WAIG 94).

2017 WAIRC 00253

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ASSOCIATION OF INDEPENDENT SCHOOLS OF WESTERN AUSTRALIA (INC) **APPLICANT** **-and-** (NOT APPLICABLE) **RESPONDENT**
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
DATE	MONDAY, 8 MAY 2017
FILE NO.	FBM 3 OF 2016
CITATION NO.	2017 WAIRC 00253

Result	Application granted
Appearances	
Applicant	Mr I Curlewis (of Counsel)

Order

This matter having come on for hearing before the Full Bench on 10 March 2017, and having heard Mr I Curlewis (of Counsel) on behalf of the applicant, the Full Bench orders that: —

The Registrar is hereby authorised to register the alteration to r 5 of the rules of the applicant as published in the Western Australian Industrial Gazette on 25 January 2017 ((2017) 97 WAIG 94).

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2017 WAIRC 00222

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2017 WAIRC 00222
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	WEDNESDAY, 1 MARCH 2017, THURSDAY, 2 MARCH 2017, THURSDAY, 9 MARCH 2017
DELIVERED	**:**	THURSDAY, 20 APRIL 2017
FILE NO.	**:**	M 23 OF 2016
BETWEEN	**:**	CHRISTINE DOROTHY ZEEB
		CLAIMANT
		AND
		KALHAVEN HOLDINGS PROPRIETY LIMITED
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Small Claim – Modern award coverage – Travel Industry – Classification of travel consultant within General Retail Industry Award 2010 [MA000004] – Contravention of terms of a modern award on minimum pay; overtime and penalty rates – Serious misconduct
Legislation	**:**	*Fair Work Act 2009* Fair Work Regulations 2009
Instruments	**:**	Clerks - Private Sector Award 2010 [MA000002] General Retail Industry Award 2010 [MA000004]
Case(s) referred to in reasons	**:**	***Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 148 ***Mr David Joseph v Amandon Pty Ltd T/A World Business Travel*** [2013] FWCFB 8539 ***Saga Holidays Ltd v Commissioner of Taxation*** [2006] FCAFC 191 ***Mr David Joseph v Amandon Pty Ltd T/A World Business Travel*** [2013] FWCFB 8539 ***Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd*** [2016] FCCA 621 ***Director of Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No7)*** [2013] FCCA 1097 ***Logan and Otis Elevator Company*** [1997] IRCA 200 ***Ware v O'Donnell Griffin (Television Services) Pty Ltd*** [1971] AR (NSW) 18 ***Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd*** [2016] FCCA 621 ***Fair Work Ombudsman v Da Adamo Nominees Pty Ltd No 4*** [2015] FCCA 1178 ***Aldo Becherelli v Mediterraneus Pty Ltd trading as Lucioli*** [2017] WAIRC 65 ***Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate*** [2015] FCAFC 99 ***James Turner Roofing Pty Ltd v Peters*** [2003] WASCA 28 ***Melbourne Stadiums Ltd v Sautner*** [2015] FCAFC 20 ***Rankin v Marine Power International Pty Ltd*** (2001) 107 IR117 ***Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)*** [2016] FCA 1453 ***Hill v Compass Ten Pty Ltd (No. 2)*** [2012] FCA 815 ***Concut Pty Ltd v Worrell*** [2000] HCA 64 ***Shepherd v Felt and Textiles of Australia Ltd*** [1931] HCA 21 ***Bruce v A W B Ltd*** [2000] FCA 594
Result	**:**	Judgment for the claimant
Representation:		
Claimant	**:**	In person
Respondent	**:**	Ms M. Harding, a director

REASONS FOR DECISION

Introduction

1 Ms Christine Zeeb (Ms Zeeb) was employed by Kalhaven Holdings Pty Ltd (the Company) from 25 February 2014 until 26 October 2015. Ms Zeeb was a travel consultant in a business operated by the Company, 'Discover Australia Holdings'. She claims $14,589.34 from the Company, alleged to be the minimum weekly wages, annual leave (including loading) and payment in lieu of notice upon termination, to which she is entitled under the provisions of the Clerks - Private Sector Award 2010 [MA000002] (the Clerks Modern Award), at a level 2 classification.

2 The Company disputes the claim on a number of grounds. First, the Company submits that the Clerks Modern Award (or any award) did not apply in circumstances where Ms Zeeb and the Company signed documents at the commencement of her employment (the Signed Documents) providing for an hourly rate and a 'team productivity bonus' which was expressed to be 'for all amounts of overtime, allowances, penalties and loadings'. Secondly (and alternatively), the Company submits that the terms and conditions of Ms Zeeb's employment were governed by the General Retail Industry Award 2010 [MA000004] (the Retail Modern Award) at a level 1 classification with the result that Ms Zeeb has been paid her entitlements in full. Thirdly, the Company submits that it had no obligation to make any payment in lieu of notice in circumstances where Ms Zeeb was summarily dismissed for lawful grounds on the last day of her employment.

3 In Schedule 1 of this decision I have set out the law relevant to the jurisdiction, practice and procedure of this court in determining this case. Relevant to matters identified under the heading, 'Jurisdiction' in Schedule 1 of this decision, I am satisfied: Ms Zeeb has elected to use the Small Claims procedure provided for in s 549 of the *Fair Work Act 2009* (FW Act); the Company is a corporation to which paragraph 51(XX) of the Constitution applies and it is a 'national system employer'; Ms Zeeb was an individual who was employed by the Company.

4 In order to determine this case, I must resolve five issues.

- First, I must determine whether Ms Zeeb and the Company were covered by the Clerks Modern Award or the Retail Modern Award (or no award). In Schedule 2 of this decision, I have set out relevant extracts of the Retail Modern Award. For the reasons set out below, I conclude that Ms Zeeb and the Company were covered by the Retail Modern Award and that, as a result of the FW Act, this award applies to this case.
- Secondly, I must determine the appropriate classification of Ms Zeeb under the Retail Modern Award. For the reasons set out below, I conclude that the appropriate level of classification from the levels set out in Schedule B of the Retail Modern Award is 'retail employee level 4'.
- Thirdly, I must determine the significance of the Signed Documents. For the reasons set out below, I conclude that the Signed Documents do not comply with the provisions of the Retail Modern Award in cl 7 setting out the requirements to vary the award. Accordingly, the Signed Documents are of no effect insofar as they are inconsistent with the Retail Modern Award.
- Fourthly, I must determine the entitlements of Ms Zeeb under the terms of the Retail Modern Award given the terms of the award concerning minimum weekly wages, ordinary hours of work, overtime, penalties and annual leave loading. I must also determine whether the entitlement of Ms Zeeb under the Retail Modern Award ought to be reduced on account of any above award payments made by the Company to Ms Zeeb (e.g. on account of team productivity bonuses). For the reasons set out below I conclude that, compared to her entitlements under the Retail Modern Award, the Company has underpaid Ms Zeeb the sum of $ 9441.06 and must now pay her that amount.
- Fifthly, I must determine whether the Company was entitled to terminate the employment of Ms Zeeb on the 26 October 2015 without notice (on the grounds of 'serious misconduct') and, if not, Ms Zeeb's entitlement to a payment in lieu of notice under the Retail Modern Award. For the reasons set out below I conclude that, by reason of the repudiatory conduct of Ms Zeeb on 26 October 2015, the Company was not required to give notice of termination.

The Business of the Company and the Duties of Ms Zeeb

5 To resolve the first two mentioned issues – identifying the relevant award and determining the appropriate classification of Ms Zeeb's position – it is necessary to make findings on the business of the Company and the role performed by Ms Zeeb in that business.

6 The Company has been involved in the tourism industry for twenty years including as a 'licensed Travel Agent, a member of the Travel Compensation Fund and a member of Australian Tourism Export Council' (Exhibits 2, 24). It conducts business under names including 'Discover Australia Holidays' and 'Discover West Holidays'.

7 The products of the Company are various 'packaged holiday deals' comprising combinations of transport (air, rail, coach, hire car etc.), accommodation and other experiences (e.g. tours). The Company does not itself supply the transport, accommodation and other experiences forming the package. Those goods and services are supplied by third party suppliers - airlines, hotels, tour providers etc. - to a customer after a booking has been placed by the Company in the name of the customer who has purchased a package deal from the Company. An example (from Exhibit 13) of a package deal is the 'Indian Pacific to Perth All-Inclusive 9 Day Train Package'. It features (prominently) an advertised 'starting cost' of $2,630 and sets out components including, 'Gold Service Indian Pacific, Airfare Perth to Sydney, 5 nights central hotel, 3 luxury coach tours: Pinnacles Desert, New Norcia, Margaret River'.

8 Each 'packaged deal' is assembled, maintained and checked by the Products Department of the Company (Exhibits 9, 24, 25). At the date of hearing, the Products Department comprised four staff, including staff located in Spain, Queensland and Fremantle, i.e. 'off-site' from the Company premises in West Leederville (Exhibit 25). The packaged deals are advertised by

the Marketing Department of the Company. The advertising is to the general public in a variety of forums and using a variety of media e.g. 'The Senior' magazine (Exhibit 4). The response to the marketing is from the general public (98%) rather than travel agents (2%) (TT294). The advertising may highlight a price for each 'packaged deal' which, as the advertising states in small print, may only be available for select low season dates (Exhibit 4, 13). The advertising directs the reader to 'book now on 1800 73 2000' and states that 'full details on discoverAustralia.com'.

9 The 'lower value' customers of the Company, measured by the amount spent with the Company, tend to initiate contact with the Company via its' website and use the website to book and pay for an advertised package via a 'fully automated process'. 'Flights, hotels etc. are electronically booked and payment is automatically processed at the time of booking (via credit card) and documentation is automatically sent by email to the customer' (Exhibit 24). The Reservations Department of the Company is not involved in those fully automated transactions. The average value of 'fully automatic transactions' was said by the witness, Mr Nathan Harding, to be approximately $1,100 (TT303). The 'higher value' customers of the Company, said to be those with an average spend of approximately $8,000, tend to initiate contact with the Company by telephone. These calls are answered by a Company employee located in the Reservations Department at the Company premises.

10 On 29 January 2014, Ms Zeeb applied for a position advertised by the Company as a 'wholesale travel consultant' (Exhibit 19). In her letter of application, Ms Zeeb referred to a 'Tourism Management Degree' and relevant work experience ('short term full time at Holiday Planet and Cruise Planet group at marketing internet assistant'; 'casual basis at Discovery Holiday Park', 'Creative Holidays full time 3 years as a reservations sales consultant and direct passenger consultant'). In her attached resume she notes: 'Retail Travel and Tourism Certificate IV (1998)'; 'Diploma in Tourism and Travel (2000)', 'Bachelor of Tourism Management (2005)'. On 25 February 2014 the parties signed what I have referred to above as "the Signed Documents". More particularly, the Signed Documents comprise: (1) a six page document in two parts, a one page 'Employee Induction Record' and a five page 'Agreement to Terms and Conditions'; (2) an eight page document in the form of a letter to Ms Zeeb, stating that 'this letter sets out the terms of your employment with the Company'. None of the documents make reference to the duties, skills or functions that Ms Zeeb was expected to perform.

11 Ms Zeeb commenced work on 25 February 2014. After a short period of training she moved to the Reservations Department and commenced work as a travel consultant. The Reservations Department was divided into two teams. Each team is comprised of a team leader and between four and seven travel consultants (Exhibit 11).

12 The *function* of a travel consultant is to do whatever is reasonably necessary to secure and maintain a booking from a customer who contacts the Company (TT295). The *tasks* performed by a travel consultant in discharging this function were variously described by the witnesses in the case. Ms Zeeb and witnesses called by her (Ms Giraldo, Mr Hariya, Ms d'Hotman de Villiers and Ms Kury) emphasised the complexity and variety of tasks that were necessary to be performed by the travel consultant in securing and maintaining a customer booking. The witnesses for the Company (Ms Harding, Ms Shah, Mr Patel, Mr Harding and Ms Innes) emphasised the routine nature of the tasks performed by the travel consultant, said to be the result of two features of the Company business model. First, a Computer system was said to enable almost every task of a travel consultant to be done by 'pointing and clicking' on a computer screen (Exhibit 24). Secondly, the implementation of a Company business system that involved a high degree of specialisation between the separate and distinct departments of the Company (reservation department, accounts department, documentation department etc.) was said to free travel consultants from the usual accounting tasks and the documentation tasks associated with a customer booking (Exhibits 24, 28). The Company witnesses also emphasised the high level of training available to a travel consultant.

13 For my purposes - identifying the relevant award and the appropriate classification - it is not necessary for me to make precise findings on the disparate views of the witnesses. It is sufficient for my purposes to make the findings below on the tasks of a travel consultant in the position of Ms Zeeb during the relevant period. The findings in points 'a' – 'g' below reflected consistencies in evidence given all witnesses. The finding in point 'h' below reflects my preference for the consistent evidence of witnesses with most experience of the role of travel consultant in preference to the evidence of Company management on the intended effect of Company systems.

a. Travel consultants communicated with customers by telephone, email, over the web and, rarely (see below), in person, as necessary to respond to customer enquiries and initiate advice about products of the Company.

b. Travel consultants prepared a written quote/costing for a proposed customer booking and 'followed up' with the customer to ascertain if the customer wished to make a booking.

c. Travel consultants, upon a customer requesting a booking, placed bookings with third parties for transport, accommodation and other experiences as required by the customer booking.

d. Travel consultants recorded the taking of the above steps, typically in a 'log'. Depending upon the task, this recording was done by a manual log entry of a travel consultant or an automatic log entry generated by the Computer system.

e. Wherever possible, travel consultants used the computer systems of the Company to complete the above tasks. For this purpose, the travel consultant *actively* used the Reservation Engine, the 'log' system and computer systems set up by the Company by which the Company communicated with customers and with certain suppliers. The travel consultant *passively* viewed the Product Engine, Accounts Engine and Documentation Engine to the extent necessary to obtain the information required to perform the above tasks.

f. On occasion, the Reservation Engine (and other Engines) were not able to be used to complete the above tasks. This was usually because of the policy of the supplier (e.g. airlines, Great Southern Rail and car hire) or the need to check on availability of a particular product (Exhibit 11). In these cases, an additional task of the travel consultant was to use the supplier's web site as required or to contact the supplier by email or telephone to complete an availability check.

g. Travel consultants did not perform tasks that the Company business system required to be performed by staff employed in other departments, notably by staff in the accounts department (receive payments, pay suppliers and other third parties, undertake banking, undertake bank reconciliations, process refunds, pay for flights) or the documentation department (issue flights, prepare travel documents, arrange collection of travel documents) (Exhibits 24, 25, 28).

h. On occasion, at the specific request of a customer during a telephone conversation with a travel consultant, it was expedient for a travel consultant to process a credit card payment over the phone (Exhibits 11, 15). On occasion, at the request of a customer to an identified travel consultant, it was expedient for a travel consultant to initiate a 'request for a refund' to be approved by Company management and paid by the accounts department in accordance with the terms and conditions of the customer booking.

14 The time involved by a travel consultant in the respective tasks outlined above is difficult to quantify with accuracy. There was evidence that on average, 11% of enquiries to a travel consultant resulted in a booking (TT 297), suggesting that significant time was spent fielding telephone enquiries (a. above). However, those telephone enquiries may have resulted in quotes/written costings which takes time (b. above) and which did not translate to bookings. It is sufficient for my purposes to state that I am satisfied that sufficient time is involved by a travel consultant in the tasks that I describe in a, b, c, d, f and h above so as to be relevant to the issues of award coverage and award classification (considered below).

15 The Company operates from premises at Railway Parade, West Leederville. Photographs (Exhibit 14) reveal the premises to have a 'commercial office' appearance. On the ground floor is a glass entry door with the Company logo. This door opens into a reasonably sized reception area with seating and a reception desk on which are displayed brochures advertising 'package deals'. The seating and the reception is used on the infrequent occasions when a customer attends and 'rings the bell' on the reception desk. It was said that 0.1% of customer enquiries were initiated by personal contact at the Company premises. A member of staff would attend upon the customer in the reception area and deal with the customer's enquiry. Often as not, given the absence of a computer terminal in the reception area, the customer would be encouraged to make future contact with the Company *after* the customer has left the premises and used their own computer device to view the Company website.

First Issue: Award Coverage in the Travel Industry

16 Ms Zeeb contends that her employment was covered by the Clerks Modern Award. Clause 4.1 of the Clerks Modern Award provides for the coverage of 'employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical work, including administrative duties of a clerical nature.' Clause 3.1 defines 'clerical work' to include 'recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard and attending a reception desk'. In support of her contention, Ms Zeeb emphasizes the similarity between the function and tasks of the travel consultants in the Reservation department of the Company and the duties and skills listed for the classifications, including the duties and skills of call centre contact officers grade 1, as set out in Schedule B of the Clerks Modern Award at B.2.2(x) for a level 2 employee. The call centre duties listed include: use known routines and procedures; some accountability for quality outcomes; receive calls; use common call centre technology; enter and retrieve data; work in a team; manage own work under guidance; and provide at least one specialised service (sales and advice for products and services, complaints or fault enquiries or data collection surveys).

17 The Company contends that *if* any award covered Ms Zeeb's employment, the Retail Modern Award was the most appropriate award. Clause 4.1 of the Retail Modern Award provides for the coverage of 'employers in the general retail industry and their employees in the classifications' as listed in cl 16 of the award. Clause 3.1 defines 'general retail industry' to mean the 'sale or hire of goods or services to final consumers for personal, household or business consumption'. Clause 16 links to a classification structure set out in Schedule B. Schedule B provides for the classification of an employee into one of eight levels, dependent upon the tasks that the employee is performing *at a retail establishment* (my emphasis). In support of its contention, the Company emphasises that the business of the Company is the selling of travel products to the general public and that the role of travel consultants was to provide 'information, advice and assistance to customers to sell the tourism products and packaged products of the Company' (Respondent's Amended Documents lodged on 29 June 2016).

18 A modern award made by the Fair Work Commission does not impose an obligation or give an entitlement unless the award *applies* to the employer and the employee: s 46 of the FW Act. An award *applies* to the employer and the employer if the award *covers* each of them: s 47 of the FW Act. An award *covers* an employer and an employee if the award is expressed to cover each of them: s 48(1) FW Act. It follows that the starting point to determine award coverage are the words of the award itself. More specifically, it is 'the objective meaning of the words used (in the relevant award) bearing in mind the context in which they appear and the purpose they were intended to serve': ***Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 148 [22] (Siopis, Buchanan and Flick JJ).

19 An examination of the words of each of the Clerks Modern Award and the Retail Modern Award is instructive. Clause 4.1 of the Clerks Modern Award provides that 'the [Clerks Modern] award does not cover an employer bound by a modern award that contains clerical classifications'. The Retail Modern Award contains clerical classifications (as a result of cl 16 and Schedule B). The Retail Modern Award provides that the functions of retail employees at levels 1, 4 and 6 are expressed, respectively, to include, 'clerical assistants functions level 1' (B.1.1), 'clerical officer level 2' (B.4.4) and 'clerical officer level 3' (B.6.3). The Retail Modern Award sets out the 'typical duties and skills' of those employees, respectively, at clauses B.1.8, B.4.5 and B.6.4. Put shortly, if the Company is covered by the Retail Modern Award, the effect of cl 4.1 of the Clerks Modern Award is to give priority to the Retail Modern Award.

20 As a result of cl 4.1 and cl 16 (with Schedule B) of the Retail Modern Award, the Retail Modern Award covers the Company if the following two questions are answered affirmatively. For the reasons set out below, my view is that each question must be answered affirmatively, with the result that the Retail Modern Award covers the Company.

Is the Company 'in the general retail industry' (cl 4.1); meaning 'the sale or hire of goods or services to final consumers for personal, household or business consumption' (cl 3.1)?

21 It is apparent from my findings above that the Company sells 'package deals' of transport, accommodation and other experiences to consumers for their personal consumption, see paragraph 7. There is no reason why the sale of this combination of goods and services does not fall within the ordinary meaning of 'general retail industry' as defined in the Retail Modern Award. The fact that it is the sale of a *future* delivery of the transport, accommodation or other experience and that the delivery is to be by a third party and not the Company, does not affect this conclusion. It is sufficient to adapt the observation of Stone J (with whom Gyles and Young JJ agreed) in ***Saga Holidays Ltd v Commissioner of Taxation*** [2006] FCAFC 191 [34] in a case where, at issue, was the legal characterisation of a transaction involving a consumer purchasing a 'package deal' from a travel agent for, inter alia, hotel accommodation that would be supplied by a third party.

> *The contract between the [travel agent] and a tourist was one whereby [the travel agent] promised to provide the tourist with certain accommodation. Had the tourist not been supplied with the promised accommodation, [the travel agent] would have been in breach of this contract. This is true irrespective of the fact that [the travel agent] was not in a position to provide the accommodation itself and was relying on its arrangements with [third parties] to enable it to fulfil its contractual obligations to the tourist. It is also irrelevant …that the accommodation had not been appropriated to the contract at the time the contract was made and that, had [the travel agent] breached the contract, specific performance would not have been an available remedy. … [A]t the time it was entered into, the contract between [the travel agent] and the tourist was an executory contract. It was none the less binding although the time for performance … had not yet arrived. There is nothing unusual about that.*

The sale of a 'package deal' by the Company confers upon the customer the right to be supplied, on a date in the future, with the contents of the 'package deal' in exchange for payments (as promised by the customer).

Do the employees of the Company perform their functions or perform work *at a retail establishment* (Schedule B1.1, B2.1, B1.3 etc.)?

22 Two things are apparent from my findings above. First, the Company premises at Railway Parade, West Leederville is a 'bricks and mortar' establishment i.e. it has a significant physical presence and it has a role in housing all of the employees of the Reservations department of the Company and (almost) all of the operations of the Company. Secondly, almost all of the retail transactions of the Company involve electronic or telephonic communications between employees of the Company and customers. Notwithstanding that an overwhelming percentage of customers of the Company will never attend the Company premises, it was from those premises that all of the employees of the Reservations department received or initiated electronic or telephonic communications that were necessary to commence, advance and resolve each *retail* transaction of the Company. This fact is sufficient, in my view, to characterise the Company premises as a 'retail establishment'.

23 My conclusion that the Retail Modern Award covers Ms Zeeb and the Company is consistent with the reasoning of the Fair Work Commission in an appeal by ***Mr David Joseph v Amandon Pty Ltd T/A World Business Travel*** [2013] FWCFB 8539 where at issue was a claim by an employee responsible for making travel bookings and supervising other travel consultants who were engaged in taking and making telephone and internet travel related bookings for an employer's corporate clients. The employer was a corporate travel consultant business with seven full-time employees and one part-time employee. Relevantly, the Commission stated:

> *In our view the work of a travel consultancy in selling and making travel bookings on behalf of clients falls within the description of the retail industry because it involves selling goods and services to final consumers for personal or business consumption. Further we are of the view that the broad classifications in that award extend to the travel consultants and (the employee) as a supervisor and a person required to perform similar duties as well as supervise their work was also covered by the award. We also are of the view that the (Clerks Modern Award) covers the substantial clerical nature of the work of travel consultants and their supervisor, although the most appropriate award to the business of (the employer) is the (Retail Modern Award) because of the nature of the employer's business and the priority given to the (Retail Modern Award) in the coverage clause of the (Clerks Modern Award) [28].*

24 Ms Zeeb's contention that her entitlements are to be found in the Clerks Modern Award cannot succeed given my conclusion that the Retail Modern Award covers the Company in circumstances where the Retail Modern Award contains clerical classifications. It remains necessary to determine the appropriate classification of Ms Zeeb's position in the Retail Modern Award.

Second Issue: Classification of Ms Zeeb Under the Retail Modern Award

25 The Retail Modern Award states that the classification of an employee 'must be according to the skill level required to be exercised by the employee in order to carry out the principle functions of the employment as determined by the employer' (cl 16.2 of the Retail Modern Award). It is necessary to focus on the skills, duties and tasks required of a travel consultant to successfully carry out the function required of a travel consultant by the Company, namely, to do whatever is reasonably necessary to secure and maintain a booking from a customer.

26 The following principles, drawn from decided cases, are relevant to determining the appropriate classification of Ms Zeeb's position:

- 'Where the particular issue is whether an employee is engaged in a particular classification or class of work, then the Court takes a practical approach and will consider the aspect of the employee's employment which is the principal or major or substantial aspect.'
  Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd [2016] FCCA 621 [27]; *Director of Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No7)* [2013] FCCA 1097; *Logan and Otis Elevator Company*, Moore J, 1997 IRCA 200 (20 June 1997).

- Determining the major or substantial aspect of an employee's employment is 'not merely a matter of quantifying the time spent on the various elements of work performed…; the quality of the different types of work done is also a relevant consideration'.
  Ware v O'Donnell Griffin (Television Services) Pty Ltd [1971] AR (NSW) 18.

27 The Company contends that the appropriate classification of a travel consultant in the position of Ms Zeeb is at the level of 'Retail Employee Level 1'. In support of its contention, the Company emphasizes the function of travel consultants was to sell 'package deals' in response to customer enquiries. From the list of skills and duties indicative of a level 1 retail employee, set out in paragraph B.1.1, the Company highlights the following as particularly relevant to the function of the travel consultant in selling packaged deals: sale of goods by any means; arranging payment by any means; provision of information, advice and assistance to customers.

28 My view is that a comparison of the tasks performed by travel consultants, in accordance with my findings as set out above at paragraphs 13-14, with the lists of indicative skills and duties set out in Schedule B suggests that the appropriate classification of a travel consultant in the position of Ms Zeeb was at the level of 'Retail Employee Level 4'. The function required of the Company, the sale of a product, appears as the duty of a level 1 retail employee. However, the same function is repeated for each higher level (B.2.1, B.3.1, B.4.1 etc) and the role performed by travel consultants is more accurately and more particularly captured by the description of the characteristics, duties and skills that appears for a level 4 retail employee at paragraph B.4.4 (i.e. a clerical officer level 2). Five matters are particularly significant in reaching this conclusion.

29 First, the characteristics of the role performed by travel consultants in the sale of the particular products of the Company (i.e. package deals comprising transport, accommodation and experiences) is aptly captured at paragraph B.4.4 as having 'had sufficient experience or training to enable (the employee) to carry out assigned duties under general direction'. Further, 'employees are responsible and accountable for their own work which is performed within established guidelines' and 'detailed instructions may be necessary'. I note the evidence of the witnesses for the Company on, firstly, the substantial level of training given to travel consultants and, secondly, on the detailed instructions available to travel consultants in the form of standard operating procedures.

30 Secondly, the typical duties and skills required of a travel consultant, described by me in paragraph 13 above, comfortably fall within the following descriptions at paragraph B.4.5: responding to enquiries as appropriate, consistent with the acquired knowledge of the organisation's operations and services and use of interpersonal skills are a key aspect of the position; operation of computerized equipment; word processing; maintenance of records including initial processing and recording relating to letters; computer application involving the use of a software package including functions such as creation of new files and records and following standard procedures and using existing models/fields of information; provide advice and information on the organisation's products and services.

31 Thirdly, compared to the text of the classification of a level 4 retail employee, the role performed by a travel consultant does not fit as comfortably in the text of the classification of any other level of retail employee. The descriptions of classifications levels 1, 2 and 3 refer to some tasks undertaken by travel consultants: the sale of goods; the provision of information, advice and assistance to customers; performing routine clerical and office functions under close direction using established procedures. However, of significance to me is the *absence* of reference in the level 1, 2 and 3 classifications to the giving of advice and information *about the Company's products* and the *absence* of reference to the necessity to use *computer systems*.

32 The Company required travel consultants to have a sufficient level of specialist product and specialist industry knowledge to confidently and appropriately enter contracts with customers for the sale of a 'package deal'. The evidence of the Company witnesses was that it devoted significant resources to training and preparing travel consultants to perform the task of advising customers and selling package deals. A number of witnesses noted that an important duty of a travel consultant was to confirm, in writing, telephone advice and costings. Before making any booking a travel consultant was required to notify the customer of the consequences if the customer was to subsequently change or 'cancel' the booking and, if a subsequent change or cancellation was requested, the travel consultant was required to advise the customer accordingly. This process of confirmation and the capacity of a travel consultant to enter a binding contract for the sale of a package deal that, after amendment, might have a sale price as high as approximately $30,000 (with an average of $8,000) is evidence of the duties of the travel consultant in advising customers and the necessity to use interpersonal (communication) skills.

33 An argument might be made for appropriate classification of Ms Zeeb's position at level 5 or level 6, having regard to the occasional requirement of 'specialized and non-routine tasks' and to the use of specialist terminology/process' that are relevant to the travel industry. However, I note that Ms Zeeb's function and tasks did not significantly change from the commencement of her employment until the end of her employment. I also note that, on my assessment of the evidence, that the principal or major role that she performed is more aptly captured by level 4 than level 6.

34 Fourthly, I have emphasized the parts of the text of the level 4 retail employee classification in Schedule B that are apposite to the work environment of the Company. The fact that other parts of the text of the level 4 classification are clearly inapposite to the work environment of the Company does not detract from my overall conclusion on the quality of work done by a travel consultant. For example, none of the indicative titles listed for a level 4 classification (assistant, deputy, second-in-command, service supervisor etc.) is relevant to the work environment of the Company which is characterized by travel consultants, team leaders, head of departments and 'management'.

35 Fifthly, the Company led evidence alleging a lack of skill of Ms Zeeb to perform the tasks expected of a travel consultant. This evidence may be relevant to the issue of the right of the Company to summary dismissal (discussed below). However, for the purpose of classification Ms Zeeb's position as a travel consultant, my focus is upon the identification of the skills and duties required of an employee who is called upon to perform the function that is required to be performed by the employer. The individual performance of a particular employee (e.g. quality and quantity of work, capacity for more complex work etc.) is less relevant than the skills and duties necessary to perform the function required to be performed by the employer: ***Fair Work***

Ombudsman v Complete Windscreens (SA) Pty Ltd [2016] FCCA 621 [32]; ***Fair Work Ombudsman v Da Adamo Nominees Pty Ltd No 4*** [2015] FCCA 1178 [256].

Third Issue: The Significance of the Signed Documents.

36 The effect of my conclusion with respect to the first two issues (above) is that the Retail Modern Award applies to the Company and Ms Zeeb and that her entitlements will be determined as provided in that award (as a level 4 retail employee). However, cl 7.1 of the Retail Modern Award provides that, 'notwithstanding any [provision of the award], an employer and an individual employee may agree to vary the application of the following terms of [the award] to meet the genuine individual needs of the employer and the individual employee': (a) arrangements for when work is performed; (b) overtime rates; (c) penalty rates; (d) allowances; and (e) leave loading (a Clause 7 Agreement).

37 A Clause 7 Agreement has no effect unless a number of conditions are satisfied; those conditions are set out in clauses 7.2 - 7.4 of the Retail Modern Award (the Clause 7 Agreement Pre-conditions). In paragraph 10 above I noted that the documents signed by the parties on 25 February 2014, at the time Ms Zeeb commenced her employment, included a document entitled 'Agreement to Terms and Conditions' (T & C) and a letter which commenced, 'this letter sets out the terms of your employment with the Company' (Employment Letter, or EL). The Company contends that the Signed Documents constitute an agreement to vary the terms of the Retail Modern Award with the result that Ms Zeeb's entitlements with respect to rate of pay, hours of work, overtime and penalties and public holidays are governed by those documents and not by the Retail Modern Award. It is necessary to compare the provisions of the Signed Documents with the Clause 7 Agreement Pre-conditions.

38 The Signed Documents include the following:

a. **Rate of Pay.** Clause 1.8 of the EL states that the company will pay 'an hourly rate of $17.38 inclusive of superannuation' and a 'team productivity bonus' and that 'your salary includes payment for all amounts of overtime, allowances, penalties and loadings to which you may become entitled under industrial laws'.

b. **Bonus.** Under the heading 'Above Award Payments', the T & C state that 'bonus payments above the award are made at the discretion of management'. Clause 1.8 of the EL states that 'it is expected you will be put on full team productivity bonus within six weeks' and sets out circumstances where the bonus may not be paid or may be reduced. E.g. 'any losses incurred by the company due to errors or omissions on your part will be deducted'.

c. **Hours of work.** '8 hours per day is to be worked (not including 30-minute lunch break), totalling 40 hours per week' (T & C). 'Your ordinary hours will be rostered hours and 'other hours required by the company as may be reasonable and necessary' (cl 1.2 of the EL).

d. **Penalties**. 'Saturday morning is worked on a roster basis which is a 4.5-hour shift. Weekends may if the need arises be required to be performed as part of the basic hours' (T & C)

e. **Public Holidays**. The T & C state that employees are required to work on public holidays and 'will receive standard rates'. Clause 3 of the EL states that 'you will also be entitled to paid public holidays under the Fair Work Act'.

f. **Overtime. '**All overtime must be authorized … prior to commencement. Overtime will not be authorized in the case of slow work performance' (T & C).

g. **Leave.** The T & C provide for accrued annual leave of 152 hours, not to be taken until the employee has been employed for 12 months, and for sick leave of 1.462 hours per week. Clause 3 of the EL states that 'you will be entitled to 4 weeks paid annual leave' and '10 days per annum' paid personal/carers leave.

h. **Deductions.** The T & C states that the Company can deduct 'pay in lieu of hours' from the pay of an employee who has accepted a bonus payment and fails to give 'appropriate notice' at the time of termination.

i. **Notice.** The T & L states that '4 weeks notice must be given mutually' and 'in accordance with the Common Law Contract signed by the employer and employee, pay in lieu of notice applies'. Clause 4 of the EL states that either party may terminate employment by giving one month's notice.

j. **Summary termination**. Clause 4(c) identifies the grounds upon which the company may summarily terminate employment including 'serious or gross misconduct', 'breach a fundamental condition' and 'engage in any conduct which in the reasonable opinion of the company might tend to injure the reputation or business of the company'.

k. **Reference to other 'industrial laws'.** Clause 1.7 of the EL states that 'the terms of the letter does not operate to the extent of inconsistency with any industrial laws' to which the company is subject except where the employee is 'in a better position than you would be' as a result of the consideration made by the Company to the employee.

39 The agreement between the Company and Ms Zeeb as evidenced by the Signed Documents *fails* to satisfy the Clause 7 Agreement Pre-conditions as follows:

a. A Clause 7 Agreement must be confined to a variation in the application of one or more of: (a) arrangements for when work is performed; (b) overtime rates; (c) penalty rates; (d) allowances; and (e) leave loading. The Signed Documents go beyond the topics upon which cl 7 applies, notably, in relation to rate of pay, deductions and notice. Mention should also be made of the Company practice, apparently authorised by the Signed Documents, by which losses as a result of an error of a travel consultant are deducted from bonus payments. Sections 324, 325 and 326 of the FW Act may have the effect of making this practice unlawful: Andrew Stewart et al, *Creighton and Stewart's Labour Law*, 6th edition, Federation Press, Sydney Australia

(2016) at [15.74]. The matter was not argued before me and it is not necessary for me to offer a conclusive view.

b. A Clause 7 Agreement must result in the employee being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to.
A comparison of the terms of the Signed Documents and the Retail Modern Award reveal that *at the time the agreement was made* i.e. 25 February 2014, Ms Zeeb was *not* better off overall as a result of the Signed Documents. It is sufficient to observe that the effect of the Signed Documents on:
(i) the arrangements for when work is performed, provides for more than an average of 38 hours per week to be performed, and infringed cl 28 of the Retail Modern Award;
(ii) overtime rates and penalty rates, does not provide for a loading, and infringed clauses 29.2 and 29.4 of the Retail Modern Award;
(iii) leave loading, does not provide for a loading and infringed cl 32.3 of the Retail Modern Award.
The Company relied upon the regular payment of a Team Productivity Bonus to Ms Zeeb, in addition to a fortnightly wage calculated by reference to information from the Fair Work Commission as to the rate of the national minimum wage, in support of an argument that Ms Zeeb was 'better off overall'. The argument overlooks the fact that the Signed Documents do not provide for a *certain* payment of *any* Team Productivity Bonus of *any* minimum amount. At 25 February 2014, the entitlement to a team productivity bonus is qualified by terminology such as 'discretion of management' and 'expected'. The Team Productivity Bonus must be ignored for the purposes of application of the better off overall calculations.

c. A Clause 7 Agreement must (b) state each term of this award that the employer and the individual employee have agreed to vary; (c) detail how the application of each term has been varied by agreement
The Signed documents do not identify the Retail Modern Award or the text of the terms of that award that are being varied or how each term has been varied.

d. A Clause 7 Agreement must (d) detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment.
The Signed documents do not detail how, compared to the Retail Modern Award, Ms Zeeb is better off overall. As noted above, she is not, in fact, better off.

40 The Signed Documents fail to satisfy the Clause 7 Agreement Pre-conditions I identified in paragraph 38. It follows that the Signed Documents are of no effect to the extent that they are inconsistent with Retail Modern Award. For completeness, I note that the Signed Documents do satisfy the following additional Clause 7 Agreement Pre-conditions: an agreement genuinely made without coercion or duress; in writing and signed; state a commencement date.

Fourth Issue: Ms Zeeb's Entitlements Under the Retail Modern Award

41 It follows from my conclusion with respect to the first three issues (above) that the Retail Modern Award applies to the parties and that Ms Zeeb's entitlements will be determined as provided in that award as a level 4 retail employee. The Retail Modern Award provides for:

- **Minimum weekly wages as set out in cl 17.** The weekly wage can be divided by 38 to calculate a minimum hourly rate. In Schedule 2 to this judgment, at cl 17 of the Retail Modern Award, I have set out each relevant iteration of cl 17 showing that the minimum hourly rate of pay for Ms Zeeb was as follows:
From 1/7/13 $19.07
From 1/7/14 $19.64
From 1/7/15 $20.13
- **Ordinary hours** to be worked at the times set out in cl 27.
- **Overtime for hours** calculated in accordance with cl 29.2 to be paid at: 150% for the first three hours and 200% thereafter; 200% on a Sunday and 250% on a Public Holiday i.e.
From 1/7/13 150%: $28.60; 200%: $38.14; 250%: $47.67
From 1/7/14 150%: $29.46; 200%; $39.28; 250%: $49.10
From 1/7/15 150%: $30.19; 200%; $40.26; 250%: $50.32
- **Penalty payments** for hours calculated in accordance with cl 29.4 to be paid at: 125% for ordinary hours after 6.00 pm Monday to Friday and ordinary hours worked on a Saturday; 200% for all hours worked on a Sunday; 250% for work on a public holiday. i.e.
From 1/7/13 125%: $23.84; 200%: $38.14; 250%: $47.67
From 1/7/14 125%: $24.55; 200%; $39.28; 250%: $49.10
From 1/7/15 125%: $25.16; 200% $40.26; 250%: $50.32
- **Annual Leave** of four weeks for each year of service accrued progressively to be paid at the employee's base rate of pay for the ordinary hours of work i.e. (38 per week) (see s 87 of the FW Act) and an annual leave loading of 17.5% (see cl 32) i.e.
From 1/7/13 $22.41
From 1/7/14 $23.08
From 1/7/15 $23.65

42 Set out below are my findings:

- On Ms Zeeb's entitlements:

- in paragraph 43, on the hours worked by Ms Zeeb to which is entitled to be paid as: ordinary hours (including sick leave entitlement), overtime and penalty rates;
- in paragraph 44, on Ms Zeeb's entitlement to ordinary pay (including sick leave), overtime and penalty payments over the total period of her employment by application of the relevant rate of pay under the Retail Modern Award, level 4 retail employee to the number of hours worked.
- in paragraph 45, on Ms Zeeb's accrued annual leave entitlements.

- On the total amount paid by the Company to Ms Zeeb on account of her entitlements under the Retail Modern Award, see paragraph 47.
- My conclusion on Ms Zeeb's entitlements, reflecting the difference between her total entitlements over the period of her employment and the total amount paid to her by the Company, see paragraph 48.

43 **Hours worked, Overtime and Penalty Calculations.** Each party has submitted calculations on Ms Zeeb's entitlements. Appendix 'CZ1' to Ms Zeeb's submission lodged 22 March 2017 sets out her calculations based on the Retail Modern Award as a level 1 retail employee (Claimant's Calculations Document, or CCD) and in Appendix 'KAL1' to the Company's submission lodged 15 March 2017, the Company sets out its calculations based on the Retail Modern Award as a level 1 retail employee (Respondent's Calculations Document, or RCD). Those documents reveal that subject to two exceptions (of 44 fortnights), the parties are in agreement on the *total* hours worked each fortnight by Ms Zeeb (See 6th column, 'Total Hours' in CCD and 5th column 'Total Hours Paid' in the RCD). However, those documents also reveal that in 32 fortnights the parties disagree on the effect of the application of the Retail Modern Award to Ms Zeeb's entitlement to overtime and penalty payments (compare the 7th (ORD Hours), 8th (Sat ORD), 9th (O/T 1.5), 10th (O/T 2) and 11th (P/H) columns in the CCD and following columns in the RCD: 9th (NORMAL HOURS WORKED, 11th (Overtime), 13th (Saturday hours worked), 15th (Sunday hours worked), 17th (Public Holiday), 19th (Sick hours paid), 21st (Annual Leave hours paid). It is necessary to give a ruling on the 34 fortnights where the parties are in disagreement as to the hours worked and the applicable rate of pay (ordinary, overtime, penalty etc.). It should be noted that the table below only identifies occasions where the parties are in dispute; it does not reproduce the figures for any fortnight or within a fortnight where the parties are in agreement on the allocation of hours to 100%, 125%, 150%, 200% or 250% of ordinary rate of pay.

	Fortnight Ending	**CZ Submission**	**Company Submission**	**Ruling**
1.	22/3/14	6 hrs overtime at 150% and 1.13 hrs overtime at 200%	7.13 hrs at 150%	Uphold CZ claim. See Clauses 28.1(b),29.2(a).
2.	5/4/14	6 hrs overtime at 150% and 1.13 hrs overtime at 200%	7.13 hrs at 150%	Uphold CZ claim. See Clauses 28.1(b),29.2(a).
3.	17/5/14	33.8hrs at ordinary time	32.8hrs at 100% and 1 hr sick leave at 100%	Same result.
4.	31/5/14 and 14/6/14	4.37 hrs Saturday penalty at 125%	Incorporated in ordinary time hours.	Uphold Company claim. Timesheet in evidence does not show any Saturday worked in these fortnights.
5.	28/6/14	14 hrs overtime at 150%	6.38 hr overtime at 150%, 7.62hrs Saturday at 125%.	Uphold CZ claim. Timesheet in evidence shows that CZ had worked 76 hrs *before* work on Saturday 28/6/14, so 150% overtime rate applies, see cl 29.2(a).
6.	12/7/14	8.46 hrs overtime at 150%	0.16 hrs overtime at 150% and 8.3 hrs at 125%(Saturday).	Uphold CZ claim. Timesheet in evidence shows that CZ had worked 76 hrs *before* work on Saturday 28/6/14, so 150% overtime rate applies, see cl 29.2(a).
7.	26/7/14	76 hrs ordinary time and 12 hrs overtime at 150%	80.22 hrs at ordinary time (inc 8 hrs sick pay) and 7.78 hrs at 125% (Saturday)	Uphold CZ claim. Timesheet in evidence shows that CZ had worked 39.85 hrs *before* work on Saturday 19/7/14, so 150% overtime rate applies.
8.	9/8/14	72.12 hrs ordinary time and 15.43 hrs at 200%	69.4 hrs ordinary time, 2.73 hrs at 125% Saturday and 15.43 hrs at 200% (Sunday)	Uphold Company calculations. Timesheet in evidence shows that CZ worked 2.73 hrs on Saturday 2/8/14.
9.	23/8/14	68.4 hrs ordinary time, 3 hrs at 125% Saturday, 10.61 hrs overtime at 150%, 8.35 hrs at 200%.	74.51 hrs ordinary time, 7.5 hrs at 125% Saturday, 8.35 hrs at 200%	Uphold CZ claim. Timesheet in evidence shows that after CZ had worked 3 hrs on Saturday 16/8/14 reached 38 hrs, so entitled to overtime rate after that.
10.	20/9/14	6.68 hrs at 150%, 7.67 hrs at 200%.	12.68 hrs at 150%. 7.67 hrs at 200%. (Error in total hours.)	Uphold CZ claim. Timesheet in evidence shows that after CZ worked 7.67 hrs on Sunday 14/9/14.
11.	4/10/14	13.4 hrs at 150%.	8.62 hrs at 150% and 5.15 hrs at 125% Saturday rate.	Uphold CZ claim. Timesheet in evidence shows that CZ had worked 42.95 hrs *before* work on Saturday 27/9/14, so 150% overtime rate applies.

	Fortnight Ending	CZ Submission	Company Submission	Ruling
12.	18/10/14	76 ordinary hrs and 14.2 hrs at 150%.	66.63 ordinary hrs and 8 hrs sick leave at ordinary rate and 15.57 hrs at 125% Saturday rate.	Partial uphold CZ claim. Timesheet in evidence shows that CZ had worked 41.61 hrs *before* work on Saturday 11/10/14 of 7.59 hrs, so 150% overtime rate applies to those hours. However, normal Saturday rate applies to 7.98 hrs work done on 18/10/14
13.	27/12/14	76 ordinary hrs, 15.52 hrs at 150%	67.58 ordinary hrs and 7.94 hrs at 125% and 15.2 hrs as public holiday.	Company claim partially upheld. Timesheet in evidence shows that CZ worked 67.58 ordinary hrs and 7.94 hrs on Saturday 27/12/14 and correct rate for that is 125%.
14.	10/1/15	76 ordinary hrs and 12.89 hrs at 150%.	66.89 ordinary hrs and 8 hrs sick leave at ordinary time and 7.6 hrs as public holiday.	Company claim partially upheld. Timesheet in evidence shows that CZ worked 66.89 hrs and received sick pay (which equates to 7.6 hrs ordinary pay). Result is 74.49 hrs ordinary pay.
15.	24/1/15	19.51 hrs at 150%.	15.6 hrs at 150% and 4.23 hrs at 125% Saturday rate.	Uphold CZ claim. Timesheet in evidence shows that CZ had worked over 76 hrs *before* work on Saturday 24/1/15, so 150% overtime rate applies
16.	7/2/15	21.87 hrs at 150%	0.27 hrs at 150%, 5.6 hrs at 125%, 7.6 hrs at 250%.	Neither claim upheld. Timesheet in evidence shows CZ worked 89.87 hrs which equates to 76 ordinary hrs and 13.87 hrs at 150% overtime.
17	21/2/15	14.36 hrs at 150% overtime.	5.69 hrs at 150% and 8.67 hrs at 125% Saturday rate.	Uphold CZ claim. Timesheet in evidence shows that CZ had worked over 76 hrs *before* work on Saturday 14/2/15, so 150% overtime rate applies
18	7/3/15	29.35 hrs at 150% overtime.	8.23 hrs at 150% and 13.12 hrs at 125% Saturday rate.	Uphold CZ claim. Timesheet in evidence shows that CZ had worked over 38 hrs *before* work on Saturday 28/2/14 and 76 hrs before work on Saturday 7/3/15, so 150% overtime rate applies.
19	21/3/15	16.85 hrs at 150% overtime.	9.25 hrs at 150% and 7.6 hrs at 125% Saturday rate.	Uphold CZ claim. Timesheet in evidence shows that CZ had worked over 76 hrs *before* work on Saturday 21/3/15 and so 150% overtime rate applies.
20.	4/4/15	76 hrs ordinary time and 2.45 hrs overtime at 150%.	70.45 hrs ordinary (inc 45.17 hrs sick pay) and 7.6 hrs as public holiday.	Neither claim upheld. Timesheet in evidence shows 25.28 hrs worked over 3 days and balance of time on sick leave. Entitled to 76 hrs at ordinary time.
21	18/4/15	16.09 hrs at 150% overtime	7.6 hrs as public holiday and 9.78 hrs at 125% Saturday rate	Neither claim upheld. Timesheet in evidence shows that Saturday rate applies to 5.13 hrs on Saturday 11/4/15 and that over 76 hrs had been worked before 4.65 hrs on Saturday 18/4/15 so 150% rate applies and that balance of hours (76 hrs) should be at the normal rate.
22	2/5/15	68.4 ordinary hrs and 7.93 hrs at 150% overtime.	76 hrs ordinary and 9.4 hrs at 150%.	Uphold CZ claim. Timesheet in evidence shows that CZ calculations to be correct.
23.	16/5/15	15.24 hrs overtime at 150%.	7.54 hrs at 150% and 7.7 hrs at 125% Saturday rate.	Uphold CZ claim. Timesheet in evidence shows that CZ had worked over 38 hrs *before* work on Saturday 9/5/15 and so 150% overtime rate applies.
24	30/5/15	76 ordinary hrs and 5.35 hrs at 150% and 8.3 hrs at 200%	38 ordinary hrs and 3.35 hrs at 150% and 8.3 hrs at 200%. 40 hrs annual leave taken and Company submits that leave loading of 117.5% applies.	Company claim upheld. Timesheet in evidence supports Company calculations.
25.	13/6/15	76 ordinary hrs and 12.7 hrs at 150% overtime.	45.6 ordinary hrs and 3.29 hrs at 150% and 7.81 hrs at 125% Saturday rate. 32 hrs annual leave taken and Company	Company claim upheld. Timesheet in evidence supports Company calculations.

	Fortnight Ending	CZ Submission	Company Submission	Ruling
			submits that leave loading of 117.5% applies.	
26.	27/6/15	68.4 ordinary hrs and 5.43 hrs at 125% Saturday rate.	73.83 ordinary hrs.	Company claim upheld. Timesheet in evidence supports Company calculations (no Saturday work in that fortnight.)
27.	25/7/15	76 ord hrs and 11.8 hrs overtime at 150%.	82.77 ord hrs (inc 8 hrs sick leave) and 5.03 hrs at 125% Saturday rate.	CZ claim upheld. Timesheet in evidence shows CZ worked over 38 hrs *before* work on Saturday 18/7/15.
28.	8/8/15	76 ordinary hrs and 6.15 hrs overtime at 150%.	82.15 ordinary hrs (inc 8 hrs sick leave).	CZ claim upheld. Timesheet in evidence shows hrs in excess of daily average of 7.6 hrs per day for days worked in fortnight.
29.	22/8/15	76 ordinary hrs and 8.15 hrs overtime.	60.15 ordinary hrs and 24 hrs annual leave. 24 hrs annual leave taken and Company submits that leave loading of 117.5% applies.	Company claim upheld. Timesheet in evidence supports Company calculations.
30.	5/9/15	76hrs ordinary and 6.75 hrs overtime at 150%	81.08 hrs ordinary (inc 8 hrs sick).	CZ claim upheld. Timesheet in evidence shows hours in excess of daily average of 7.6 hrs per day for days worked in fortnight.
31	19/9/15	10.78 hrs at 150% overtime.	5.76 hrs at 150% overtime and 5.02 hrs at 125% Saturday rate.	CZ claim upheld. Timesheet in evidence shows CZ worked over 38 hrs *before* work on Saturday 12/9/15 and so 150% overtime rate applies.
32.	3/10/15	67.35 ordinary hrs and 5.54 hrs at 150% overtime rate	72.89 ordinary hrs (including 8 hrs sick leave).	CZ claim upheld. Timesheet in evidence shows hrs in excess of daily average of 7.6 hrs per day for days worked in fortnight.
33.	17/10/15	44.1 ordinary hrs and 3.72 hrs at 150% overtime.	41.72 ordinary hrs and 6.1 hrs personal leave.	CZ claim upheld. Timesheet in evidence shows hrs in excess of daily average of 7.6 hrs per day for days worked in fortnight
34.	26/10/15	43.8 ordinary hrs and 2.58 hrs overtime at 150%.	Same as CZ for this per period.	

44 In Schedule 3 of this decision I have undertaken the calculations necessary to work out Ms Zeeb's entitlement to ordinary pay (including sick leave), overtime and penalty payments over the total period of her employment by application of the relevant rate of pay under the Retail Modern Award, level 4 retail employee to the number of hours worked (reflecting my ruling in paragraph 42 above). The calculation has been done by amending the electronic version of the spreadsheet which is the Claimant's Calculations Document to incorporate the correct rates of pay and my ruling in paragraph 43 above and checking that the formulae in the spreadsheet are correct. The result is that Ms Zeeb's entitlement to ordinary pay (including sick leave), overtime and penalty payments is:

Total: $75,284.22

Ordinary Pay, Overtime and Penalty Payments

45 **Accrued annual leave and leave loading.** The Company made payments to Ms Zeeb at the rate calculated in accordance with the Signed Documents, *without* any leave loading, on four occasions: 40 hours (3 June 2015), 32 hours (17 June 2015); 24 hours (26 August 2015); 145.96 hours (26 October 2015) (see RCD). Ms Zeeb does not dispute the number of hours of accrued annual leave (see Exhibit 1). It will be necessary to re-calculate Ms Zeeb's entitlement based on the rate provided in the Retail Modern Award plus leave loading. The result is:

40 x $23.08 = $ 923.2
32 x $23.08 = $ 738.56
24 x $23.65 = $ 567.60
145.96 x 23.65 = $3,451.95
Total: $5,681.31

Annual Leave entitlement

46 **Total entitlements of Ms Zeeb. $80,965.53** is the combined total of Ms Zeeb's entitlements for ordinary pay, overtime and penalty payments ($75,284.22) and annual leave ($5,681.31) from the above paragraphs.

47 **Payments made by the Company to Ms Zeeb on account of her entitlements under the Retail Modern Award**. Ms Zeeb calculates the gross amount paid by the Company to her over the period of her employment and excluding superannuation payments, as $68,384.09 (see CCD, column 5 – 'Gross wages paid (ex super)'). The Company calculates the amount paid by it to Ms Zeeb as $71,981.98 (see RCD, Column 4 – 'Gross Pay'). The difference between the calculations ($3,597.89) arises because:

- Ms Zeeb's calculations do not reflect an ex gratia payment made on 26 October 2015 of $616.73. This amount should be included in calculating the amount paid to Ms Zeeb.
- Ms Zeeb's calculations do not reflect an accrued annual leave made on 26 October 2015 of $2,523.65. This amount should be included in calculating the amount paid to Ms Zeeb.

- The remaining discrepancy is an amount of $457.51 which arises because there are 10 fortnights where the parties are at odds on the amount paid by the Company to Ms Zeeb – in amounts ranging from $40 - $98.29 ($50 being a common discrepancy) said by the Company to have been paid but said by Ms Zeeb not to have been paid. An explanation appears in a sample 'Payroll Advice Slip' for payment date of 8 April 2015 which is annexure KAL 4.1 to the RCD where '-$50' appears as an 'Adjustment for Income' and the same entry for the pay slip of Ms Zeeb (attached to Exhibit 6) appears as '-$50 Adjustments'. It is apparent that these amounts were not paid to Ms Zeeb. However, the Company has the onus to explain any deduction and the reason for the deduction is not explained. Unless Ms Zeeb concedes that she is not entitled to this amount, it should not be included in calculating the amount paid to Ms Zeeb.

The result is that $71,524.47 paid by the Company to Ms Zeeb ($71,981.98 claimed to have been paid less $457.51), will be taken into account in calculating her outstanding entitlements.

48 **Outstanding balance of Ms Zeeb's entitlements. $9,441.06** is the difference between the total entitlements of Ms Zeeb of $80,965.53 (calculated above) and the amount paid by the Company to Ms Zeeb of $71,524.47 (calculated above) and this represents the amount to which Ms Zeeb is entitled.

49 The payments made by the Company to Ms Zeeb were comprised of two components. First, an hourly rate determined by the agreement evidenced by the Signed Documents and, secondly, a 'productivity bonus'. The bonus was a discretionary payment and, when paid, was calculated on the basis of an (undisclosed) fraction of (undisclosed) total sales made by the 'team' of which the employee was a member. Ms Zeeb and the Company have, in their submissions, assumed that the productivity bonus payment made to Ms Zeeb may be applied in discharge of the award obligations of the Company. For the reasons set out below, I conclude that this assumption was, in this case, correct.

50 In a recent decision (***Aldo Becherelli v Mediterraneus Pty Ltd trading as Lucioli*** [2017] WAIRC 65 [23]) I noted that in ***Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate*** [2015] FCAFC 99, the Full Court of the Federal Court reviewed the law on this issue. The review included an assessment of the decision of the WA Industrial Appeal Court (Anderson, Scott and Parker JJ) in ***James Turner Roofing Pty Ltd v Peters*** [2003] WASCA 28. The judgment of North and Bromberg JJ placed emphasis on the following passage of the judgement of Anderson J from ***James Turner Roofing***:

> *The payment of an amount as wages for hours worked in a period can be relied on by the employer in satisfaction of an award obligation to pay wages for that period whether in relation to wages for ordinary time, overtime, weekend penalty rates, holidays worked or any other like monetary entitlement under the award. This is so, whether the payment of the wages is made in contemplation of the obligations arising under the award or without regard for the award. However, if a payment is made expressly or impliedly to cover a particular obligation (whether for ordinary time, overtime, weekend penalty rates, fares, clothing or any other entitlement whether arising under the award or pursuant to the contract of employment) the payment cannot be claimed as a set off against monies payable to cover some other incident of employment. A payment made on account of say ordinary time worked cannot be used in discharge of an obligation arising on some other account such as a claim for overtime. Whether or not the payment was for a particular incident of employment will be a question of fact in every case* [45].

51 In ***Linkhill Pty Ltd*** the joint judgment proceed to state:

> *[W]hat is required is a close correlation between the award obligation and the contractual obligation in respect of which the payment was made. It is not the monetary nature of the payment made under the contract that must correlate with the award. It is the subject matter of the contractual obligations for which the payment was made that must be examined and be found to closely correlate with the obligations in the award said to be discharged by the payment.* … [98]

52 Applied to the facts of this case, I noted above that the Signed Documents included reference to salary payments by the Company to employees (*including* the bonus) being in discharge of payments required by industrial laws (see paragraph 38). The subject matter of the contractual obligation included the discharge of award obligations. It is also significant to me that pay slips given by the Company to employees included reference to the bonus for each week and added the bonus to the fortnightly salary before recalculating in the pay slip an hourly rate of pay. This documentation is strongly suggestive that the bonus was paid and received in discharge of any obligation to pay a wage, overtime or penalty rates.

Fifth Issue: Whether the Company was Entitled to Summarily Terminate the Employment of Ms Zeeb on the 26 October 2015

53 On 26 October 2015, Ms Harding, on behalf of the Company, informed Ms Zeeb that her employment was being terminated with immediate effect. The effect of sections 117 and 123(1)(b) of the FW Act (set out below) is that, unless Ms Zeeb's employment was being terminated for 'serious misconduct', the Company was required to either give Ms Zeeb two weeks' notice or to make a payment in lieu of two weeks' wages (i.e. **$1,529.88** - 76 hours at $20.13 per hour). Ms Zeeb was not given any notice or given any payment in lieu; she was required to forthwith leave the Company premises on 26 October 2015. The Company submits that her employment was lawfully terminated because Ms Zeeb had engaged in 'serious misconduct'. Ms Zeeb disputes this contention. If the Company does not satisfy me that Ms Zeeb engaged in serious misconduct, there will be an order that the Company pay to Ms Zeeb the sum of **$1,529.88 (**a payment in lieu of two weeks' notice). If the Company does satisfy me that Ms Zeeb engaged in serious misconduct, then it will be for Ms Zeeb to satisfy me that in the circumstances, her conduct did not make it unreasonable for her to work for a further period of two weeks (see reg 1.07(3)(c) of the Fair Work Regulations 2009 (FW Regulations) set out below).

54 Section 117(2) of the FW Act provides:

> *(2) The employer must not terminate the employee's employment unless:*
>
> *(a) the time between giving the notice and the day of the termination is at least the period (the minimum period of notice) worked out under subsection (3); or*

(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

55 The operation of s 117 of the FW Act is subject to s 123(1)(b) of the FW Act, which provides, in effect, that the section does not apply to an employee 'whose employment is terminated because of serious misconduct. The FW Regulations define 'serious misconduct' in regulation 1.07:

(1) For the definition of serious misconduct in section 12 of the Act, serious misconduct has its ordinary meaning.

(2) For subregulation (1), conduct that is serious misconduct includes both of the following:

(a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;

(b) conduct that causes serious and imminent risk to:

(i) the health or safety of a person; or

(ii) the reputation, viability or profitability of the employer's business.

(3) For subregulation (1), conduct that is serious misconduct includes each of the following:

(a) the employee, in the course of the employee's employment, engaging in:

(i) theft; or

(ii) fraud; or

(iii) assault;

(b) the employee being intoxicated at work;

(c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

(4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(5) For paragraph (3) (b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform.

56 Cases on the meaning of 'serious misconduct' establish the following relevant principles:

- **Repudiation.** Conduct which, to a reasonable person, is incompatible with the future fulfilment of an employee's duty or impedes the faithful performance of an employee's obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal. However, the conduct of the employee must itself involve the incompatibility, conflict, or impediment or be destructive of confidence. An actual repugnance between the conduct and the employment relationship must be found. It is not enough that ground for uneasiness as to future conduct arises.
  ***Melbourne Stadiums Ltd v Sautner* [**2015] FCAFC 20 (26 February 2015) [12] - [13]**; *Rankin v Marine Power International Pty Ltd* (**2001) 107 IR117 [254**]**
- **Fundamental Breach.** A one-off sufficiently serious act of misconduct may justify dismissal, even though the probabilities are high that it would not occur again. In assessing whether the breach is sufficiently serious to justify termination, the court will take into account 'the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party'. Such conduct may not, of itself, show that an employee was intending not to perform contractual obligations in the future.
  Melbourne Stadiums Ltd* [**12] - [13]; ***Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3) [2016] FCA 1453 [51] (Tracey J)
- **Grounds discovered by employer *after* termination.** 'If an employer terminates an employee for misconduct on certain grounds and another ground of misconduct is subsequently discovered, the fact that the employer is not aware of such misconduct while the employee is employed is not relevant. The employer may subsequently raise such misconduct in support of a decision to terminate the employee' (***Hill v Compass Ten Pty Ltd (No. 2)*** [2012] FCA 815 [18] per Cowdery J)
  Concut Pty Ltd v Worrell [2000] HCA 64; (2000) 176 ALR 693 at [27]; ***Shepherd v Felt and Textiles of Australia Ltd*** [1931] HCA 21; (1931) 45 CLR 359 at 371.

57 At the time of termination, the Company relied upon the following as 'serious misconduct' of Ms Zeeb which justified the summary termination of her employment:

- Ms Zeeb, in breach of the standard operating procedures of the Company, knowingly made a false log entry in the computer database of the Company. The relevant log entry was alleged to have been made at 4.32 pm on 22 October 2015 and recorded Ms Zeeb as stating that she had completed and sent a costing to a customer when, in fact, Ms Zeeb did not complete that task on 22 October 2015 (the False Log Entry Allegation) (see the 'Termination Letter' in Exhibit 19).

- Ms Zeeb, in breach of the standard operating procedures of the Company, failed to use the template supplied by the Company for use by travel consultants in communications with customers (the Template Allegation) (see the 'Termination Letter' in Exhibit 19)
- Ms Zeeb, in the presence of other employees, had argued loudly with her supervisors, including challenging their authority to give directions relevant to 'taking shifts' (the Insubordination Allegation). The allegation related to an incident reported by 'Kelsey and Paulina' as Acting Head of Reservations to Ms Harding by email on 22 October 2015 when Ms Zeeb loudly refused to participate in a process to complete work rosters for a period that included public holidays (see the 'Termination Letter' in Exhibit 19 and the email of 22 October 2015 from Head of Reservations to Marlene Harding in Exhibit 19).
- Ms Zeeb's response to the Insubordination Allegation, made during a meeting with Ms Harding and Ms Shah on 26 October 2015, included: claiming that Ms Harding had falsely recorded the presence of Joel Collins at an earlier meeting involving Ms Zeeb; maintaining that the wrongful conduct of her supervisors was the cause of any workplace disruptions on earlier occasions; stating that she felt unsafe in the workplace. (Ms Zeeb's Unsafe Workplace Allegation) (see Ms Shah's diary note of 26 October 2015 at 1:50 pm in Exhibit 19).

58 **Finding on False Log Entry and Template Allegation.** Ms Zeeb admits that her log entry of 22 October 2015 was inaccurate. She says that she did not have time to complete the costing on 22 October 2015 and completed the task on the morning of 23 October 2015. I am satisfied that she did complete the task on the 23 October 2015 in accordance with her evidence. The log entry was false. Ms Zeeb also admits that, on occasion, she did not use the template supplied by the Company when communicating with customers. She says that the supplied templates were not always suitable for a communication she was required to undertake. The Company did not introduce any document constituting "standard operating procedures" into evidence. However, I am satisfied that a knowingly inaccurate entry into an employer's computer business records, as admitted by Ms Zeeb, is a breach of the 'good faith' and 'reasonable skill' obligations of an employee. Similarly, Ms Zeeb's failure to use a template was a breach of her obligations to her employer. Notwithstanding these findings, I am not satisfied that the conduct constituted by each breach (alone or in combination) amounts to '*serious* misconduct'. There is no evidence of the Company suffering a financial loss or a reputational loss from the conduct of Ms Zeeb. I accept that the integrity of log entries is critical to the operation of the business of the Company. However, I note that Ms Zeeb ensured that the relevant task was completed the following day.

59 **Finding on Insubordination Allegation.** A difficulty for the Company in relying upon Ms Zeeb's conduct in protesting about roster arrangements is that it is apparent from my findings above on the failure of the Company to observe the provisions of the Retail Modern Award that her protests about the lawfulness of her being directed to work on public holidays at non-award rates were well founded. Ms Zeeb's refusal to perform work based upon a good faith interpretation of her legal rights, much less a 'good interpretation' of her legal rights, is not repudiation and not serious misconduct: ***Bruce v A W B Ltd*** [2000] FCA 594 [16].

60 **Finding on Ms Zeeb's Unsafe Workplace Allegation.** I am satisfied that during the meeting with Ms Harding on 26 October 2015, Ms Zeeb made irrational and unsubstantiated allegations about Ms Harding falsely recording the presence of Joel Collins at an earlier meeting and about feeling 'unsafe' in the workplace. My finding is based on the evidence of Ms Shah who was present, resilient in cross-examination and made a diary note to the same effect. Ms Zeeb was unhappy about the level of attention shown to her work performance over previous months, believing that the Company was artificially seeking a pretext to terminate her employment. Insofar as that attention was a result of her complaints about the Company's failure to comply with the relevant award, her unhappiness was well-founded. However, Ms Zeeb's complaint about an unsafe workplace, combined with the unjustified attack on Ms Harding's creditability (regarding Joel Collins presence at an earlier meeting), created the impression that Ms Zeeb no longer considered herself bound to follow *any* directions of Ms Harding and other workplace supervisors, lawful or otherwise. Those statements by Ms Zeeb went beyond an uneasiness as to her future conduct; they were incompatible with the employment relationship. The Company has satisfied me that it was serious misconduct. Ms Zeeb has failed to satisfy me that, in the circumstances, her conduct did not make it unreasonable for her to work for a further period of two weeks. The breakdown in the relationship between Ms Zeeb and Ms Harding, as a result of Ms Zeeb's statements in the meeting of 26 October 2015, was irreparable.

61 As a result of my finding in paragraph 59, the Company was not required to give notice of termination or to make any payment in lieu of notice. Accordingly, it is not necessary to make findings on other allegations by the Company of conduct of Ms Zeeb that was said to be instances of unsatisfactory performance.

Conclusion

62 In the result, I am satisfied that Ms Zeeb and the Company were covered by the Retail Modern Award and that her appropriate level of classification was as a 'Retail Employee Level 4'. When applied to hours worked by Ms Zeeb, and given the terms of the award concerning minimum weekly wages, ordinary hours of work, overtime, penalties and annual leave loading, my finding is that she was *underpaid* by the Company in the amount of $9,441.06.

63 Section 547(1)(2) of the FW Act provides, in effect, that when making an order that an employer pay an amount to an employee, the court 'must, on application, include an amount of interest in the sum ordered unless good cause is shown to the contrary'. I will hear from parties. If an application is made, the appropriate interest payable is 6% per annum calculated from 26 October 2015 until judgement. The interest payable is at $1.55 per day. The total of interest payable is for 542 days totalling $840.10.

M. FLYNN

INDUSTRIAL MAGISTRATE

Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA) under the *Fair Work Act 2009* (Cth): Small Claim Alleging Contravention of Modern Award

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.

[2] The Industrial Magistrates Court (WA) (IMC), being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': FWA, s 12 (see definitions of 'eligible State or Territory court' and 'Magistrates Court'); Industrial Relations Act 1979 (WA), ss 81, 81B.

[3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.

[4] The civil penalty provisions identified in s 539 of the FWA include the terms of a modern award where the award *applies* to give an entitlement to a claimant employee and to impose an obligation upon a respondent employer: FWA, s 45, s 46. The award *applies* if it *covers* the employee and the employer and there are no relevant statutory exceptions (e.g. high income employees e.g. $138,900 pa from 1 July 2016): FWA, s 47. The award *covers* the employee and the employer if it is expressed to cover the employee and the employer: FWA, s 48(1).

[5] An obligation upon an 'employer' covered by an award is an obligation upon a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': FWA, s 42, s 47, s 14, s 12. An entitlement of an employee covered by an award is an entitlement of an 'employee' who is a 'national system employee' and that term, relevantly, is defined to include 'an individual so far as he or she is employed by a national system employer': FWA, s 42, s47, s 13.

[6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for an *employer* to pay to an employee an amount that the employer was required to pay under the modern award: FWA, s 545(3)(a).

[7] Where the claimant elects to use the small claims procedure as provided for in section 548 of the FWA, the Court may not award more than $20,000 and may not make orders for any pecuniary penalty: FWA, s 548(1)(a), (2)(a).

Burden and standard of proof

[8] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

> *It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

[9] 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.

Practice and Procedure of the Industrial Magistrates Court: Small Claim

[10] The FWA provides that 'in small claims proceedings, the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities: FWA, s 548(3). The significance of this provision was explained by Judge Lucev in *McShane v Image Bollards Pty Ltd* [2011] FMCA 215 at [7] in the following terms:

> *Although the Court is not bound by the rules of evidence, and may act informally, and without regard to legal forms and technicalities in small claim proceedings in the Fair Work Division, this does not relive an applicant from the necessity to prove their claim. The Court can only act on evidence having a rational probative force.*

[11] The IMC has experience of similar provisions. The *Industrial Relations Act 1979* (WA) (IRA) provides that, except as prescribed by or under the Act, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): IRA, s 81CA Relevantly, regulations prescribed under the IRA provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: Regulation 35(4). In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observations (omitting citations):

> *40* … *The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence.*
>
> *42* … *After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of enquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'.*
>
> 43 … *The tribunal can obtain information in any way it thinks best, always giving a fair opportunity to any party interested to meet that information; it is not obliged to obtain such independent opinion, for instance, upon oath, and whether the cross-examination shall take place upon that opinion is entirely a question for the discretion of the Tribunal; it is not bound by any rules of evidence and is authorised to act according to substantial justice and the merits of the case.*
>
> *44* … *An essential ingredient of procedural fairness is the opportunity of presenting one's case.*

45 *… the right to cross-examination is viewed as an important feature of procedural fairness.*

47 *… Procedural fairness requires fairness in the particular circumstances of the case. While a right to cross-examination is not necessarily to be recognised in every case as an incident of the obligation to accord procedural fairness, the right to challenge by cross-examination a deponent whose evidence is adverse, in important respects, to the case a party wishes to present, is.*

Schedule 2: MA000004 - General Retail Industry Award 2010

This Fair Work Commission consolidated modern award incorporates all amendments up to and including 30 December 2013 (variation PR545959).

…

1. Definitions and interpretation

[Varied by PR992088, PR992124, PR992724, PR994449, PR997207, PR997772, PR503607, PR540640, PR544243, PR545959]

1.1 In this award, unless the contrary intention appears:

[Definition of **Act** substituted by PR994449 from 01Jan10]

Act means the *Fair Work Act 2009* (Cth)

…

[Definition of **employee** substituted by PR994449, PR997772 from 01Jan10]

employee means national system employee within the meaning of the Act

[Definition of **employer** substituted by PR994449, PR997772 from 01Jan10]

employer means national system employer within the meaning of the Act

…

[Definition of **general retail industry** varied by PR992724 ppc 29Jan10, PR997207 from 01Jan10, PR540640 ppc 23Aug13]

general retail industry means the sale or hire of goods or services to final consumers for personal, household or business consumption including:

- food retailing, supermarkets, grocery stores;
- department stores, clothing and soft goods retailing;
- furniture, houseware and appliance retailing;
- recreational goods retailing;
- personal and household goods retailing;
- household equipment repair services;
- bakery shops, where the predominant activity is baking products for sale on the premises;

and includes:

- customer information and assistance provided by shopping centres or retail complexes;
- labour hire employees engaged to perform work otherwise covered by this award; and
- newspaper delivery drivers employed by a newsagent,

but does not include:

- community pharmacies;
- pharmacies in hospitals and institutions providing an in-patient service;
- hair and beauty establishments;
- hair and beauty work undertaken in the theatrical, amusement and entertainment industries;
- stand-alone butcher shops;
- stand-alone nurseries;
- retail activities conducted from a manufacturing or processing establishment other than seafood processing establishment;
- clerical functions performed away from the retail establishment;
- warehousing and distribution;
- motor vehicle retailing and motor vehicle fuel and parts retailing;
- fast food operations;
- restaurants, cafes, hotels and motels; or
- building, construction, installation, repair and maintenance contractors engaged to perform work at a retail establishment

…

[Definition of **NES** substituted by PR994449 from 01Jan10]

NES means the National Employment Standards as contained in sections 59 to 131 of the *Fair Work Act 2009* (Cth)

…

[Definition of shop with Departments/Sections inserted by PR992724 ppc 29Jan10]

Shop with Departments/Sections means any shop which has clearly distinguishable Departments or Sections. A department or Section will have a dedicated Department or Section Manager and at least 3 subordinate employees who work solely or predominantly in that section

…

3.2 Where this award refers to a condition of employment provided for in the NES,the NES definition applies.

4. Coverage

[Varied by PR994449]

[4.1 substituted by PR994449 from 01Jan10]

4.1 This industry award covers employers throughout Australia in the general retail industry and their employees in the classifications listed in clause 16— to the exclusion of any other modern award. The award does not cover employers covered by the following awards:

- the *Fast Food Industry Award 2010*;
- the *Meat Industry Award 2010*;
- the *Hair and Beauty Industry Award 2010*; or
- the *Pharmacy Industry Award 2010*.

4.2 The award does not cover an employee excluded from award coverage by the Act.

[4.3 substituted by PR994449 from 01Jan10]

4.3 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

[New 4.4 inserted by PR994449 from 01Jan10]

4.4 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

[4.5 inserted by PR994449 from 01Jan10]

4.5 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

[4.6 inserted by PR994449 from 01Jan10]

4.6 This award covers employers which provide group training services for apprentices and/or trainees engaged in the industry and/or parts of industry set out at clause 4.1 and those apprentices and/or trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.

[4.4 renumbered as 4.7 by PR994449 from 01Jan10]

4.7 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

5. Access to the award and the National Employment Standards

[5 varied by PR540640 ppc 23Aug13]

The employer must ensure that copies of this award and the NES are easily available to all employees to whom they apply either on a noticeboard or other prominent location which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible.

6. The National Employment Standards and this award

The NES and this award contain the minimum conditions of employment for employees covered by this award.

7. Award flexibility

[Varied by PR994449, PR542124]

7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

(a) arrangements for when work is performed;

(b) overtime rates;

(c) penalty rates;

(d) allowances; and

(e) leave loading.

[7.2 varied by PR542124 ppc 04Dec13]

7.2 The employer and the individual employee must have genuinely made the agreement without coercion or duress. An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.

7.3 The agreement between the employer and the individual employee must:

(a) be confined to a variation in the application of one or more of the terms listed in clause 7.1; and

[7.3(b) substituted by PR994449 from 01Jan10; varied by PR542124 ppc 04Dec13]

(b) result in the employee being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to.

[7.4 substituted by PR994449 from 01Jan10]

7.4 The agreement between the employer and the individual employee must also:

(a) be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;

(b) state each term of this award that the employer and the individual employee have agreed to vary;

(c) detail how the application of each term has been varied by agreement between the employer and the individual employee;

(d) detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and

(e) state the date the agreement commences to operate.

[7.5 deleted by PR994449 from 01Jan10]

[7.6 renumbered as 7.5 by PR994449 from 01Jan10]

7.5 The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.

[New 7.6 inserted by PR994449 from 01Jan10]

7.6 Except as provided in clause 7.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.

7.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

7.8 The agreement may be terminated:

[7.8(a) varied by PR542124 ppc 04Dec13]

(a) by the employer or the individual employee giving 13 weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

[Note inserted by PR542124 ppc 04Dec13]

Note: If any of the requirements of s.144(4), which are reflected in the requirements of this clause, are not met then the agreement may be terminated by either the employee or the employer, giving written notice of not more than 28 days (see s.145 of the *Fair Work Act 2009* (Cth)).

[New 7.9 inserted by PR542124 ppc 04Dec13]

7.9 The notice provisions in clause 7.8(a) only apply to an agreement entered into from the first full pay period commencing on or after 4 December 2013. An agreement entered into before that date may be terminated in accordance with clause 7.8(a), subject to four weeks' notice of termination.

[7.9 renumbered as 7.10 by PR542124 ppc 04Dec13]

7.10 The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.

….

16. Classifications

[Varied by PR988390]

16.1 All employees covered by this award must be classified according to the structure set out in 0. Employers must advise their employees in writing of their classification and of any changes to their classification.

16.2 The classification by the employer must be according to the skill level or levels required to be exercised by the employee in order to carry out the principal functions of the employment as determined by the employer.

17. Minimum weekly wages

With effect 1 July 2013

FAIR WORK COMMISSION DETERMINATION Fair Work Act 2009 s.285—Annual wage review (C2013/1) GENERAL RETAIL INDUSTRY AWARD 2010 [MA000004] JUSTICE ROSS, PRESIDENT SENIOR DEPUTY PRESIDENT WATSON COMMISSIONER SPENCER COMMISSIONER HAMPTON MR VINES PROFESSOR RICHARDSON MR DWYER MELBOURNE, 19 JUNE 2013 Annual Wage Review 2012–13. A. Further to the decision issued by the Minimum Wage Panel in the Annual Wage Review 2012–13 on 3 June 2013 1, the above award is varied as follows: 1. By deleting the table appearing in clause 17 and inserting the following:

Classifications Per week

Retail Employee Level 1 683.40

Retail Employee Level 2 699.70

Retail Employee Level 3 710.60

Retail Employee Level 4 724.50 [19.07 per hour]

Retail Employee Level 5 754.30

Retail Employee Level 6 765.20

Retail Employee Level 7 803.50

Retail Employee Level 8 836.20

With effect 1 July 2014

FAIR WORK COMMISSION DETERMINATION Fair Work Act 2009 s.285—Annual wage review Annual Wage Review 2013–14 (C2014/1) GENERAL RETAIL INDUSTRY AWARD 2010 [MA000004] Retail industry JUSTICE ROSS, PRESIDENT SENIOR DEPUTY PRESIDENT WATSON COMMISSIONER SPENCER COMMISSIONER HAMPTON PROFESSOR RICHARDSON MR COLE MR HARCOURT MELBOURNE, 19 JUNE 2014 Annual Wage Review 2013–14. A. Further to the decision issued by the Expert Panel in the Annual Wage Review 2013–14 on 4 June 2014 [[2014] FWCFB 3500], the above award is varied as follows: 1. By deleting the table appearing in clause 17 and inserting the following: Classifications Per week

Retail Employee Level 1 703.90

Retail Employee Level 2 720.70

Retail Employee Level 3 731.90

Retail Employee Level 4 746.20 [19.64 per hour]

Retail Employee Level 5 776.90

Retail Employee Level 6 788.20

Retail Employee Level 7 827.60

Retail Employee Level 8 861.30

With effect 1 July 2015

FAIR WORK COMMISSION DETERMINATION Fair Work Act 2009 s.285—Annual wage review Annual Wage Review 2014–15 (C2015/1) GENERAL RETAIL INDUSTRY AWARD 2010 [MA000004] Retail industry JUSTICE ROSS, PRESIDENT SENIOR DEPUTY PRESIDENT WATSON SENIOR DEPUTY PRESIDENT HARRISON COMMISSIONER HAMPTON MR COLE PROFESSOR RICHARDSON MR GIBBS MELBOURNE, 18 JUNE 2015 Annual Wage Review 2014–15. A. Further to the decision issued by the Expert Panel in the Annual Wage Review 2014–15 on 2 June 2015 [[2015] FWCFB 3500], the above award is varied as follows: 1. By deleting the table appearing in clause 17 and inserting the following: Classifications Per week

Retail Employee Level 1 721.50

Retail Employee Level 2 738.70

Retail Employee Level 3 750.20

Retail Employee Level 4 764.90 [20.13 per hour]

Retail Employee Level 5 796.30

Retail Employee Level 6 807.90

Retail Employee Level 7 848.30

Retail Employee Level 8 882.80

…

Part 5—Ordinary Hours of Work

27. Hours of work

[Varied by PR992724, PR994449; 26 renumbered as 27 by PR998580 from 01Jul10]

27.1 This clause does not operate to limit or increase or in any way alter the trading hours of any employer as determined by the relevant State or Territory legislation.

27.2 Ordinary hours

(a) Except as provided in clause 27.2(b), ordinary hours may be worked, within the following spread of hours:

Days	**Spread of hours**
Monday to Friday, inclusive	7.00 am–9.00 pm
Saturday	7.00 am–6.00 pm
Sunday	9.00 am–6.00 pm

[26.2(b)(i) substituted by PR994449 from 01Jan10]

(b) Provided that:

(i) the commencement time for ordinary hours of work for newsagencies on each day may be from 5.00 am;

[26.2(b(ii) substituted by PR994449 from 01Jan10]

(ii) the finishing time for ordinary hours for video shops may be until 12 midnight; and

[26.2(b)(iii) inserted by PR992724 ppc 29Jan10]

(iii) in the case of retailers whose trading hours extend beyond 9.00 pm Monday to Friday or 6.00 pm on Saturday or Sunday, the finishing time for ordinary hours on all days of the week will be 11.00 pm.

(c) Hours of work on any day will be continuous, except for rest pauses and meal breaks.

27.3 Maximum ordinary hours on a day

(a) An employee may be rostered to work up to a maximum of nine ordinary hours on any day, provided that for one day per week an employee can be rostered for 11 hours.

[26.3(b) deleted by PR992724 ppc 29Jan10]

28. 38 hour week rosters

[27 renumbered as 28 by PR998580 from 01Jul10]

28.1 A full-time employee will be rostered for an average of 38 hours per week, worked in any of the following forms or by agreement over a longer period:

(a) 38 hours in one week;

(b) 76 hours in two consecutive weeks;

(c) 114 hours in three consecutive weeks; or

(d) 152 hours in four consecutive weeks.

28.2 The 38 hour week may be worked in any one of the following methods:

(a) shorter days, that is 7.6 hours;

(b) a shorter day or days each working week;

(c) a shorter fortnight, i.e. four hours off in addition to the rostered day off;

(d) a fixed day off in a four week cycle;

(e) a rotating day off in a four week cycle;

(f) an accumulating day off in a four week cycle, with a maximum of five days being accumulated in five cycles.

28.3 In each shop, an assessment will be made as to which method best suits the business and the proposal will be discussed with the employees concerned, the objective being to reach agreement on the method of implementation. An assessment may be initiated by either the employer or employees not more than once a year.

28.4 Circumstances may arise where different methods of implementation of a 38 hour week apply to various groups or sections of employees in the shop or establishment concerned.

28.5 In retail establishments employing on a regular basis 15 or more employees per week, unless specific agreement exists to the contrary between an employer and an employee, the employee will not be required to work ordinary hours on more than 19 days in each four week cycle.

28.6 Where specific agreement exists between an employer and employee, the employee may be worked on the basis of:

(a) not more than 4 hours' work on one day in each two week cycle;

(b) not more than 6 hours' work on one day in each week;

(c) not more than 7.6 hours' work on any day.

28.7 Substitute rostered days off (RDOs)

(a) An employer, with the agreement of the majority of employees concerned, may substitute the day or half day an employee is to take off in accordance with a roster arrangement for another day or half day in the case of a breakdown in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation.

(b) By agreement between an employer and an employee, another day may be substituted for the day that employee is to be rostered off.

28.8 Accumulation of RDOs

By agreement between the employer and an employee, the rostered day off may be accumulated up to a maximum of five days in any one year. Such accumulated periods may be taken at times mutually convenient to the employer and the employee.

28.9 A roster period cannot exceed four weeks.

28.10 Ordinary hours will be worked on not more than five days in each week, provided that if ordinary hours are worked on six days in one week, ordinary hours in the following week will be worked on no more than four days.

28.11 Consecutive days off

(a) Ordinary hours will be worked so as to provide an employee with two consecutive days off each week or three consecutive days off in a two week period.

(b) This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements, which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request.

(c) An employee can terminate the agreement by giving four weeks' notice to the employer.

28.12 Ordinary hours and any reasonable additional hours may not be worked over more than six consecutive days.

28.13 Employees regularly working Sundays

(a) An employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.

(b) This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request.

(c) An employee can terminate the agreement by giving four weeks' notice to the employer.

28.14 Notification of rosters

(a) The employer will exhibit staff rosters on a notice board, which will show for each employee:

(i) the number of ordinary hours to be worked each week;

(ii) the days of the week on which work is to be performed; and

(iii) the commencing and ceasing time of work for each day of the week.

(b) The employer will retain superseded notices for twelve months. The roster will, on request, be produced for inspection by an authorised person.

(c) Due to unexpected operational requirements, an employee's roster for a given day may be changed by mutual agreement with the employee prior to the employee arriving for work.

(d) Any permanent roster change will be provided to the employee in writing with a minimum seven days notice. Should the employee disagree with the roster change, they will be given a minimum of 14 days written notice instead of seven days, during which time there will be discussions aimed at resolving the matter in accordance with clause **Error! Reference source not found.**—**Error! Reference source not found.**, of this award.

(e) Where an employee's roster is changed with the appropriate notice for a once-only event caused by particular circumstances not constituting an emergency, and the roster reverts to the previous pattern in the following week, then extra work done by the employee because of the change of roster will be paid at the overtime rate of pay.

(f) An employee's roster may not be changed with the intent of avoiding payment of penalties, loading or other benefits applicable. Should such circumstances arise the employee will be entitled to such penalty, loading or benefit as if the roster had not been changed.

29. Overtime and penalties

[Varied by PR992724, PR994449, PR504525, PR539248, PR540640; 28 renumbered as 29 by PR998580 from 01Jul10; 29 varied by PR585796]

29.1 Reasonable overtime

(a) Subject to clause 29.1(b) an employer may require an employee other than a casual to work reasonable overtime at overtime rates in accordance with the provisions of this clause.

(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

(i) any risk to employee health and safety;

(ii) the employee's personal circumstances including any family responsibilities;

(iii) the needs of the workplace or enterprise;

(iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and

(v) any other relevant matter.

29.2 Overtime

[29.2 substituted by PR504525 from 10Dec10; corrected by PR505487 from 10Dec10]

(a) Hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in clauses 27 and 28 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Hours worked by part-time employees in excess of the agreed hours in clause **Error! Reference source not found.** or as varied under clause **Error! Reference source not found.** will be paid at time and a half for the first three hours and double time thereafter.

(c) The rate of overtime on a Sunday is double time, and on a public holiday is double time and a half.

(d) Overtime is calculated on a daily basis.

29.3 Time off instead of payment for overtime

[28.3 renamed and varied by PR994449; 29.3 renamed and substituted by PR585796 ppc14Dec16]

(a) An employee and employer may agree to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) The period of time off that an employee is entitled to take is equivalent to the overtime payment that would have been made.

EXAMPLE: By making an agreement under clause 29.3 an employee who worked 2 overtime hours at the rate of time and a half is entitled to 3 hours' time off.

(c) Time off must be taken:

(i) within the period of 6 months after the overtime is worked; and

(ii) at a time or times within that period of 6 months agreed by the employee and employer.

(d) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 29.3 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(e) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (c), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

(f) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(g) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 29.3 will apply for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

(h) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 29.3 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 29.3.

29.4 Penalty payments

(a) Evening work Monday to Friday

A penalty payment of an additional 25% will apply for ordinary hours worked after 6.00 pm. This does not apply to casuals.

(b) Saturday work

[29.4(b) substituted by PR540640 ppc 23Aug13]

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time and part-time employees. A casual employee must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm.

(c) Sunday work

[28.4(c) varied by PR992724 ppc 29Jan10]

A penalty payment of an additional 100% loading will apply for all hours worked on a Sunday. This penalty payment also applies to casual employees instead of the casual loading in clause **Error! Reference source not found.**.

(d) Public holidays

[29.4(d) substituted by PR539248 ppc 01Aug13]

(i) Work on a public holiday must be compensated by payment at the rate of an additional 150%.

(ii) Provided that by mutual agreement of the employee and the employer, the employee (other than a casual) may be compensated for a particular public holiday by either:

(A) An equivalent day or equivalent time off instead without loss of pay. The time off must be taken within four weeks of the public holiday occurring, or it shall be paid out; or

(B) An additional day or equivalent time as annual leave.

(iii) The employee and employer are entitled to a fresh choice of payment or time off by agreement on each occasion work is performed on a public holiday.

(iv) If no agreement can be reached on the method of compensation, the default arrangement shall be as per clause 29.4(d)(i).

…

32. Annual leave

[31 renumbered as 32 by PR998580 from 01Jul10; varied by PR583010]

32.1 Annual leave is provided for in the NES.

32.2 Definition of shiftworker

For the purpose of the additional week of annual leave provided for in the NES, a shiftworker is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for seven days a week.

32.3 Annual leave loading

(a) During a period of annual leave an employee will receive a loading calculated on the rate of wage prescribed in clause 17—Minimum weekly wages of this award. Annual leave loading is payable on leave accrued.

(b) The loading will be as follows:

(i) Day work

Employees who would have worked on day work only had they not been on leave—17.5% or the relevant weekend penalty rates, whichever is the greater but not both.

(ii) Shiftwork

Employees who would have worked on shiftwork had they not been on leave—a loading of 17.5% or the shift loading (including relevant weekend penalty rates) whichever is the greater but not both.

32.4 Paid leave in advance of accrued entitlement

An employer may allow an employee to take annual leave either wholly or partly in advance before the leave has accrued. Where paid leave has been granted to an employee in excess of the employee's accrued entitlement, and the employee subsequently leaves or is discharged from the service of the employer before completing the required amount of service to account for the leave provided in advance, the employer is entitled to deduct the amount of leave in advance still owing from any remuneration payable to the employee upon termination of employment.

32.5 Requirement to take leave notwithstanding terms of the NES

An employer may require an employee to take annual leave by giving at least four weeks' notice in the following circumstances:

(a) as part of a close-down of its operations; or

(b) where more than eight weeks' leave is accrued.

…

Schedule B—Classifications

[Sched B varied by PR988390, PR992724, PR540640]

B.1 Retail Employee Level 1

B.1.1 An employee performing one or more of the following functions at a retail establishment:

- the receiving and preparation for sale and or display of goods in or about any shop;
- the pre-packing or packing, weighing, assembling, pricing or preparing of goods or provisions or produce for sale;
- the display, shelf filling, replenishing or any other method of exposure or presentation for sale of goods;
- the sale or hire of goods by any means;
- the receiving, arranging or making payment by any means;
- the recording by any means of a sale or sales;
- the wrapping or packing of goods for despatch and the despatch of goods;
- the delivery of goods;
- window dressing and merchandising;
- loss prevention;
- demonstration of goods for sale;
- the provision of information, advice and assistance to customers;
- the receipt, preparation, packing of goods for repair or replacement and the minor repair of goods;
- all directly employed persons engaged in retail stores in cleaning, store greeting, security, lift attending, store cafeterias and food services;
- Clerical Assistants functions Level 1; or
- work which is incidental to or in connection with any of the above.

B.1.2 Retail Employees will undertake duties as directed within the limits of their competence, skills and training including incidental cleaning. The cleaning of toilets is not incidental cleaning except in the case of a take away food establishment.

[B.1.3 varied by PR540640 ppc 23Aug13]

B.1.3 Indicative job titles which are usually within the definition of a Retail Employee Level 1 are:

- Shop Assistant,
- Clerical Assistant,
- Check-out Operator,
- Store Worker,
- Reserve Stock Hand,
- Driver,
- Boot/Shoe Repairer (Not Qualified),
- Window Dresser (Not Qualified),
- LPO,
- Photographic Employee,
- Store Greeter,
- Assembler,
- Ticket Writer (Not Qualified),

- Trolley Collector,
- Video Hire Worker,
- Telephone Order Salesperson,
- Door-to-door Salesperson, or Retail Outdoor Salesperson, and,
- Demonstrator and/or Merchandiser not elsewhere classified (including a Demonstrator and/or Merchandiser who is not a direct employee of the retailer).

B.1.4 **Clerical Assistant** means an employee accountable for clerical and office tasks as directed within the skill levels set out.

B.1.5 Employees at this level may include the initial recruit who may have limited relevant experience. Initially work is performed under close direction using established practices, procedures and instructions.

B.1.6 Such employees perform routine clerical and office functions requiring an understanding of clear, straightforward rules or procedures and may be required to operate certain office equipment. Problems can usually be solved by reference to established practices, procedures and instructions.

B.1.7 Employees at this level are responsible and accountable for their own work within established routines, methods and procedures and the less experienced employee's work may be subject to checking at all stages. The more experienced employee may be required to give assistance to less experienced employees in the same classification.

B.1.8 Indicative typical duties and skills at this level may include:

- reception/switchboard, e.g. directing telephone callers to appropriate staff, issuing and receiving standard forms, relaying internal information and initial greeting of visitors;
- maintenance of basic records;
- filing, collating, photocopying etc;
- handling or distributing mail including messenger service;
- recording, matching, checking and batching of accounts, invoices, orders, store requisitions etc; or
- the operation of keyboard and other allied equipment in order to achieve competency as prescribed in Level 2.

B.2 Retail Employee Level 2

B.2.1 An employee performing work at a retail establishment at a higher skill level than a Retail Employee Level 1.

B.2.2 Indicative job titles which are usually within the definition of a Retail Employee Level 2 include:

- Forklift Operator,
- Ride on Equipment Operator.

B.3 Retail Employee Level 3

B.3.1 An employee performing work at a retail establishment at a higher level than a Retail Employee Level 2.

B.3.2 Indicative of the tasks which might be required at this level are the following:

- Supervisory assistance to a designated section manager or team leader,
- Opening and closing of premises and associated security,
- Security of cash, or
- Fitting of surgical corset.

B.3.3 Indicative job titles which are usually within the definition of a Retail Employee 3 include:

- Machine operators,
- 2IC to Dept Manager,
- Senior Salesperson,
- Corsetiere,
- Driver Selling Stock,
- Cook (Not Qualified) in a cafeteria,
- Senior LPO, including an armed LPO,
- LPO Supervisor,
- Designated second-in-charge of a section (i.e. senior sales assistant),
- Designated second-in-charge to a service supervisor, or
- Person employed alone, with responsibilities for the security and general running of a shop.

B.4 Retail Employee Level 4

B.4.1 An employee performing work at a retail establishment at a higher level than a Retail Employee Level 3.

B.4.2 Indicative of the tasks which might be required at this level are the following:

- Management of a defined section/department,
- Supervision of up to 4 sales staff (including self),
- Stock control,
- Buying/ordering requiring the exercise of discretion as to price, quantity, quality etc.,

- An employee who is required to utilise the skills of a trades qualification for the majority of the time in a week, or
- Clerical functions Level 2.

B.4.3 Indicative job titles which are usually within the definition of a Retail Employee 4 include:

[B.4.3 varied by PR992724 ppc 29Jan10]

- An Assistant, Deputy, or 2IC Shop Manager of a shop without Departments,
- An employee who is required to utilise the skills of a trades qualified person for the majority of the time in a week. This includes: Butcher, Baker, Pastry Cook, Florist,
- An employee who has completed an appropriate trades course or holds an appropriate Certificate III and is required to use their qualifications in the course of their work,
- A Qualified Auto Parts and Accessories Salesperson,
- A Window Dresser (Cert III or equivalent experience),
- A Boot/Shoe Repairer (Cert III),
- A Shiftwork Supervisor,
- Section/Department manager with up to 2 employees (including self),
- Service Supervisor of up to 15 employees,
- Nightfill Supervisor/Leader,

B.4.4 Clerical Officer Level 2 characteristics:

- This level caters for the employees who have had sufficient experience and/or training to enable them to carry out their assigned duties under general direction.
- Employees at this level are responsible and accountable for their own work which is performed within established guidelines. In some situations detailed instructions may be necessary. This may require the employee to exercise limited judgment and initiative within the range of their skills and knowledge.
- The work of these employees may be subject to final checking and as required progress checking. Such employees may be required to check the work and/or provide guidance to other employees at a lower level and/or provide assistance to less experienced employees at the same level.

B.4.5 Indicative typical duties and skills at this level may include:

- Reception/switchboard duties as in Level 1 and in addition responding to enquiries as appropriate, consistent with the acquired knowledge of the organisation's operations and services, and/or where presentation and use of interpersonal skills are a key aspect of the position.
- Operation of computerised radio/telephone equipment, micro personal computer, printing devices attached to personal computer, dictaphone equipment, typewriter.
- Word processing, e.g. the use of a word processing software package to create, format, edit, correct, print and save text documents, e.g. standard correspondence and business documents.
- Stenographer/person solely employed to take shorthand and to transcribe by means of appropriate keyboard equipment.
- Copy typing and audio typing.
- Maintenance of records and/or journals including initial processing and recording relating to the following:
  - **(i)** reconciliation of accounts to balance;
  - **(ii)** incoming/outgoing cheques;
  - **(iii)** invoices;
  - **(iv)** debit/credit items;
  - **(v)** payroll data;
  - **(vi)** petty cash Imprest System;
  - **(vii)** letters etc.
- Computer application involving use of a software package which may include one or more of the following functions:
  - **(i)** create new files and records;
  - **(ii)** spreadsheet/worksheet;
  - **(iii)** graphics;
  - **(iv)** accounting/payroll file;
  - **(v)** following standard procedures and using existing models/fields of information.
- Arrange routine travel bookings and itineraries, make appointments.
- Provide general advice and information on the organisation's products and services, e.g. front counter/telephone.

B.5 Retail Employee Level 5

B.5.1 An employee performing work in or in connection with a retail establishment at a higher level than a Retail Employee Level 4.

B.5.2 Indicative job titles which are usually within the definition of a Retail Employee 5 include:

- A tradesperson in charge of other tradespersons within a section or department,
- Service Supervisor (more than 15 employees).

B.6 Retail Employee Level 6

B.6.1 An employee performing work in or in connection with a retail establishment at a higher level than a Retail Employee Level 5.

B.6.2 Indicative job titles which are usually within the definition of a Retail Employee 6 include:

- Section/Department manager with 5 or more employees (including self),
- Manager/Duty Manager in a shop without Departments/Sections (may be under direction of person not exclusively involved in shop management),

[B.6.2 varied by PR992724 ppc 29Jan10]

- Assistant or Deputy or 2IC Shop Manager of a shop with Departments/Sections,
- Clerical Officer Level 3.

B.6.3 **Clerical Officer Level 3** characteristics:

- Employees at this level have achieved a standard to be able to perform specialised or non-routine tasks or features of the work. Employees require only general guidance or direction and there is scope for the exercise of limited initiative, discretion and judgment in carrying out their assigned duties.
- Such employees may be required to give assistance and/or guidance (including guidance in relation to quality of work and which may require some allocation of duties) to employees in Levels 1 and 2 and would be able to train such employees by means of personal instruction and demonstration.

B.6.4 Indicative typical duties and skills at this level may include:

- Prepare cash payment summaries, banking report and bank statements; calculate and maintain wage and salary records; follow credit referral procedures; apply purchasing and inventory control requirements; post journals to ledger.
- Provide specialised advice and information on the organisation's products and services; respond to client/public/supplier problems within own functional area utilising a high degree of interpersonal skills.
- *Apply one or more computer software packages developed for a micro personal computer or a central computer resource to either/or:
  - **(i)** create new files and records;
  - **(ii)** maintain computer based records management systems;
  - **(iii)** identify and extract information from internal and external sources;
  - **(iv)** use of advanced word processing/keyboard functions.
- Arrange travel bookings and itineraries; make appointments; screen telephone calls; respond to invitations; organise internal meetings on behalf of executive(s); establish and maintain reference lists/personal contact systems for executive(s).
- Application of specialist terminology/processes in professional offices.

*NOTE: These typical duties/skills may be either at Level 3 or Level 4 dependent upon the characteristics of that particular Level.

B.7 Retail Employee Level 7

B.7.1 An employee performing work in or in connection with a retail establishment at a higher level than a Retail Employee Level 6.

B.7.2 Indicative job titles which are usually within the definition of a Retail Employee Level 7 include:

- Visual Merchandiser (diploma),
- Clerical Officer Level 4.

B.7.3 **Clerical Officer Level 4** characteristics:

- Employees at this level will have achieved a level of organisation or industry specific knowledge sufficient for them to give advice and/or information to the organisation and clients in relation to specific areas of their responsibility. They would require only limited guidance or direction and would normally report to more senior staff as required. Whilst not a pre-requisite, a principal feature of this level is supervision of employees in lower levels in terms of responsibility for the allocation of duties, co-ordinating work flow, checking progress, quality of work and resolving problems.
- They exercise initiative, discretion and judgment at times in the performance of their duties.
- They are able to train employees in Clerical Levels 1–3 by personal instruction and demonstration.

B.7.4 Indicative typical duties and skills at this level may include:

- Secretarial/Executive support services which may include the following: maintain executive diary; attend executive/organisational meetings and take minutes; establish and/or maintain current working and personal filing systems for executive; answer executive correspondence from verbal or handwritten instructions.
- Able to prepare financial/tax schedules, calculate costings and/or wage and salary requirements; complete personnel/payroll data for authorisation; reconciliation of accounts to balance.

- Advise on/provide information on one or more of the following:
  - **(i)** employment conditions
  - **(ii)** workers compensation procedures and regulations
  - **(iii)** superannuation entitlements, procedures and regulations
- *Apply one or more computer software packages, developed for a micro personal computer or a central computer resource to either/or:
  - **(i)** create new files and records;
  - **(ii)** maintain computer based management systems;
  - **(iii)** identify and extract information from internal and external sources;
  - **(iv)** use of advanced word processing/keyboard functions.

*NOTE: These typical duties/skills may be either at Level 3 or Level 4 dependent upon the characteristics of that particular Level.

B.8 Retail Employee Level 8

B.8.1 An employee performing work in or in connection with a retail establishment at a higher level than a Retail Employee Level 7.

B.8.2 A person with a Diploma qualification.

B.8.3 Indicative job titles which are usually within the definition of a Retail Employee 8 include:

[B.8.3 varied by PR992724 ppc 29Jan10]

- A Shop Manager of a shop with Departments/Sections, or
- Clerical Officer Level 5.

B.8.4 **Clerical Officer Level 5** characteristics:

- Employees at this level are subject to broad guidance or direction and would report to more senior staff as required.
- Such employees will typically have worked or studied in a relevant field and will have achieved a standard of relevant and/or specialist knowledge and experience sufficient to enable them to advise on a range of activities and features and contribute, as required, to the determination of objectives, within the relevant field(s) of their expertise.
- They are responsible and accountable for their own work and may have delegated responsibility for the work under their control or supervision, in terms of, among other things, scheduling workloads, resolving operations problems, monitoring the quality of work produced as well as counselling staff for performance as well as work related matters.
- They would also be able to train and to supervise employees in lower levels by means of personal instruction and demonstration. They would also be able to assist in the delivery of training courses. They often exercise initiative, discretion and judgment in the performance of their duties.
- The possession of relevant post secondary qualifications may be appropriate but not essential.

B.8.5 Indicative typical duties and skills at this level may include:

- Apply knowledge of organisation's objectives, performance, projected areas of growth, product trends and general industry conditions.
- Application of computer software packages within either a micropersonal computer or a central computer resource including the integration of complex word processing/desktop publishing, text and data documents.
- Provide reports for management in any or all of the following areas:
  - **(i)** account/financial
  - **(ii)** staffing
  - **(iii)** legislative requirements
  - **(iv)** other company activities.
- Administer individual executive salary packages, travel expenses, allowances and company transport; administer salary and payroll requirements of the organisation.

Schedule 3: Calculation of Pay, Overtime and Penalty Payments under General Retail In dustry Award 2010 as Level 4 Retail Employee

	Ordinary	Saturday	Overtime	Overtime	Public H
	100%	**125%**	**150%**	**200%**	**P/H**
1.7.13 Level 4	19.07	23.84	28.6	38.14	47.67
1.7.14 Level 4	19.64	24.55	29.46	39.28	49.1
1.7.15 Level 4	20.13	25.16	30.19	40.26	50.32

Fortnight Ending	Hrs at 100%	Hrs at 125	Hrs at 150%	Hrs at 200%	Hrs at 250%	Ord pay at 100%	Sat at 125%	O/T at 150%	O/T at 200%	P/H at 250%	Total Entitlement
25-Feb-14											
8-Mar-14	63				8	$1,201.41	$0.00	$0.00	$0.00	$381.36	$1,582.77
22-Mar-14	76		6	1.13		$1,449.32	$0.00	$171.60	$43.10	$0.00	$1,664.02
5-Apr-14	76		6	1.3		$1,449.32	$0.00	$171.60	$49.58	$0.00	$1,670.50
19-Apr-14	56.43					$1,076.12	$0.00	$0.00	$0.00	$0.00	$1,076.12
3-May-14	24.5					$467.22	$0.00	$0.00	$0.00	$0.00	$467.22
17-May-14	33.8					$644.57	$0.00	$0.00	$0.00	$0.00	$644.57
31-May-14	32.35					$616.91	$0.00	$0.00	$0.00	$0.00	$616.91
14-Jun-14	44.47				8.16	$848.04	$0.00	$0.00	$0.00	$388.99	$1,237.03
28-Jun-14	76		14	12.33		$1,449.32	$0.00	$400.40	$470.27	$0.00	$2,319.99
12-Jul-14	76		8.46	8.45		$1,492.64	$0.00	$249.23	$331.92	$0.00	$2,073.79
26-Jul-14	76		12			$1,492.64	$0.00	$353.52	$0.00	$0.00	$1,846.16
9-Aug-14	69.4	2.73		15.43		$1,363.02	$67.02	$0.00	$606.09	$0.00	$2,036.13
23-Aug-14	68.4	3	10.61	8.35		$1,343.38	$73.65	$312.57	$327.99	$0.00	$2,057.58
6-Sep-14	76		7.93	8.1		$1,492.64	$0.00	$233.62	$318.17	$0.00	$2,044.43
20-Sep-14	76		6.68	7.67		$1,492.64	$0.00	$196.79	$301.28	$0.00	$1,990.71
4-Oct-14	68.4		13.4		7.97	$1,343.38	$0.00	$394.76	$0.00	$391.33	$2,129.47
18-Oct-14	76	7.98	7.59			$1,492.64	$195.91	$223.60	$0.00	$0.00	$1,912.15
1-Nov-14	76		4			$1,492.64	$0.00	$117.84	$0.00	$0.00	$1,610.48
15-Nov-14	76		10.56			$1,492.64	$0.00	$311.10	$0.00	$0.00	$1,803.74
29-Nov-14	76		7.74			$1,492.64	$0.00	$228.02	$0.00	$0.00	$1,720.66
13-Dec-14	76		5	11.58		$1,492.64	$0.00	$147.30	$454.86	$0.00	$2,094.80
27-Dec-14	67.58	7.94				$1,327.27	$194.93	$0.00	$0.00	$0.00	$1,522.20
10-Jan-15	74.49		12.89			$1,462.98	$0.00	$379.74	$0.00	$0.00	$1,842.72
24-Jan-15	76		19.51	3.23		$1,492.64	$0.00	$574.76	$126.87	$0.00	$2,194.28
7-Feb-15	76		13.87			$1,492.64	$0.00	$408.61	$0.00	$0.00	$1,901.25
21-Feb-15	76		14.36			$1,492.64	$0.00	$423.05	$0.00	$0.00	$1,915.69
7-Mar-15	68.4		29.35		8.35	$1,376.89	$0.00	$886.08	$0.00	$420.17	$2,683.14
21-Mar-15	76		16.85			$1,529.88	$0.00	$508.70	$0.00	$0.00	$2,038.58
4-Apr-15	76					$1,529.88	$0.00	$0.00	$0.00	$0.00	$1,529.88
18-Apr-15	76	5.13	4.65			$1,529.88	$129.07	$140.38	$0.00	$0.00	$1,799.33
2-May-15	68.4		7.93	8.18	9.07	$1,376.89	$0.00	$239.41	$329.33	$456.40	$2,402.03
16-May-15	76		15.24			$1,529.88	$0.00	$460.10	$0.00	$0.00	$1,989.98
30-May-15	38		3.35	8.3		$764.94	$0.00	$101.14	$334.16	$0.00	$1,200.23
13-Jun-15	45.6	7.81	3.29			$917.93	$196.50	$99.33	$0.00	$0.00	$1,213.75
27-Jun-15	73.83			7.65		$1,486.20	$0.00	$0.00	$307.99	$0.00	$1,794.19
11-Jul-15	76		5.55	8.32		$1,529.88	$0.00	$167.55	$334.96	$0.00	$2,032.40
25-Jul-15	76		11.8			$1,529.88	$0.00	$356.24	$0.00	$0.00	$1,886.12
8-Aug-15	76		6.15			$1,529.88	$0.00	$185.67	$0.00	$0.00	$1,715.55
22-Aug-15	60.15					$1,210.82	$0.00	$0.00	$0.00	$0.00	$1,210.82
5-Sep-15	76		6.75	7.6		$1,529.88	$0.00	$203.78	$305.98	$0.00	$2,039.64
19-Sep-15	76		10.78			$1,529.88	$0.00	$325.45	$0.00	$0.00	$1,855.33
3-Oct-15	67.35		5.54		8.65	$1,355.76	$0.00	$167.25	$0.00	$435.27	$1,958.28
17-Oct-15	44.1		3.72			$887.73	$0.00	$112.31	$0.00	$0.00	$1,000.04
31-Oct-15	43.8		2.58			$881.69	$0.00	$77.89	$0.00	$0.00	$959.58
TOTALS											**$75,284.22**

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2017 WAIRC 00238

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00238
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 18 JANUARY 2017 THURSDAY, 19 JANUARY **(WRITTEN SUBMISSIONS)** FRIDAY, 20 JANUARY 2017 MONDAY, 23 JANUARY 2017
DELIVERED	**:**	MONDAY, 1 MAY 2017
FILE NO.	**:**	APPL 109 OF 2015
BETWEEN	**:**	SHANE MICHAEL FERGUSON Appellant AND THE COMMISSIONER OF POLICE Respondent

CatchWords	**:**	Removal of Police Officer – Appeal against removal – Code of Conduct – Conduct likely to bring discredit on and unbecoming of a member of the Police Force - Loss of Confidence by Commissioner of Police – Loss of Confidence proceedings not suspended pending criminal trial – Misconduct as criminal offence or disciplinary matter – Allegations of assault and grievous bodily harm disciplinary matters and not relied on same considerations as required to prove criminal conduct - Denial of procedural fairness and natural justice – Right to claim privilege against self-incrimination – Denial of real opportunity to respond to allegations and express contrition
Legislation	**:**	*Criminal Code Act 1902* s 231, s 260, s 297, s 313(1)(b) *Police Act 1892* s 33L, s 33Q, s 33R, s 33T, s 33W *Police Force Regulations 1979* reg 603
Result	**:**	Appeal upheld
Representation:		
Counsel:		
Appellant	**:**	Mr D Jones of counsel and later, Ms K Vernon of counsel
Respondent	**:**	Mr N John of counsel
Solicitors:		
Appellant	**:**	Tindall Gask Bentley Lawyers
Respondent	**:**	State Solicitor's Office

Reasons for Decision

1 On 18 July 2014, Shane Michael Ferguson, a serving police officer, was off duty. Having attended social functions during the day and evening, at around 11 pm, Mr Ferguson was leaving a bar in Midland where the WA Police Social Club had held a function. He heard a car doing a burnout in the road. He walked out into the road where the vehicle had stopped and leaned down to take a photograph of the registration plate. He then walked to the driver's door. He says that he announced that he was a police officer and showed his police identification. It is alleged that Mr Ferguson attempted to drag the driver, Gavin Ross Gero, from the car. Mr Ferguson says he unsuccessfully attempted to arrest Mr Gero.

2 In the minutes that followed, Mr Ferguson says that Mr Gero and his friends tried to drag Mr Ferguson away from Mr Gero. Mr Gero and his friends say that Mr Ferguson was either drunk or affected by drugs, they did not think Mr Ferguson could be a police officer because of the way he was behaving, and a number of physical altercations followed.

3 A number of people, including Mr Ferguson, were injured in the altercations.

4 This incident led to internal and criminal investigations.

The managerial interview and witness statements

5 Acting Detective Inspector Jackson took charge of the internal investigation into the incident on 21 July 2014.

6 On 29 July 2014 Acting Detective Inspector Jackson interviewed Mr Ferguson in the presence of Inspector Alan Carter and a lawyer for the police union. In this interview, Mr Ferguson was ordered, in accordance with reg 603 of the *Police Force Regulations 1979*, to answer questions, and he did so, noting that the interview was not voluntary.

7 A number of people who attended the social function attended by Mr Ferguson immediately before the incident, staff members at the bar and a group of young people who were in a vehicle departing from the venue, gave statements to police. There was also a witness statement from a police sergeant who attended the scene after the incident. Some of these statements are signed and witnessed and some are not.

The criminal charges

8 On 21 July 2014, Acting Detective Inspector Jackson started the criminal investigation.

9 On 21 August 2014, Mr Ferguson was charged with offences arising during the incident of:

(a) Causing grievous bodily harm to a Mr Prime contrary to s 297 of *The Criminal Code*;

(b) Assaulting a Ms Lloyd-Riley contrary to s 313(1)(b) of *The Criminal Code*.

The Interim Internal Investigation Report

10 On 27 August 2014, Acting Detective Inspector Jackson produced an Interim Internal Investigation Report into the incident. It examined the witness statements and other evidence, including CCTV footage and a video and audio recording made by one of the witnesses on his telephone.

11 A decision was then made to proceed with a loss of confidence (LOC) process under s 33L of the *Police Act 1892* (the Police Act). Inspector Neville Dockery was appointed as a review officer in that process. He issued his Summary of Investigation (SOI) on 7 November 2014 recommending that the Commissioner consider issuing Mr Ferguson with a Notice of Intention to Remove (NOITR) having regard to Mr Ferguson's integrity, professionalism and conduct on the grounds that he:

I. On 18 July 2014 at Midland, acted in a manner that was likely to bring discredit on the force or in a manner that is unbecoming of a member of the force by using excessive force when arresting Gavin Ross Gero;

II. On 18 July 2014 at Midland, acted in a manner that was likely to bring discredit on the force or in a manner that is unbecoming of a member of the force by assaulting Hayley Lloyd-Riley;

III. On 18 July 2014 at Midland, acted in a manner that was likely to bring discredit on the force or in a manner that is unbecoming of a member of the force by causing serious injury to Joshua Keiran Prime; and

IV. On 18 July 2014 at Midland, acted in a manner that was likely to bring discredit on the force or in a manner that is unbecoming of a member of the force by being disorderly and assaulting Sam Self.

Respondent's reg 92 Bundle, document 1, page 58

12 The Commissioner issued a NOITR to Mr Ferguson on 27 November 2014 in which he said, amongst other things, that 'in the absence of being persuaded otherwise' he intended to recommend to the Minister for Police that she approve Mr Ferguson's removal from the Police Force. This was on the basis that he had lost confidence in Mr Ferguson's suitability to continue as a member of WA Police. He said that his loss of confidence was based on the matters set out in the SOI prepared by the Review Officer and in particular, the four allegations set out above. He invited Mr Ferguson to respond by making a written submission within 21 days in relation to the loss of confidence.

13 Mr Ferguson's solicitor, Darren Jones, wrote to the Commissioner by letter dated 29 December 2014. He asked the Commissioner to suspend the LOC process until the criminal charges against Mr Ferguson were resolved in the District Court. He noted the likely timing for the trial. He said that it would be unfair for Mr Ferguson to be required to respond to the four issues because it would affect his position and defence to the criminal charges. He said:

> The pressure to respond to the allegations as part of s.33L process may intrude upon Detective 1/C Ferguson's lawful privilege against self-incrimination. You will be aware that issues relating to the privilege in light of compulsion, and the compulsory nature of a s.33L response, have recently been raised and commented upon in cases like *Critchley v The State of WA* [2013] WASCA 28, *Lee v The Queen* [2014] HCA 20 and others that have a bearing on these issues.

14 Mr Jones also asserted that the allegations and 'component issues' that would arise at trial are matters that would be tested and decided by jury. He said that the result would have a strong bearing on the Commissioner's position on the allegations as part of the LOC process, and he respectfully suggested that the Commissioner would be in 'a much better position to make [his] decision with the fulness[sic] of information available after trial'.

15 The letter pointed out that the Commissioner would be aware that s 33T of the *Police Act* provides for an adjournment of appeal proceedings in cases where the grounds correspond to criminal charges.

16 On an unknown date in December 2014, the Commissioner responded saying that criminal and LOC proceedings were quite separate processes and both have to be independently considered and resolved. He said the outcome of either proceedings should not influence the other. He also said that a criminal conviction or acquittal alone is not a sole determining factor in the LOC process and that 'what is more important is a comprehensive and fair managerial examination of all the facts in issue which form the basis of the LOC nomination and action'. He therefore denied the request to suspend the LOC process.

17 Mr Ferguson then provided his response to the NOITR by letter dated 6 January 2014. He reiterated his previous concerns, also expressed in the interview some months earlier, about any link between the LOC proceedings and the criminal matters. He noted his intention to enter a plea of not guilty to the alleged offences of Grievous Bodily Harm (GBH) and Common Assault. He referred to the submission Mr Jones made on his behalf dated 29 December 2014, saying:

> I cannot properly respond to issues that relate directly to the criminal charges against me for the reasons he has identified in his submission.
>
> Respondent's reg 92 Bundle, document 4

18 He noted that '[a] large amount of emphasis has been placed on my level of intoxication at the time of this incident including my previous complaint history'. He addressed those matters in his letter. He went on to say that he wanted 'to co-operate as much as possible with these proceedings at least to the extent that I can address certain concerns identified in the SOI'. He addressed his personal background; briefly set out the circumstances leading up to the incident; set out his injuries and hospital treatment following the incident; noted that he had been arrested on suspicion of GBH and common assault; he had been offered an opportunity to take part in an Electronic Record of Interview which he declined at the time; and was charged with GBH and common assault.

19 In response to the particulars of the allegations, Mr Ferguson said that although his desire was to 'articulate the circumstances of the night, I consider myself in a precarious position, as I do not wish to jeopardise the court process.' He denied unlawfully assaulting Ms Lloyd-Riley, Mr Gero or Mr Self as alleged. In relation to the assault of Mr Prime, Mr Ferguson said he acted to protect himself in response to being attacked. Under the heading of Ancillary Issues, he then addressed what he described as 'peripheral aspects of the SOI without compromising my position as an accused person'. These included whether or not he was intoxicated at the time of the incident, and he gave reasons associated with his physical characteristics why people may have come to the conclusion that he was intoxicated.

20 He responded to the issues of his complaint history. He also put forward his personal attributes and skills for the Commissioner's consideration.

21 Next, he set out, in brief terms that he acted in good faith during the incident. He accepted that in hindsight he made a poor decision by getting involved in the incident and that there were other options available to him.

22 He argued his case generally, highlighting his productivity and the further positive contribution he could make.

23 The letter demonstrates that Mr Ferguson did not wish to, and did not, respond to the particulars of the allegations or to the reports about what the witnesses had said about the incident because he did not wish to jeopardise the court process.

24 Mr Dockery then provided an Analysis of Response dated 21 January 2015.

25 By letter dated 10 February 2015, the Commissioner noted that:

> Your subsequent response to the Notice failed to provide sufficient detailed explanation or mitigation for your actions, (despite my attempt to reassure you that one process does not affect the other), so given your lack of detailed explanation or acknowledgement for your conduct therefore, it offers me no comfort that your actions were appropriate, justified or measured.
>
> Other than your denial of unlawfully assaulting the alleged victims and claiming you acted in self-defence, your lack of detail explaining the significant amount of police and independent evidence against you, leaves me very little scope to even consider that your actions may have been justified.
>
> On balance, the evidence clearly reveals (albeit a perhaps well-intentioned, yet misguided attempt by you to intervene in a traffic incident), your subsequent over-zealous response significantly escalated the matter and conduct as alleged. Your failure to specifically respond does not attempt to account for your actions, nor have you recognised that your actions were excessive and disproportionate and you have offered no contrition for your actions to address the serious questions that remain over your integrity, conduct and performance.
>
> Respondent's reg 92 Bundle, document 7

26 The Commissioner also said:

> the existence of criminal proceedings does not preclude me from taking LOC action in relation to any matter, act or omission relating to or being an element of the offence. This recognises the managerial and summary nature of this process, as being both an effective and expedient means of addressing risk and maintaining community confidence in WA Police.

27 He noted that criminal charges were currently pending against Mr Ferguson but said that they 'do not form the basis for LOC proceedings against you, but rather your demonstrated unprofessional conduct which is relevant.' He said that there is nothing in Mr Ferguson's response that altered the position that he exhibited serious unprofessional conduct, used excessive and unnecessary force, was disorderly on the evening, and did not meet the standards required of a member of WA Police. The letter then addressed each of the allegations.

28 The concluding paragraphs of the letter note that Mr Ferguson's response did not justify or acknowledge that his actions were inappropriate, and say that he failed to accept responsibility, failed to show contrition for his actions, exhibited poor judgement and a lack of professionalism. The Commissioner concluded that Mr Ferguson's unprofessional conduct was in clear contravention of the WA Police Code of Conduct and that his 'actions significantly undermined the credibility and reputation of WA Police.'

29 Therefore, following the internal investigation, the Commissioner of Police found that Mr Ferguson had acted in a manner that was likely to bring discredit on WA Police, in a manner that was unbecoming of a member of WA Police by:

(1) Using excessive force when arresting Mr Gero;

(2) Assaulting Ms Lloyd-Riley;

(3) Causing serious injury to Mr Prime; and

(4) Being disorderly and assaulting Mr Self.

30 The Commissioner decided to remove Mr Ferguson from office as a member of the WA Police on the basis that he had lost confidence in Mr Ferguson's suitability to remain as a member of WA Police, having regard to Mr Ferguson's integrity, performance and conduct.

Outcome of criminal trial

31 When the two criminal charges against Mr Ferguson were heard in the District Court he was acquitted and the charges were discontinued respectively.

The process of this appeal

32 The process of this matter being dealt with by the WAIRC was deferred, in accordance with s 33T of the Police Act, on the basis that Mr Ferguson had been charged with criminal offences arising from the same incident and did not wish to proceed to hearing until those charges had been dealt with.

33 Following the dismissal of the charges, the Commissioner of Police filed his response to the appeal on 23 November 2016. The appellant filed an outline of submissions on 10 January 2017. The Commissioner filed an outline of submissions on 16 January 2017. The matter was to be heard on 18 January 2017.

The application to amend the grounds of appeal

34 On 13 January 2017, Mr Ferguson filed an application to amend his grounds of appeal to add to ground 3, that the respondent 'failed to consider and/or take into account evidence which was available to the Respondent of the CCTV footage taken from inside the [bar] which contradicted the eye witness evidence that the appellant was intoxicated'.

35 At the hearing on 18 January 2017 when the application to amend was raised, it was unclear whether or not the Commissioner had seen and considered the evidence to which the application to amend related. The Commissioner was on leave and was not immediately available to provide instructions to his counsel, and his counsel needed an adjournment to obtain instructions.

36 We decided that it was appropriate to adjourn to allow clarification about whether the Commissioner had viewed and considered that footage.

37 Mr Ferguson preferred to proceed with the hearing rather than have the adjournment. Accordingly, the application to amend ground 3 was abandoned.

The Commissioner's reasons for removal

38 Under s 33Q of the Police Act, the WAIRC is required to consider the Commissioner's reasons for deciding to take removal action.

39 The WAIRC is required to be 'attentive to the reasons for which the Commissioner of Police decided to remove a member … [and] to examine closely those reasons in terms of substance and the process by which they were formulated' (*Carlyon v Commissioner of Police* [2004] WAIRC 11966 at [15]).

40 In our view, that does not require the WAIRC to necessarily review the Commissioner's reasons either in addition to or separately from the grounds of appeal. It would be unusual were the WAIRC expected to independently assess those reasons with a view to itself identifying errors or omissions not raised on appeal. Rather, it is a step in the process of dealing with the appeal. The WAIRC is not, in that sense, an independent oversight body charged with reviewing the Commissioner's decisions.

41 The Commissioner's reasons were as a result of his having formed the view that in the incident, Mr Ferguson had acted in the manner alleged.

42 The Commissioner notes that the removal action does not relate to the lawfulness or otherwise of the conduct. Rather, it is conduct likely to bring discredit on the Force or unbecoming of a member of the Force.

43 An examination of the material before us, in particular his letter of 10 February 2015, leads to a conclusion that the Commissioner's reasons for removal were formed by an examination of the evidence from a number of witnesses as well as Mr Ferguson, and from the CCTV footage and the video recording. He weighed that evidence and the conflicts within it. Subject to a small number of errors in the findings, which were acknowledged by the Commissioner's counsel during the hearing, the Commissioner's letter to Mr Ferguson of 10 February 2015 sets out the detail of those reasons.

44 The conclusion to the letter sets out that in his response, Mr Ferguson did not justify or acknowledge that his actions were inappropriate, that he failed to accept responsibility, or show contrition for his actions, and exhibited poor judgment and a lack of professionalism. It said that 'your unprofessional conduct was a flagrant disregard of police policies and guidelines.'

45 The Commissioner then said he accepts that there was sufficient evidence to sustain the issues put to him in the Notice and that 'I have concluded that your unprofessional conduct was in clear contravention of the *WA Police Code of Conduct* in respect of your integrity, performance and conduct and that your actions significantly undermined the credibility and reputation of WA Police.' He also noted that he had had regard to the context of Mr Ferguson's response, including his personal circumstances, letters of support, and previous service history, however, this did not ameliorate his concerns about Mr Ferguson's suitability to remain a member of WA Police.

46 Therefore, we think it is fair to say that the Commissioner's reasons relied upon conclusions, drawn from a number of accounts of the incident, that Mr Ferguson had done the four things alleged and that his conduct in the incident was abrasive, over-zealous, unprofessional and an over-reaction; he used excessive force; exercised poor judgment; his behaviour was questionable and his conduct unprofessional; that his actions caused significant bodily injury to Mr Prime; that his use of force towards Mr Prime was excessive and inappropriate in the circumstances, was totally unwarranted; that he had admitted that his conduct was disorderly and a complete over-reaction in the circumstances; that '[a]lthough enduring a hostile reaction and

receiving injury in the process would have been confronting and challenging, for a trained police officer, it does not excuse your aggressive and inappropriate response towards the group in a public place.'

47 We note that the allegations against Mr Ferguson in the LOC notice were not that his conduct was abrasive, over-zealous, unprofessional, etc. in the incident, but that he acted in a manner that was likely to bring discredit on the Force, or in a manner unbecoming of a member of the Force *by* assaulting Ms Lloyd-Riley, using excessive force against Mr Gero, causing serious injury to Mr Prime and being disorderly and assaulting Mr Self.

48 Finally, the Commissioner concluded that his integrity, performance, conduct and actions significantly undermined the credibility and reputation of WA Police.

49 As to the issue of intoxication, we think it is fair to say that the letter indicates that it is not the intoxication itself which is the issue. It is the particular conduct of use of excessive force, assault, causing serious injury and being disorderly and assault, which brought significant discredit to the Force. The conclusion appears to be that the conduct is exacerbated by Mr Ferguson's apparent level of intoxication, that it is, for example, the excessive use of force 'coupled with [his] apparent heightened state of intoxication'. Therefore, one of the clear conclusions was that Mr Ferguson had consumed a significant amount of alcohol and was intoxicated.

50 Whether he was intoxicated or not does not appear to be the main cause of concern, rather it was his conduct being unbecoming and bringing discredit on the Force. However, the level of intoxication and the perception of the level of intoxication clearly evident by the comments and actions of others around him, were a cause for concern.

The Grounds of Appeal

51 The grounds of appeal are that the decision to remove Mr Ferguson was harsh, oppressive or unfair because:

1. The findings that the Appellant, on 18 July 2014 at Midland, acted in a manner that was likely to bring discredit on the force or in [a] manner that is unbecoming of a member of the force cannot be a basis for the Respondent to have lost confidence in the Appellant's suitability to continue as a member of the WA Police Service having regard to his honesty, integrity and conduct because:
    - 1.1 the findings were entirely based on findings that the Appellant's conduct as alleged constituted criminal offences contrary to the Criminal Code WA;
    - 1.2 as at the date of the Removal, the Appellant had been charged with criminal offences arising from the same conduct and findings as alleged by the Respondent (**criminal charges**);
    - 1.3 as at the date of the Removal, the criminal charges had not been dealt with by a court.
2. The Appellant was denied a fair go all round because the Respondent:
    - 2.1 unreasonably refused the Appellant's request dated 29 December 2014 (via his legal representative) to suspend the loss of confidence process under section 33L of the *Police Act 1892* (WA) (**Act**) until after the determination of the criminal charges;
    - 2.2 failed to take into account the Appellant's right to claim the privilege against self-incrimination whilst the criminal charges remained undetermined by concluding that the Appellant's failure to provide a detailed explanation for, or acknowledgment of, his conduct on 18 July 2014 left the Respondent with very little scope to even consider that the Appellant's actions may have been justified;
    - 2.3 denied the Appellant the benefit of the privilege against self-incrimination;
    - 2.4 in denying the Appellant the benefit of the privilege against self-incrimination, thereby:
        - 2.4.1 denied the Appellant the right to be heard in response pursuant to section 33L(2) of the Act; and/or
        - 2.4.2 failed to properly consider whether the Appellant had committed the conduct as alleged.
3. The Respondent failed to properly take into account the effect of the Appellant's written submissions in response to the Respondent's Notice of Intention to Remove and therefore took removal action contrary to section 33(L)(4) of the Act.

Consideration

52 Rather than attacking the particular evidence or findings, Mr Ferguson says that the process is flawed and therefore the result is unfair.

Ground 1

53 In proceeding with the LOC process, Mr Ferguson says the Commissioner made his own findings that Mr Ferguson was guilty of criminal conduct prior to a valid judgment of a criminal court. He is said to have denied Mr Ferguson a fair go all around by:

- (a) ignoring the presumption of innocence;
- (b) making findings that he committed offences of assault alleged in the NOITR in reliance on unsworn and untested statements; and
- (c) making those findings of fact prior to the trial of the charges, and with knowledge that the same unsworn and untested statements the respondent relied upon would be tested in court.

54 Mr Ferguson says that where the conduct relied on by the Commissioner constitutes criminal offences, such conduct cannot be the basis for a finding of a LOC until a prosecution is brought and the conduct is proven in a court of criminal jurisdiction. To proceed with a LOC process in the absence of that proof is a denial of natural justice and procedural fairness.

55 There were two criminal charges; one of assaulting Ms Lloyd-Riley and one of GBH to Mr Prime. These two terms of 'assault' and 'grievous bodily harm' are terms arising in criminal law, under *The Criminal Code*. Mr Ferguson says the language used in the LOC allegations against him is either the same language used in the criminal charges or it has the same meaning. For example, the term used in respect of the conduct towards Mr Prime was 'causing serious injury' and this has the same meaning as the criminal charge of grievous bodily harm. The 'use of excessive force' is the same as 'assault'. Also, using 'more force than is justified by law under the circumstances' is unlawful (*The Criminal Code* s 231, see also s 260).

56 The Commissioner is said to have found Mr Ferguson had committed criminal offences. Mr Ferguson says that only a criminal court can make such findings. At the time of those LOC findings, the court had not found him guilty.

57 The Commissioner is also said to have made the findings based on unsigned and untested witness statements, and would appear to have used a lower standard of proof than is required to prove them under criminal law.

58 In this way, the Commissioner is said to have erred.

59 Mr Ferguson refers to *AM v Commissioner of Police* [2009] WAIRC 01285; (2009) 90 WAIG 276 and to *Gordon v Commissioner of Police* [2010] WAIRC 00937; (2010) 90 WAIG 1644, where the Commissioner deferred the removal process pending the outcome of the criminal proceedings. Mr Ferguson says this is the way the Commissioner ought to have dealt with his case.

60 Therefore, Mr Ferguson says that the Commissioner has, in effect, dismissed him for breaking the law when in fact, at the time he was dismissed, the criminal charges had not been heard and that is the only way for a conclusion to be reached about such an issue. In any event, the charges were ultimately dismissed.

61 The Commissioner says that the same conduct may constitute both criminal offences and disciplinary matters. Merely using words which coincide with the language of crimes does not mean that the acts themselves can only constitute crimes.

62 The Commissioner says that s 33T and s 33W of the *Police Act* provide a complete answer to this ground. Firstly, the Commissioner was entitled to proceed as the existence of the charges did not preclude the Commissioner from taking removal action in relation to any matter, act or omission relating to, or being an element of, the offence.

63 We find that the Commissioner is able to make findings about conduct, which might also constitute criminal conduct, as a step towards deciding whether to lose confidence in an officer, in the absence of a criminal court deciding the matter.

64 In *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352; [2015] HCA 7, the plurality of the High Court commented on courts exercising civil jurisdiction, determining facts which establish that a person has committed a crime (footnotes omitted):

> 32 The Authority submits, correctly, that the 'general principle' stated by the Full Court and set out at [26] above is expressed too widely and does not follow from the constitutional constraint stated in the joint reasons in *Lim* on the *adjudgment and punishment of criminal guilt* under Commonwealth law. Not uncommonly, courts exercising civil jurisdiction are required to determine facts which establish that a person has committed a crime. Satisfaction in such a case is upon the balance of probability. In *Helton v Allen*, Mr Helton's acquittal of the murder of the testatrix was no bar, on the trial of the civil suit arising out of the will, to the finding that he had unlawfully killed her.
>
> 33 More generally, and contrary to the 'normal expectation' stated by the Full Court, it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action. The decisions of this Court in *Attorney-General (Cth) v Alinta Ltd* and *Albarran v Companies Auditors and Liquidators Disciplinary Board* accept so much. There is no reason to suppose that a Commonwealth public housing authority might lack the capacity to terminate a lease on the ground of the tenant's use of the premises for an unlawful purpose notwithstanding that the tenant has not been convicted of an offence arising out of that unlawful use.

65 In the same way, the Commissioner exercising a statutory function, may decide that an officer has conducted himself or herself in a way that might also constitute an offence under the criminal law, but which for the Commissioner's purposes of managing the officer, constitutes conduct that is likely to bring discredit on the Force and is unbecoming.

66 In *Gordon v Commissioner of Police*, Beech CC, with whom Scott A/SC and Mayman C agreed, said that:

> 29 … The fact that Mr Gordon's conviction for two cases of aggravated common assault was quashed and he is entitled to the presumption of innocence on those criminal charges, does not mean that the circumstances leading to the preferring of those charges is not available to the Commissioner of Police for the purposes of the loss of confidence process. Section 33W of the *Police Act* makes this abundantly clear: if a police officer has been charged with committing an offence or has been acquitted of an offence, the charge or the existence of proceedings relating to the charge or the acquittal does not preclude the Commissioner of Police from taking any action in relation to loss of confidence in relation to any matter, act or omission relating to, or being an element of, the offence. The fact that Mr Gordon remains entitled to the presumption of innocence in relation to whether he committed a criminal offence does not mean that the incident to which those charges relate ceases to exist. Conduct by an employee which might not be criminal conduct nevertheless might be misconduct, that is to say, conduct so seriously in breach of the contract of employment that by standards of fairness and justice an employer should not be bound to continue the employment (*North v. Television Corporation Ltd* (1976) 11 ALR 599 at 608/9 per Smithers and Evatt JJ).

> 30 For the Commissioner of Police to rely upon the events at the Midland Gate Shopping Centre in order to reach a conclusion that he had lost confidence in Mr Gordon's suitability to remain a member of the WA Police is not at all the same as the Commissioner of Police finding that Mr Gordon was guilty of the criminal charges when he has not been found guilty of them in a court. Whether the Commissioner of Police has lost confidence in Mr Gordon's suitability to remain a police officer, and the issue of whether or not Mr Gordon was guilty of a criminal charge, are two entirely different things: the reformulated reasons show that the Commissioner of Police is separately satisfied that Mr Gordon's conduct in the Midland Gate Shopping Centre incident was inappropriate and excessive to the position in which Mr Gordon found himself, not that his conduct was aggravated common assault.
>
> 31 That is a conclusion which is reasonably open to the Commissioner of Police on the material that was before him. Ms Vernon (at [26] of her submission and [11] of her submissions in reply) drew attention to the decision in *AM*, where (at WAIG 282; WAIRC [48]) the WAIRC stated that to the extent that the Summary of Facts in that case states as fact the allegation made against *AM*, it was untested and remains just an allegation. Ms Vernon submitted that *AM* is applicable here because the loss of confidence materials contained untested, unproven but disputed allegations. However, in my view, and unlike the facts in *AM*, in this case the material before the Commissioner of Police included Mr Gordon's own evidence of his conduct at the Midland Gate Shopping Centre contained in the record of interview (CoP bundle, tab 12(11)) and in his response to the Notice of Intention to Remove (CoP bundle, tab 9) which together do permit a conclusion to be fairly drawn that Mr Gordon's conduct in the Midland Gate Shopping Centre incident was inappropriate and excessive to the position in which Mr Gordon found himself.

67 Therefore, the same conduct can constitute misconduct or conduct unbecoming, as well as being criminal conduct. However, they can be separate matters. One relates to whether or not the person has broken the law. A court will decide, on evidence to the appropriate standard, whether the conduct of the person constitutes a breach of the law.

68 The same conduct, which might be the basis for criminal charges, while not being demonstrated to the criminal standard of proof, may still be demonstrated to the standard set out in *Briginshaw v Briginshaw* [1938] HCA 34, (1938) 60 CLR 336, taking account of the seriousness of the allegations, etc. That conduct may also demonstrate a lack of judgment, poor self control, verbal abuse, or other characteristics which mean that the Commissioner might, in a particular case, be entitled to lose confidence.

69 In this case, it is clear from the language used in the letter of 10 February 2015 and the way the allegations are framed, that those allegations do not rely on the same considerations as are required to prove criminal conduct in respect of the same behaviour. The fact that they rely on the same incident, conduct and consequences does not mean that the Commissioner was obliged to await the outcome of criminal charges. Mr Ferguson was not removed because he had broken the law. He was removed because the Commissioner decided that his conduct, found on the lesser standard of proof, was likely to bring discredit on the Force or was unbecoming of a member of the Force. Those things might be true of conduct whether it also constitutes criminal conduct or not. In this case, there were two sets of complaints arising from the same conduct, one of them alleged criminal conduct and the other was conduct likely to bring discredit to the Force or in a manner that is unbecoming to a member of the Force.

70 Merely because the language used in the allegations in the LOC process is the same or similar language as would arise in criminal charges does not mean the conduct is exclusively criminal. For example, the use of the term 'assaulting' or 'causing serious injury' does not mean that that conduct can only be characterised as criminal conduct. Those terms have an ordinary meaning. Such conduct may still be misconduct or conduct likely to bring discredit to the Force or in manner unbecoming of a member of the Force.

71 We find that the cases of *AM v Commissioner of Police* and *Gordon v Commissioner of Police* should be distinguished. They were cases where the Commissioner awaited the outcome of the trial. They were each convicted. However, they each appealed. The convictions were subsequently overturned, a retrial ordered and no retrial eventuated. The circumstances giving rise to those matters and the issues and the manner in which they were determined was quite different to the circumstances in this case.

72 In *Gordon v Commissioner of Police* [2010] WAIRC 00937 at [21], Beech CC, with whom Scott A/SC and Mayman C agreed, noted that in the Commissioner's letter to Mr Gordon, he said that he would avail himself 'of any additional information or evidence that may be led at the criminal trial and which may be of benefit to me in making my final decision'. Mr Ferguson says that this is what should have happened in his case. Beech CC went on to comment that:

> The stated purpose of reserving the decision until the outcome of the trial is known is not to take into account Mr Gordon's acquittal or conviction. It is quite appropriate, in my respectful view, for the Commissioner of Police to wait to see if any additional information or evidence is led at the criminal trial and the wording of this letter is consistent with the Commissioner of Police's reformulated reasons where he states no additional material was presented to him that assisted him one way or the other.

73 The Commissioner is not obliged to await the criminal trial to see if any additional information or evidence is led that might assist him in making his decision. That is a matter for the Commissioner in considering whether it is appropriate to proceed or not.

74 In this case, the reason why Mr Ferguson wanted a delay was so that he would not compromise his rights at the criminal trial. It is up to the Commissioner whether or not he wished to delay so that he could either take account of the acquittal or conviction, or take account of any additional information or evidence that was led at the trial. In this case, he decided not to. That does not assist the appellant in this particular case.

75 Merely because the Commissioner decided not to proceed pending the outcome of the trials in those cases does not mean he is obliged to do so in other circumstances. In fact, s 33T of the *Police Act* envisages that the Commissioner may proceed on the LOC process and act in the face of unresolved criminal charges.

76 Therefore, we would dismiss the first ground of appeal.

Ground 2

77 Prior to the Commissioner coming to a final conclusion, he offered Mr Ferguson an opportunity to respond to the allegations and to any proposed action. Mr Ferguson sought to defer any response to avoid compromising his right to silence and his privilege against self-incrimination in his upcoming criminal trial.

78 In light of the history of cases which have demonstrated that information provided in internal cases may end up before the courts, and in any event, Mr Ferguson did not want to be required to compromise his privilege against self-incrimination.

79 In Mr Jones' letter to the Commissioner, he referred to two cases. *Critchley* was a case where the trial judge erroneously allowed into evidence Mr Critchley's letter to the Commissioner in response to a NOITR in which he made admissions against his interests. *Lee & Anor v The Queen* [2014] HCA 20 involved the unlawful publication of the transcripts of interviews by the New South Wales Crime Commission to the New South Wales Police and to officers of the Director of Public Prosecutions.

80 In this case, the Commissioner sought to give certain assurances about the use he might make of any response Mr Ferguson might make but he could not guarantee that other use might be sought, either lawfully or otherwise.

81 The Commissioner refused to defer the process, saying that the two processes were unrelated, and went on to make his decision. In his letter of 10 February 2015, he said that '[y]our failure to specifically respond does not attempt to account for your actions, nor have you recognised that your actions were excessive and disproportionate and you have offered no contrition for your actions to address the serious questions that remain over your integrity, conduct and performance'.

82 It was this exact opportunity, to respond by giving an account of his actions, either recognising that they were excessive and disproportionate or of justifying and explaining them, or of offering contrition, that Mr Ferguson was denied because he sought to preserve, and not potentially compromise, his rights in the criminal trial.

83 His failure to address those things in his response to the Commissioner is understandable and reasonable in the circumstances.

84 There is a good argument that a member facing such a charge should enjoy his right to silence until the last minute; that is, until he has heard all the evidence against him in the criminal proceedings and needs to make a decision whether or not to give evidence in his own defence.

85 There is a good argument that he should be able to make a decision unencumbered by considerations of whether previous statements made by him in the matter may affect the credibility of that evidence in the myriad ways that previous statements, in the hands of a skilful cross-examiner, may do so (and we add here, especially if the trier of fact is a jury).

86 One of the key points identified in the process in *Carlyon* at [16] is that:

> The Commissioner of Police must have given the member the opportunity to answer any allegations and review all of the evidence.

87 Mr Ferguson was constrained by potentially compromising his rights in his impending criminal trial and he sought the Commissioner to defer the process until then. In that context, the Commissioner's refusal to allow this meant that Mr Ferguson was not given a real opportunity to answer the allegations, and was unfair.

88 A denial of procedural fairness is arguably able to be cured in a de novo hearing in an industrial tribunal: JRS Forbes, 'Justice in Tribunals', referred to in *Australian Medical Association (WA) Incorporated v The Minister of Health* (FB) [2016] WAIRC 00699; (2016) 96 WAIG 1255 at [176].

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

89 Also in *Fombason v Kimberley Individual and Family Support Association* [2016] WAIRC 00171; (2016) 96 WAIG 295 [84] – [85], Smith AP, with whom Beech CC and Scott A/SC agreed, said:

> 84 Even if this argument is accepted, and a breach of procedural fairness could be made out, not every breach of procedural fairness will necessarily lead to a decision being set aside. In ***Stead v State Government Insurance Commission*** [1986] HCA 54; (1986) 161 CLR 141, 145 - 146, the High Court found:
>
> > The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Parker L.JJ.) in *Jones v. National Coal Board* ([1957] 2 Q.B. 55, at p. 67), in these terms:
> >
> > > 'There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge.... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.'
> >
> > That general principle is, however, subject to an important qualification which Bollen J. plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.

> For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.
>
> *Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference.* True it is that an appeal to the Full Court from a judgment or order of a judge is by way of rehearing and that on hearing such an appeal the Full Court has all the powers and duties of the primary judge, including the power to draw inferences of fact: Supreme Court Rules, O. 58, rr. 6 and 14. *However, when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial.* (emphasis added)

85 In ***Health Services Union of Western Australia (Union of Workers) v Director General of Health*** [2008] WAIRC 00215; (2008) 88 WAIG 543 [187] - [188], Ritter AP said:

> The broader principle which may be extracted from Stead is encapsulated by their Honour's question 'would further information possibly have made any difference?' (145) and that all 'the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome' (147).
>
> Gleeson CJ in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [10] said: 'In a case of failure to give a hearing when a hearing is required, the person complaining of denial procedural fairness does not have to demonstrate that, if heard, he or she would have been believed. The loss of an opportunity is what makes the case of unfairness'. Similarly, Kirby J in *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at [86] referred to the High Court in *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82 as affirming the 'strong principle earlier stated in Stead'. This principle was a 'could not possibly have produced a different result' test.

90 The WAIRC cannot now know what Mr Ferguson might have said to the Commissioner had he had an opportunity after the threat to his right of privilege against self-incrimination was no longer hanging over him. He may have made submissions on issues of fact. He may have responded to the evidence and the conclusions regarding the allegations by putting his version and giving a different perspective of the other evidence. He might have expressed contrition in ways acceptable to the Commissioner.

91 We note that Mr Ferguson did some of those in the managerial interview on 29 July 2014, in the days immediately following the incident. Mr Ferguson provided a very detailed account of the events that day, including answering questions of clarification and detail. Mr Ferguson was shown video footage from a CCTV camera and was asked for his comments about particular matters displayed in the footage. He was asked about his alcohol consumption and his view of his level of intoxication, about injuries he and others received and about statements made by others either involved in or witness to the incident. The questions and answers are detailed and extensive. The transcript of the interview indicates it went for two hours and nine minutes. The transcript is just over 36 closely typed pages.

92 However, that interview was before Mr Ferguson was charged with criminal offences, and he was compelled to answer. Yet, at the end of the process, Mr Ferguson did not have a proper opportunity to respond to all of the evidence and the analysis of it that was finally before the Commissioner. That ultimately was put to him in the NOITR.

93 Although the Commissioner says that Mr Ferguson could have informed the WAIRC during the course of the hearing of anything that he would have said to the Commissioner in response now that the criminal trial has been concluded and the charges dismissed, the refusal to allow him to await that outcome cannot now be cured by the hearing.

94 This is reinforced by it not being for the WAIRC to take over the role of the Commissioner in managing WA Police by deciding that it would have come to a different conclusion (see *Carlyon* [215]).

95 It is not an answer to now say that Mr Ferguson could have put something to the Commissioner after the criminal trial by way of new evidence by utilising s 33R of the *Police Act*. By then, the LOC decision had been made and Mr Ferguson was removed. Section 33R would then come into play as part of the appeal process, after the removal, not before. It should not be for an appellant to apply to the WAIRC to tender new evidence to overcome the Commissioner's error.

96 It is not incumbent upon Mr Ferguson to now prove to the WAIRC that he would have given a fuller account, that he would have admitted fault and expressed contrition at the material time but felt he could not do so and that this would have made a difference.

97 The appellant does not now have to tell the WAIRC what he would have said if the process had been stayed and he had given his substantive response to the Commissioner once the criminal charges had been determined.

98 It will now never be known what Mr Ferguson would have said in those different circumstances and it will never be known what attitude the Commissioner would have taken to Mr Ferguson's submissions in those circumstances.

99 The time for those different circumstances to arise has now passed and, what is more, passed for all time. The Commissioner cannot now put what he knows out of his mind and look at a fresh submission unencumbered by it. Mr Ferguson could hardly now address the Commissioner's evident concerns by making a submission that involved him admitting that his actions were 'excessive and disproportionate' and 'offering contrition'.

100 Further, it requires the Commissioner to agree to the new evidence being tendered or for the WAIRC to be satisfied of a range of things.

101 Mr Ferguson has not applied to the WAIRC to tender new evidence. We must consider the fairness of the Commissioner acting as he did, when he did. We conclude that s 33R does not cure the denial of procedural fairness in this case.

102 The Commissioner argues that any officer, faced with a criminal charge arising from the same conduct as gave rise to the LOC process, could rely on the right to silence to avoid responding until criminal charges were dealt with, and that s 33W says he does not have to wait. We are not convinced that this will apply in all cases. The circumstances of this case indicate that fairness overrides s 33W.

103 It was unfair of the Commissioner to proceed with the Part IIB process over Mr Ferguson's request that it be stayed and to then rely upon what may very well have been a product of refusing the stay, namely a response that was not detailed and did not admit fault and express contrition.

104 In coming to this conclusion, we have also taken account of the provisions of s 33T and s 33W of the *Police Act*. These provisions merely say that the Commissioner is not precluded from proceeding with the LOC process. It does not oblige him to proceed. In this particular case, it was unfair that the Commissioner did not grant Mr Ferguson's request for a deferral to ensure that his rights were not negated.

105 We uphold this ground.

Ground 3

106 This ground of appeal relates to the Commissioner's final decision which stated that Mr Ferguson's response did not explain or acknowledge his conduct, and gave no real response to the evidence against him. Yet the Commissioner's comments reflect that he did not accept and take account of what Mr Ferguson had said to him. That is, that he could not address those things without compromising his rights in the criminal trial.

107 We conclude that this ground is merely consequential on the finding that ground 2 is made out.

In conclusion

108 Section 33Q(4) of the *Police Act* provides:

> Without limiting the matters to which the WAIRC is otherwise required or permitted to have regard in determining the appeal, it shall have regard to —
>
> (a) the interests of the appellant; and
>
> (b) the public interest which is taken to include —
>
> (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and
>
> (ii) the special nature of the relationship between the Commissioner of Police and members of the Force.

109 It is in the public interest that public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force is maintained. However, in the Commissioner deciding to take removal action, he must do so in a way that is fair. The denial of a real opportunity to respond to the detail of the evidence and, if appropriate, to express contrition in a meaningful way about particular matters is a matter of unfairness. It was denied by the insistence on a response which might have compromised Mr Ferguson's rights.

110 We would uphold the appeal and find that, in the circumstances, the decision to take removal action was unfair.

Remedy

111 The parties are to confer about remedy and advise the WAIRC within 14 days of any agreement on remedy, or alternatively, of any agreed directions for a hearing on that matter.

112 We note that in our Reasons for Decision dealing with the Commissioner's application to tender new evidence ([2016] WAIRC 00918; (2016) 96 WAIG 1599) at [45], we indicated that should we uphold the appeal and need to determine whether, under s 33U(3), it is impracticable for the removal to be taken as having no effect, that matter of the new evidence may be raised. The parties are to confer about that issue also.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 00208

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	MONDAY, 10 APRIL 2017
FILE NO/S	U 176 OF 2016
CITATION NO.	2017 WAIRC 00208

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 31 March 2017, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*;

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

THAT the application be, and by this order is, dismissed.

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

2016 WAIRC 00768

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YOHAN VALES DE MENEZES
	APPLICANT
	-v-
	FIRELAKE PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 22 SEPTEMBER 2016
FILE NO/S	B 111 OF 2016
CITATION NO.	2016 WAIRC 00768

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard the applicant on his own behalf and there being no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the application be and is hereby adjourned sine die.

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

2017 WAIRC 00209

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00209
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 20 SEPTEMBER 2016, MONDAY, 10 APRIL 2017
DELIVERED	**:**	MONDAY, 10 APRIL 2017
FILE NO.	**:**	B 111 OF 2016
BETWEEN	**:**	YOHAN VALES DE MENEZES Applicant AND FIRELAKE PTY LTD Respondent

Catchwords	**:**	*Industrial Law (WA) - Contractual benefits claim - Failure to effect proper service - Application discontinued*
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Industrial Relations Commission Regulations 2005* (WA)
Result	**:**	Discontinued
Representation:		
Counsel:		
Applicant	**:**	No appearance
Respondent	**:**	No appearance

Reasons for Decision

Ex Temporé

1 This application was listed by the Commission of its own motion today given the history of the matter, which is briefly as follows.

2 The applicant Mr Vales de Menezes commenced a claim on 11 July 2016 against Firelake Pty Ltd claiming that the respondent had denied him certain contractual benefits on the termination of his employment. It became evident to the Commission shortly after the claim had been filed and the Commission was making arrangements to list the application for conciliation, that the applicant had not served the application on the respondent in accordance with reg 24(2) of the *Industrial Relations Commission Regulations 2005*, which require, in the case of a corporation, that the application be served on its principal place of business or alternatively, its registered office in the State.

3 Accordingly, the Commission listed the application for mention on 20 September 2016. At that time the Commission raised the issue of service with the applicant and also the fact that he had commenced another application, seemingly against another employer which, as it transpires, was the successor business to his former employer, Firelake Pty Ltd.

4 On the basis of those proceedings the Commission made an order that the proceedings be adjourned and Mr Vales de Menezes was to make appropriate arrangements to ensure the application was properly served. By letter dated 15 February 2017, after not having heard from the applicant for a number of months, my Associate informed the applicant that unless within 14 days of the date of that letter he advised of his intention to proceed with the matter, then the Commission may issue an order of discontinuance without further notice.

5 My Associate informs me that subsequently the applicant did indicate his intention to proceed and would be filing an amended notice of application in the Registry. That appears not to have happened. The Commission has taken steps today to relist the application for mention, to ascertain the applicant's intentions and also to ascertain whether or not there has been proper service effected. The record reflects that has not occurred to date, despite many months now passing from the initial mention before me on 20 September 2016.

6 Despite the Commission notifying the applicant of the proceedings today and serving him with a notice of hearing and informing him of the date of hearing, the applicant has failed to appear before the Commission. No contact has been made with my Chambers by the applicant as to why he cannot appear. I am satisfied that the Commission can proceed on the basis that he has been duly notified at his address for service for all communications in these proceedings.

7 Given the unfortunate history of this matter it appears that the applicant has still failed to meet his obligations under reg 24(2)(b) of the Regulations to properly serve the notice of application, let alone any amended notice of application. As I indicated to the applicant on 20 September last year, proper service of process is absolutely fundamental to the Commission's jurisdiction. At this point in time the application has not been properly served and therefore the matter can proceed no further. Given the obligation on the Commission to deal with all matters which are before it with all due speed and expedition, without unreasonable delay, and as there has been no indication from the applicant as to why he has further failed to properly serve the application in accordance with the requirements of the Regulations as made clear to him last September, the way to proceed with this matter appropriately is to make an order that the application be discontinued, which the Commission will make.

2017 WAIRC 00216

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YOHAN VALES DE MENEZES
	APPLICANT
	-v-
	FIRELAKE PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 13 APRIL 2017
FILE NO/S	B 111 OF 2016
CITATION NO.	2017 WAIRC 00216

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance required

Order

THERE having been no appearance on behalf of the applicant and there being no compulsion for the respondent to attend, 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.

2016 WAIRC 00859

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00859
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	FRIDAY, 28 OCTOBER 2016
DELIVERED	**:**	TUESDAY, 1 NOVEMBER 2016
FILE NO.	**:**	U 113 OF 2016
BETWEEN	**:**	CARLO ELIO GROSSETTI Applicant AND CITY OF WANNEROO (ABN 64 295 981 165) Respondent

CatchWords	**:**	Unfair dismissal claim - interim order sought - application dismissed
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application for interim order dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr W Keane (of counsel)

Reasons for Decision

1 The applicant was dismissed from the position he held with the respondent, Manager, Community Safety and Emergency Management, on 16 June 2016.

2 The applicant has brought two claims, one alleging unfair dismissal and the other denied contractual benefits.

3 The applicant by application filed 20 October 2016 seeks that the Commission make an interim order in this matter, his unfair dismissal claim.

4 The applicant seeks that I order that another position within the respondent's organisation, the position of Manager, Health and Compliance, not be filled until his unfair dismissal claim is decided.

5 As I say the position is not the position the applicant held.

6 The relevant background to the application for an interim order is that the person who previously held the position Manager, Health and Compliance, has been substantively appointed to the position held by the applicant prior to his dismissal. The

respondent is now going through a process to fill the position of Manager, Health and Compliance. Applications closed on 28 October 2016 and subject to any order I make it is intended that it will be filled in the medium term.

7 The applicant states in his unfair dismissal claim that he seeks reinstatement to the position of Manager, Community Safety and Emergency Management, and he maintained that position at the hearing of the application for an interim order.

8 The applicant says that if he is successful in his unfair dismissal claim, and consideration is given by me to the question of remedy, his position will be materially affected if the interim order he seeks is not made. His argument is this:

(1) The question of practicability is determinative of reinstatement;

(2) That his position has been substantively filled will impact on my consideration of the question of practicability;

(3) The question of what is to happen to the current holder of his former position will be relevant to my consideration of practicability;

(4) If the holder of his former position had "somewhere to go" in terms of his employment, if the applicant were reinstated, this would make it easier for me to order the applicant's reinstatement;

(5) That is, the possibility of a return of the current holder of the applicant's position to the holder's previous position would be an option that might make it easier for me to order that he, the applicant, be reinstated to his former position;

(6) Or, looked at another way, if the current holder of the applicant's former position cannot be returned to his former position, because it has been filled by the process currently on foot, it will be all the harder for me to order reinstatement.

9 Basically the applicant is concerned that, if his position has been substantively filled and the former position of the current holder is now substantively filled, the respondent will, if the applicant's unfair dismissal claim succeeds, be able to say "check mate" to me in relation to an order for the applicant's reinstatement.

10 I reject the applicant's argument and do not propose to make the order sought.

11 As I explained at the hearing, and repeat here, a respondent cannot say "check mate" to me in relation to the matter of reinstatement simply because a successful applicant's position has been filled since the applicant was dismissed. The filling of the position may be a relevant consideration but it will not present me with a *fait accompli* in relation to the matter of reinstatement. If this was the case the remedy of reinstatement would be all too easily closed off, a position that would be entirely inconsistent with it being the primary remedy for unfair dismissal.

12 In any event, the applicant's former position has already been substantively filled. If I considered that ruled out reinstatement, if the issue became relevant, the damage has already been done. If I considered that reinstatement should be ordered despite the position being substantively filled it goes without saying that would cause difficulties for the respondent. The respondent would have to deal with those difficulties when and if they arose. It is not my role at this stage to force the respondent to leave options open to potentially ameliorate those difficulties.

13 Finally, I find that, even if the order the applicant seeks was made, this would not necessarily leave open an option to the respondent in the way the applicant thinks it might. Just because the position of Manager, Health and Compliance, was left open would not mean that the former holder of that position (the current holder of the applicant's position) would volunteer to return to it to make the respondent's situation easier or that the respondent would want that person to return to his former position as the solution to dealing with the difficulties arising from an order for reinstatement if one were made.

14 In short, the order sought is too remote, both factually and legally, from the matter the applicant seeks be addressed or affected by it.

15 I note that the respondent argued that I do not have jurisdiction to make the order sought. The respondent put forward some thought provoking submissions in support of that position

16 As I do not propose to make an order I do not need to consider the argument. If I had proposed to make an order I would have had to deal with it, of course, but as I do not propose to make an order I will restrain myself from making any comment in relation to it. I am conscious that it is an important issue and I consider that not even *obiter* comment should be made about it in the absence of full argument from legal representatives for both sides, something I have not had the benefit of in these proceedings.

17 The application is dismissed.

2016 WAIRC 00858

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CARLO ELIO GROSSETTI
	APPLICANT
	-v-
	CITY OF WANNEROO (ABN 64 295 981 165)
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 1 NOVEMBER 2016
FILE NO/S	U 113 OF 2016
CITATION NO.	2016 WAIRC 00858

Result	Application for interim order dismissed
Representation	
Applicant	In person
Respondent	Mr W Keane (of counsel)

Order

HAVING heard the applicant on his own behalf and Mr W Keane, of counsel, for the respondent, on 28 October 2016; and

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

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

The application for an interim order be dismissed.

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

2017 WAIRC 00235

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00235
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 5 DECEMBER 2016, TUESDAY, 6 DECEMBER 2016, WEDNESDAY, 7 DECEMBER 2016, MONDAY, 6 FEBRUARY 2017, TUESDAY, 7 FEBRUARY 2017, WEDNESDAY, 8 FEBRUARY 2017
DELIVERED	**:**	WEDNESDAY, 26 APRIL 2017
FILE NO.	**:**	U 113 OF 2016, B 113 OF 2016
BETWEEN	**:**	CARLO ELIO GROSSETTI Applicant AND CITY OF WANNEROO (ABN 64 295 981 165) Respondent

CatchWords	**:**	Industrial law (WA) - Termination of employment - Alleged harsh, oppressive and unfair dismissal - Dismissal occurred within period of probation - Dismissal not harsh, oppressive or unfair substantively or procedurally - Alleged denied contractual benefits - Termination complied with contract - No denial of contractual benefits
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application and claim dismissed
Representation		
Applicant	**:**	In person
Respondent	**:**	Mr W Keane of counsel
Solicitors:		
Respondent	**:**	Squire Patton Boggs and later Hall & Wilcox

Cases referred to in reasons:

Commissioner of Police for New South Wales v Eaton (2013) 252 CLR 1

East Kimberly Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers (2000) 80 WAIG 3155

Hutchinson v Cable Sands (WA) Pty Ltd (1999) 79 WAIG 951

Peter Milford Weston v WA Property Lawyers (2015) 95 WAIG 1455

Case(s) also cited:

Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635

Erica Jean Dimer v South West Aboriginal Medical Service Aboriginal Corporation (2004) 84 WAIG 2310

Franklin Isa v Cooks Construction Pty Ltd Civil, Mining and Plant Hire Contractors (2004) 84 WAIG 2648

J.A. Marjio v Fremantle Arts Centre Press. (1990) 70 WAIG 2559

Karine Lecaude v Trident Produce Pty Ltd (2003) 83 WAIG 1214

Nathan James Roberts v John Ryan owner of Metro Security Services (2003) 83 WAIG 1521

Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (2016) 96 WAIG 408

Vick Dimitriou v Energy World Corporation Ltd (2003) 83 WAIG 1195

Walter Alfred Edom v Vision Surveys Pty Ltd (2006) 86 WAIG 2608

Westheafer v Marriage Guidance Council of WA (1985) 65 WAIG 2311

Reasons for Decision

1 On 26 April 2016 Mr Carlo Elio Grossetti commenced work with the respondent as its Manager, Community Safety and Emergency Management, having beaten a field comprising around 120 applicants. On 16 June 2016, less than two months later and during his probationary period, Mr Grossetti was dismissed from his employment. The case before me concerns what went wrong in that short period of time and whether the termination of Mr Grossetti's employment was harsh, oppressive or unfair.

2 Mr Grossetti filed a detailed Notice of Application comprising 97 paragraphs and containing a blow by blow account of his employment. The points of friction between Mr Grossetti and the respondent emerge from the Notice as does Mr Grossetti's overarching view that, if the points of friction are properly analysed and understood, his dismissal was "disproportionate." It also sets out details of Mr Grossetti's contention that his dismissal was procedurally flawed.

3 The respondent, on 9 August 2016, filed a Notice of Answer which contends that, in the context that the dismissal occurred within Mr Grossetti's probationary period, it was neither substantively nor procedurally unfair.

4 The hearing took place over six days and all of the issues were well and truly ventilated through evidence and submissions.

5 By way of summary I am able to say that I have considerable sympathy for Mr Grossetti. He was in the wrong place at the wrong time. He evidently has considerable talent and experience and, had things worked out differently, he may very well have made a great contribution to the respondent in his role. To some extent he is a person whose intentions were good but who was misunderstood. However, my sympathies cannot be decisive here.

6 Mr Grossetti was on probation at the time of his dismissal and he gave the respondent ample material upon which it could reasonably doubt that he was a "good fit" for employment with it. Having brought those doubts to Mr Grossetti's attention he was unable to respond to them in such a way as to remove or sufficiently alleviate them. A genuine question of compatibility remained as at 16 June 2016 and Mr Grossetti cannot reasonably complain that the respondent got the answer to that question wrong.

7 Most of the facts in this matter, despite the considerable attention given to them in evidence, were not really in dispute. The controversy was about the proper characterisation of those facts. The exception is exactly what happened on 15 June 2016 when Mr Grossetti presented at the door of the meeting at which another employee was to be given a notice to show cause why he should not be dismissed from his employment.

8 I will go through the factual matters, making comments and findings as the need arises, beginning with two matters that provide essential background and relevant context.

9 The first matter was a complicating factor exercising the minds of the respondent's relevant officers in relation to Mr Grossetti's employment. This was as follows:

(1) Mr Grossetti would be the manager of a Mr Trevor Prentis, who held the position of Co-ordinator, Community Safety and Emergency Management;

(2) as at the date of Mr Grossetti's appointment the respondent held concerns about the level of Mr Prentis's performance and, without it being necessary to characterise the process in place at that time in relation to him, the respondent was acting on those concerns; and

(3) it had come to the attention of the respondent that Mr Grossetti and Mr Prentis knew each other through previous employment (both had been police officers at the same time).

10 I interpose here that the fact of the matter, as I find it, is that the relationship between Mr Grossetti and Mr Prentis was simply that they had both worked for the same employer at the same time and had known each other at that time. I find that they were not friends or even ongoing acquaintances. Mr Prentis, upon learning that Mr Grossetti was to be appointed, especially in light of the difficulties he was facing, may have intimated there was more but I find there was not.

11 Nonetheless, that Mr Grossetti and Mr Prentis were known to each other came to the attention of the relevant officers of the respondent and the relationship, even expressed in these neutral terms, was something the respondent was reasonably entitled to react to.

12 The respondent handled the matter in this way. Through Ms Michelle Brennand, Operations Manager, Community Service Delivery, the respondent informed Mr Grossetti on the second day of his employment that there were problems with Mr Prentis' performance (ts 104 - 105). Then, in the second week of his employment, Mr Grossetti met with the respondent's Chief Executive Officer, Mr Daniel Sims, who asked Mr Grossetti about his relationship with Mr Prentis and said to Mr Grossetti words to the effect that in his employment he was to be Mr Prentis' boss and not his friend.

13 Ms Georgina Monkhouse, Manager, People and Culture, who was also present at the meeting with the Chief Executive Officer gave more detailed, and dramatic, evidence about what was said by the Chief Executive Officer but I place no reliance on her evidence in this regard it not having been put to Mr Grossetti.

14 Mr Grossetti was thereafter involved in meetings relating to Mr Prentis' performance including meetings with him and about him (until mid-June which is a matter to which I will need to return).

15 So to summarise, when Mr Grossetti commenced employment he was the line manager of someone with whom he had a very basic and historical acquaintance and the respondent addressed the issue, apparently to everyone's satisfaction, by the Chief Executive Officer raising the issue with Mr Grossetti and being assured by the responses he received.

16 The second matter was that prior to Mr Grossetti's employment the respondent had commenced a structural review of what were described in the proceedings as its "business units". One of those business units was "Community, Safety and Emergency Management" which, of course, Mr Grossetti was to manage.

17 The review was being conducted by a contractor, Joanne Graham, and at least one of its purposes was, as described by counsel for the respondent, and accepted by Mr Grossetti (ts 99), "to clarify basically who did what and who reported to who."

18 Early in Mr Grossetti's employment, probably within the first week, and certainly within the first two weeks, Mr Grossetti had been told about Ms Graham's work and had met with her about it (ts 99 - 100).

19 It was explained to Mr Grossetti by the respondent's officers that he could have input into the review of the Community, Safety and Emergency Management business unit. Mr Grossetti was told, and understood, that he could make recommendations about the right structure for the business unit (ts 100).

20 Over a short period of time this developed into a point of friction between Mr Grossetti and the respondent.

21 Mr Grossetti had a very strong view that the role of "Co-ordinator" was crucial to the successful management of the business unit. This was based on his experience in a similar business unit at a previous local government employer.

22 The respondent had a view that the role of "Co-ordinator" was neither necessary nor desirable. That view was, at the time of the commencement of Mr Grossetti's employment, a nearly fully cured slab of concrete. The Chief Executive Officer had, in fact, given a direction that the business unit was "top heavy" in having a Director, Manager and Co-ordinator and, reacting to this, the holder of the Director position at the time, Ms Fiona Hodges, had the position of "Co-ordinator" firmly in her sights (ts 439).

23 Mr Grossetti was told by Ms Hodges that she "was open to a process to look at the structure" in light of anything Mr Grossetti might suggest (ts 453) but I find that the fact of the matter was that it would have taken a jackhammer to disturb the view within the respondent that the Co-ordinator positon had no future. (see evidence of Ms Brennand at ts 327)

24 I am of the view that any polite comment that represented otherwise to Mr Grossetti could only have given him false hope.

25 These two matters, the previous relationship between Mr Grossetti and an employee whose performance was being questioned and the proposed restructure, are those that move me to say that Mr Grossetti was in the wrong place at the wrong time.

26 Mr Grossetti commenced his employment in circumstances where there was a likelihood that anything he had to say about the management of Mr Prentis might be misinterpreted and where the business unit he was being tasked to manage was very close to being restructured in a way he thought was going to seriously and adversely affect its operations.

27 In relation to both issues I find that the respondent encouraged, or did not discourage, input from Mr Grossetti but had very little interest in what he had to say. In fact, insofar as what Mr Grossetti had to say was not in line with the prevailing views and momentum of events within the respondent it was a source, quite unfairly, of irritation with, and negativity toward, Mr Grossetti.

28 A few examples will suffice, and here I deal with some of the factual matters before me.

29 On 19 May 2016 Mr Grossetti attended a meeting to discuss Mr Prentis. Also present were Ms Hodges, Ms Brennand, Ms Monkhouse, Ms Leah Piper, Coordinator, Operational Human Resources and Ms Katherine MacAdams, Senior Human Resources Advisor.

30 It is clear that the meeting was about how to remove Mr Prentis from his position of Co-ordinator, Community Safety and Emergency Management.

31 Exhibit 45 is the notes of Ms Brennand of the meeting. Exhibit 56 is Ms MacAdams' notes of the meeting. Exhibit 60 is the notes of Ms Piper. Each exhibit reflects that there were two options discussed being; (1) an escalation of, or to, formal performance management; or (2) what is noted in Exhibit 45 and Exhibit 60 as "Exit Strategy" and in Exhibit 56 as "Exit from organisation".

32 Exhibits 45 and 56, the two most comprehensive sets of notes, reflect that the bulk of the meeting dealt with Mr Prentis' "exit" from employment and I have little trouble in reaching a conclusion that the discussion centred on this.

33 I also have little doubt that Mr Grossetti pointed out the risks associated with the various "exit" options discussed and that he did so assertively and for the most part alone.

34 I also find that Mr Grossetti's input about the risks might have been viewed as useful. I do not need to go into great deal of detail to come to a conclusion that there were risks if the respondent decided to deal with Mr Prentis outside of the application of its written policies and procedures, which was something it was considering doing as at 19 May 2016.

35 Mr Grossetti was within his rights to point out the risks and there was nothing wrong with him stating his opposition at that meeting to what was proposed (especially given that Ms Brennand says it concluded with Mr Grossetti saying that in the end "he would do what he had to do" (ts 330)).

36 However, the respondent interpreted Mr Grossetti's input as reinforcing their (largely unsubstantiated) concerns that Mr Grossetti had an "allegiance" to Mr Prentis (ts 361) that was clouding his ability to be appropriately involved in management of him. That interpretation was, in my view, unfair and is an example of Mr Grossetti simply being the wrong man in the wrong place and at the wrong time.

37 What might have been viewed as helpful or responsible in a different context was viewed with suspicion and negativity in the extant circumstances.

38 Another example is the respondent's reaction to Mr Grossetti's comments at the "Get to Know Your Leader" sessions on 23 May 2016.

39 This session was one for the members of staff within the Community, Safety and Emergency Management business unit to get to know their new boss, Mr Grossetti.

40 Ms MacAdams, who facilitated the session, explained in evidence (ts 506) that "the aim was to provide Mr Grossetti's direct reports with an opportunity to get to know him better and to lay foundations for communication, how the team would operate."

41 Exhibit 10 was Ms MacAdams' preparatory notes for the session to which she spoke during the session. Exhibit 11 was a one-page dot pointed summary of comments made during the session.

42 The session was, from the point of view of staff, held against a background of the review of the structure of the business unit and their anxiety about this comes through very strongly in Exhibit 11.

43 Exhibit 10 has Ms MacAdams saying to the participants that "open and honest dialogue" was important and that the objectives of the session were to provide them with an opportunity to "get to know" Mr Grossetti, to "build the basis for long-term working relationships" between them and Mr Grossetti and to "lay the foundation, very early on, for open communications."

44 From Mr Grossetti's point of view he entered the session with an awareness that a positon he thought crucial to the operation of the business unit was in jeopardy but a hope, engendered by the respondent, as forlorn as it may have been, that it might survive.

45 To complete the background, it is fair to say that the issue of the new structure already had a history as between Mr Grossetti and the respondent as at 23 May 2016

46 Mr Grossetti had prepared a new structure which included the Co-ordinator positon soon after commencing employment (ts 111). In response, by email dated 4 May 2016, which became Exhibit 26, Ms Hodges had told him "it will be beneficial for all to be aligned in our thinking" in relation to the structure of the business unit and had told Mr Grossetti, to characterise it in the way Mr Grossetti accepted to be accurate under cross-examination, to "hold his horses" (ts 111) in relation to his advocacy for his structure.

47 Mr Grossetti was subsequently told, on the respondent's version of events, that all was not lost in relation to his proposed structure. However, the instruction to "hold his horses" was certainly never countermanded.

48 The above was the state of play in relation to the re-structure issue as at 23 May 2016.

49 On 23 May 2016 Mr Grossetti said to the five or so assembled staff at the Get to Know Your Leader session, among many other things, and in answer to a direct question on the subject (ts 145), that he wanted a structure that included the position of Co-ordinator or equivalent.

50 In terms of exactly what was said I find (because Mr Grossetti while not recalling it admits that it may have been said in this way (ts 147) and because Ms MacAdams is firm that Mr Grossetti said it this way (ts 506) and she took undisputed action after the meeting on the basis that it was said in this way) that Mr Grossetti said words to the effect that:

> his leaders had a position on what the structure of the team should be and that he didn't necessarily agree with it…but that if he had to implement the structure that his leaders were indicating they wanted in place, then he would do so.
>
> (ts 506)

51 Ms MacAdams reported Mr Grossetti's comments up the line and relevant officers of the respondent took a dim view of them. They were characterised as an example of Mr Grossetti having a problem with "appropriate information sharing" (Exhibit 13) and not "aligning himself with the leadership team" (ts 332).

52 I find that Mr Grossetti's conduct at the session should have, reasonably, been viewed quite neutrally.

53 It was a session where his staff were supposed to get to know Mr Grossetti, with objectives as lofty as "building the basis for long-term working relationships" and the "laying of the foundation for open communication" being explained to staff present.

54 The issue of the structure of the business unit was evidently going to be something on the minds of staff and was likely to be raised with their new leader, as indeed it was. The respondent could have protected Mr Grossetti from the matter by having Ms MacAdams ask staff to excuse Mr Grossetti from fielding questions about it. It would have, in my view, been sensible to offer Mr Grossetti this protection. But the respondent did not do this.

55 As I say, predictably, Mr Grossetti was asked questions about it. If Mr Grossetti was trying to do his part to "build the basis" and "lay a foundation" for good communication he could hardly begin by dissembling or deflecting or reaching for a dictionary of weasel words.

56 Instead, and not inappropriately, Mr Grossetti gave his honest opinion but qualified it by saying that it was ultimately not up to him and he would abide by the decision, obviously intimating to his staff that they would be expected to do the same.

57 Again, the words of Mr Grossetti came back to bite him not because there was anything inherently wrong with them but because he was the wrong man in the wrong place and at the wrong time.

58 Mr Grossetti had experience in a structure where there had been Co-ordinator positions (or equivalents) and he had been hired to manage a business unit where they were set to disappear because the Chief Executive Officer had directed the Director to create a less "top heavy" structure.

59 Mr Grossetti arrived right in the middle of that process and with it having considerable, really irreversible, momentum.

60 If Mr Grossetti had arrived before the process of review began things might have been different. If he had arrived after it had been completed he would have already known the structure he was to manage. As it was, he arrived at a time when his voice, technically, may have counted for something but, realistically, never could. His comments and attitudes, including his comments at the Get to Know Your Leader session, were seen as disruptive and irritating because he was in the wrong place at the wrong time and he didn't seem to know it.

61 There were some other factual matters relied upon by the respondent that are not really disputed by Mr Grossetti, other than by way of characterisation and weight, that I do not find helpful either alone or in combination with each other or in combination with weightier matters.

62 The first of these is the parking infringement issue.

63 The relevant documents formed, as a bundle, Exhibit 29. To summarise very briefly a ratepayer received a parking infringement which she paid, after having disputed its appropriateness. The ratepayer raised the issue with the local newspaper which in turn made an enquiry of the respondent about it. Mr Grossetti was asked to comment by the respondent's "Senior PR/Communications Officer". Mr Grossetti reviewed the matter and was of the view that the infringement was appropriately issued and paid. Nonetheless the draft media statement circulated for comment said "the City is currently investigating [the ratepayer's] original appeal".

64 Mr Grossetti did not see why the statement should give the reader the impression that the original decision to insist on the fine being paid would change and made that comment in his response email. He was then told by email that the Chief Executive Officer "would like to provide a refund given the circumstances".

65 Mr Grossetti replied, in part, "that's his prerogative, but a dangerous precedent to set (in my humble opinion)." Mr Grossetti goes on to cite reasons which suggest a good knowledge of parking issues confronting the respondent and familiarity with staff concerns.

66 Mr Grossetti's contributions about the issue were held against him by the respondent at the time and, with appropriate qualification provided by counsel for the respondent, at the hearing.

67 It was said they were evidence of poor communication skills (during his employment) and of precociousness (given they took place within two weeks of starting employment) and inappropriate "pushing back" (ts 123) at the hearing.

68 I find that there is nothing relevant in this incident for my purposes. Mr Grossetti was asked for his view and gave it. He had experience in the area and had made efforts, consistent with the energetic approach he took to his employment, to get relevant feedback from his staff (ts 124-125). I do not see why he would have to wait a certain period of time before giving his employer the benefit of his view, especially when he was asked for it.

69 Mr Grossetti did not "push back" in the pejorative sense the term was used. He gave his view and did so with the qualification that it was only "his humble opinion." Although it might be said that real humility did not reveal itself during the hearing as one of Mr Grossetti's defining character traits the use of the phrase in the email carries its normal meaning and implication.

70 Ms Hodges gave evidence about the "grey environment" (ts 449) of local government by which she meant, she explained, that sometimes decisions get made for political reasons that might differ from the "best professional advice" (ts 449) of employees. She went on to be critical of Mr Grossetti's handling of this issue (ts 450). Ms Hodges, in my view, fails to appreciate that black and white views behind the scenes might be required to make the "grey" that is the ultimate outcome. She also failed to give Mr Grossetti credit for, once his view had been given and rejected, carrying out the instructions to meet with the ratepayer, apologise to her on behalf of the respondent, promise to address her concerns and to inform her that the infringement penalty would be refunded.

71 The second factual matter in this category is that relating to a vehicle for the use of Mr Prentis.

72 Mr Prentis was at one time the Acting Manager, Community, Safety and Emergency Management and, when so acting, he had the use of one of the respondent's vehicles. He later reverted to his substantive position of Co-ordinator.

73 Mr Grossetti proposed to Ms Hodges that Mr Prentis, in his role as Co-ordinator, be allowed to use an underutilised vehicle of the respondent. Ms Hodges rejected the proposal on the basis that she had already told Mr Prentis, verbally and in writing, that he would not "have the use of a vehicle upon his reversion to the Co-ordinator position." (Exhibit 30)

74 Mr Prentis then claimed to Mr Grossetti that he had been given an undertaking by the respondent that when he reverted to his substantive position he would have the use of one of the respondent's vehicles for commuting purposes if the lack of such a vehicle was causing him personal hardship. Mr Grossetti took the issue up again with Ms Hodges and also with Ms Brennand.

75 The whole matter is captured within email exchanges between Mr Grossetti and Ms Hodges and Ms Brennand on 23, 24 and 25 May 2016 which became, as three bundles, exhibits 30, 31 and 32 in these proceedings. The emails speak for themselves.

76 The exhibits show that when Mr Grossetti raised the issue of the "undertaking" with Ms Brennand and Ms Hodges, Ms Brennand gave a lengthy written reply setting out the history and concluding relevantly as follows:

> Based on the above, I believe the decision to allocate a car to Trevor may depend on the outcomes of the on call review. However, this then needs to take into account that his role is additional in the structure at present and I should probably also add that not all Coordinator roles have cars and use pool cars for operational requirements. Lastly, and as Fiona has already stated, there is also a need to consider the appropriateness of this potential car allocation.
>
> (Exhibit 31)

77 In response Mr Grossetti wrote the following:

> Good morning
>
> Thank you both for bringing some clarity to this issue and apologies if sound like a broken record!

> Trying to get my head around what the "arrangements" are or what undertaking may (or may not) have presented is challenging at best.
> I will not raise the issue again until such time as the "on-call review" is completed. I note that there is some considerable confusion and inconsistency about on-call allowances, where, how and to whom they are applied as was evidenced in discussions at the recent EA information session.
>
> (Exhibit 32)

78 In light of Mr Grossetti's response I am not sure why the issue was raised against him before me. I can only imagine that the respondent's attitude to the exchange was informed by a wholly misconceived idea that Mr Grossetti was closely aligned through friendship with Mr Prentis because absent that factor it is completely uncontroversial.

79 The third and final matter in this category is Mr Grossetti's behaviour at the meeting of the body called the "Community Safety Working Group" which comprised two elected officials and some ratepayers as "community representatives". No persons present other than Mr Grossetti was called to give evidence. His evidence, under cross-examination, raised no issue of concern and accordingly I place no reliance on the matter.

80 I then turn to the factual matters in relation to which there can be no misunderstanding, which are not open to misinterpretation or unconscious bias against a wider background or otherwise, and for which Mr Grossetti has no-one to blame but himself.

81 The first of these is Mr Grossetti giving feedback to a ranger he managed who had prepared prosecution briefs for his review by placing on the brief a post-it note describing aspects of its contents as "crap". Mr Grossetti admitted that he had done this several times (ts 116) and had commenced doing so in the first week or so of commencing employment.

82 One example went into evidence as Exhibit 28 in these proceedings. The post-it note contained the following written feedback set out in its entirety:

- STATEMENT FORMAT (CRAP!)
- (SEE WILLIAMS STATEMENT)
- SMF FORMAT CRAP!
- Initials of Mr Grossetti 4/5/16
- CRAP!

(Exhibit 28)

83 No explanation or clarification for the notes was attempted by Mr Grossetti in re-examination.

84 I have no idea how Mr Grossetti came to the conclusion that such conduct was acceptable. I find that to give written feedback to persons you manage in these terms is outrageous and completely unacceptable.

85 The second of these factual matters was Mr Grossetti's conduct towards Ms Brennand on 3 June 2016.

86 On 2 June 2016 Ms Brennand emailed Mr Grossetti, after having missed him in person, to tell him that a probationary review meeting would be held on 3 June 2016 and that at the meeting the following "areas" would be covered:

- Feedback and general observations
- Alignment with leadership team
- Leadership approach
- Behavioural expectations and the City's core values.

(Exhibit 12)

87 At the meeting Ms Brennand had with her some notes, prepared it would seem from Exhibit 46 with the assistance of Ms MacAdams, which became Exhibit 13 in these proceedings. The notes reveal that the feedback was intended to be a mixture of good and bad with a conclusion to be expressed to Mr Grossetti that there was a "need to improve."

88 Although there was dispute about some of the detail, the oral evidence establishes to my satisfaction that this is exactly what happened at the meeting. Mr Grossetti got some positive feedback and some negative feedback and was left with the impression that there were some key areas in which he needed to improve (ts 165-170, 333-338).

89 Then, either at the end of the meeting (according to Ms Brennand (ts 335)) or later that day (according to Mr Grossetti (ts 170-172)), Mr Grossetti was made aware that the discussion was to be committed to writing. In the event a letter was sent to Mr Grossetti by Ms Brennand dated 3 June 2016 which became Exhibit 14 in these proceedings.

90 Whether it occurred at the meeting or later, it not being relevant for me to decide, when Mr Grossetti was made aware that the discussion would be reduced to writing he reacted badly.

91 Under cross-examination Mr Grossetti gave evidence as follows (ts 172-174):

- He was not happy about a letter going on his file;
- He may have raised his voice to Ms Brennand but he doesn't recall it;
- He doesn't now know whether he got angry;
- He quite possibly said words like "you've got to be kidding me";
- He doesn't recall it but may have said "this is bullshit"; and
- He doesn't believe he said words like "there will be fire and brimstone if a letter goes on my file" but he uses that term so it is possible he did.

92 Ms Brennand gave the following evidence about Mr Grossetti's reaction:

> He became aggressive at that point and just saying "Oh, you've got to be kidding me" words to that effect… [he said] "There will be fire and brimstone if that occurs" or words to that effect but definitely "fire and brimstone".
>
> (ts 335)

93 I have no hesitation in finding that Mr Grossetti did get angry when he was told that the discussion would be reduced to writing and placed on his file and that he spoke aggressively and without proper restraint. Mr Grossetti's denials were half-hearted at best and I prefer Ms Brennand's evidence in relation to both content and characterisation.

94 I find that Mr Grossetti's reaction was inappropriate.

95 The respondent had every right to raise the issues it did with Mr Grossetti and, to the extent it held negative views, to tell him to improve in certain areas. I do not understand that even Mr Grossetti disagrees with this.

96 The respondent, and this is where Mr Grossetti and the respondent clearly did disagree, also had every right to reduce the matters discussed to writing and to place the document on Mr Grossetti's personnel file.

97 It does not matter that I have found that some of the issues, in the context of the current proceedings, are not significant or may be viewed differently from the way the respondent viewed them at the time.

98 If the respondent had genuine concerns, and plainly it did, it was perfectly entitled, indeed it could be said obliged in the interests of fairness, to record them.

99 Even if Mr Grossetti had a competing view, that view should not have been rudely and aggressively conveyed to Ms Brennand.

100 I am not relevantly informed by Mr Grossetti's written response to Exhibit 14, a memorandum to Ms Hodges that became Exhibit 15 in these proceedings. Mr Grossetti was entitled to write it but, in my view, if by that time damage had been done to the respondent's attitude toward Mr Grossetti as a result of conduct on 3 June 2016 he had no-one to blame but himself.

101 I should add here that after becoming aware of Mr Grossetti's conduct at the meeting and Mr Grossetti's written response, Ms Hodges wrote an email to the Chief Executive Officer and Ms Monkhouse on 7 June 2016 (Exhibit 55 in these proceedings) stating that "the potential for this individual to become more threatening, should matters progress down a more negative path, do cause worry from a personal and family perspective, and I hold a similar concern for Michelle". It continued that "the behaviour demonstrated to date indicates the potential for the individual to be physically threatening."

102 The reference to Mr Grossetti as "this [and the] individual" is disrespectful. The sentiments expressed may have been genuinely held by Ms Hodges (although they were not shared by Ms Brennand (ts 352, 400, 443, 460)) but even so they were, on any reasonable analysis, exaggerated and fanciful. That Ms Hodges was not prepared in the stand to admit that she may have been wrong about Mr Grossetti, given that in response to being dismissed he quietly packed up his belongings and left and pursued his grievance respectfully and calmly through a statutory process, is troubling to me considering the power Ms Hodges had in relation to Mr Grossetti and the role she played in his dismissal. However, the matter is ultimately not relevant to the determination of Mr Grossetti's application because of the findings I make about his conduct.

103 And so I come to the events of 15 June 2016.

104 I have already mentioned the meeting on 19 May 2016 at which Mr Prentis' future was discussed. After that meeting the respondent sought legal advice and decided to present Mr Prentis with a notice to "show cause" why his employment should not be terminated. The notice was to be presented to Mr Prentis at a regular scheduled meeting held in relation to his performance management or development process.

105 On 14 June 2016 a meeting was held attended by Mr Grossetti, Ms Brennand and Ms Monkhouse to discuss the meeting with Mr Prentis planned for 15 June 2016. Notes of the meeting taken by Ms Brennand became Exhibit 17 in these proceedings and Mr Grossetti told me that they basically accord with his recollection of the meeting (ts 72).

106 I can summarise the meeting quite fairly, in my view, in this way.

107 Based on the notes, the evidence of the witnesses and what has, in light of the background, a ring of truth about it Mr Grossetti was told of the plan for 15 June 2016 in relation to Mr Prentis and why it was being implemented. Mr Grossetti objected to the planned course of action and did so in clear and strong terms. His main objection was that the performance management or development approach was inappropriately morphing into a disciplinary process without relevant policies and procedures being followed.

108 Mr Grossetti was told that he was not to attend the meeting with Mr Prentis planned for the next day. By way of explanation Ms Brennand told Mr Grossetti that three people would be too many on the management side of the table at such a meeting and that as she and a Human Resources representative had to be there Mr Grossetti was not required to attend (ts 346-347).

109 Mr Grossetti objected, again clearly and strongly, and Ms Brennand, equally clearly, told him that he was not to attend.

110 There the matter was left.

111 Three things may be observed at this point. The first is that Mr Grossetti was not told the full reasons why he was not to attend the meeting. A big part of the reason why the respondent did not want him there is because by 14 June 2016 the relevant officers of the respondent had begun to lose confidence in Mr Grossetti's ability to remain cool and dispassionate, particularly in relation to matters involving Mr Prentis. As early as 9 June 2016, as Exhibit 47 shows, Ms Brennand had raised with Human Resources whether Mr Grossetti should be at the meeting with Mr Prentis. (I note that the comment on the subject in the email which was Exhibit 47 arose out of a meeting on an unrelated matter between Mr Grossetti and Ms Brennand upon which little weight was placed in these proceedings).

112 Ms Brennand explained in her evidence, although it must be said reluctantly, that, at least in part, the respondent did not want Mr Grossetti to attend the meeting because "of the concerns we had around the relationship and that Mr Grossetti seemed to have aligned himself more with the team than he did with management." (ts 347)

113 I think the reason given to Mr Grossetti was not a strong one (certainly the "three on one is too many" rule was not applied to Mr Grossetti when it was his turn to get bad news, as Ms Hodges, Ms Brennand and Ms MacAdams were in that meeting) and it could, in part, explain Mr Grossetti's resistance to his exclusion and his actions the next day.

114 The second thing to observe is that Mr Grossetti, in my view, was quite within his rights to query the actions the respondent was planning to take in relation to Mr Prentis. Without making conclusive comment, because it is clear I don't need to, what

was being proposed was, to anyone with a working knowledge of workplace policies and procedures in relation to performance management and discipline, as Mr Grossetti apparently had, highly unusual and it must be said highly suspect.

115 The third and final thing to observe is that whether or not Mr Grossetti was convinced the respondent was doing the right thing in relation to Mr Prentis, and whether or not he was convinced there were good reasons for his exclusion from the planned meeting, it is abundantly clear that Mr Grossetti was told, by someone with the authority to so direct, that he was not to be at the meeting on 15 June 2016.

116 In light of these comments I can preface my comments about the events of 15 June 2016 by saying that even if I accepted Mr Grossetti's versions of events, and even if I convinced myself that there was an explanation for his actions, I could not possibly find there was a good excuse for them.

117 Mr Grossetti's version is that Mr Prentis attended his office about five minutes before the scheduled meeting as was Mr Prentis' practice before his performance management or development meetings.

118 I interpose to comment that this situation arising is an unfortunate, but perhaps predictable, by-product of the respondent implementing its plan as part of a meeting scheduled for entirely different purposes. I add however that it should not have been enough to throw Mr Grossetti off stride.

119 Mr Grossetti says that he told Mr Prentis that he had been "directed not to attend the meeting and that [Mr Prentis] was to attend the meeting alone" (ts 72). Mr Prentis' antennae went up and he said to Mr Grossetti "They're going to try and sack me, aren't they? I don't trust them. I want you to be there as my support person." (ts 73)

120 Mr Grossetti says that he then told Mr Prentis to wait in his office and Mr Grossetti left his office with the intention of going to the meeting venue to seek advice on Mr Prentis' request that Mr Grossetti attend as his support person. (ts 73)

121 Mr Grossetti says he did that saying to Ms Brennand and Ms Piper, the respondent's attendees at the planned meeting, words to the effect "I know you don't want me to be at this meeting. Trevor has asked me to be his support person, will you tell me what I should do?" (ts 73)

122 Mr Grossetti says that he then noticed that Mr Prentis had ignored his request to stay in Mr Grossetti's office and was "standing to my right, and slightly behind me, to my shoulder." (ts 73 and 187)

123 Ms Brennand then said words to Mr Grossetti to the effect "I've told you you're not required at the meeting. We want to discuss something else with Trevor. We will speak to Trevor alone" (ts 73) at which point Mr Grossetti left and returned to his office, the meeting then proceeding in his absence (ts 73).

124 Accepting everything Mr Grossetti said to be true, his version does not assist him in my decision-making. Not only had it been made clear to Mr Grossetti by his direct line manager that he was not to attend the meeting, he had been told this over his objections and when he knew that his direct line manager was aware of his objections, and the reasons for them, and had overruled them.

125 Mr Grossetti could have been in no doubt that, whatever he thought about the matter, Ms Brennand's position was a considered, firm and final position.

126 It would have been equally clear to anyone thinking about the matter sensibly that it was not within Mr Prentis' powers of persuasion to have Mr Grossetti at the meeting. In other words, it should have been clear that whatever Mr Prentis wanted in relation to Mr Grossetti's attendance was completely irrelevant. Whether Mr Grossetti attended the meeting was not up to Mr Prentis.

127 Mr Prentis' stated desire that Mr Grossetti be at the meeting should have been deftly deflected by Mr Grossetti. It cannot possibly be a good excuse for any other action on the part of Mr Grossetti.

128 Perhaps inadvertently, perhaps even by some ineptitude on its part, the respondent had set a test for Mr Grossetti to show that he could obey instructions he didn't like and, if that required some careful and intelligent management of a difficult situation, to show it.

129 Mr Grossetti resoundingly failed the test. He had any number of options for dealing with the situation that arose without inserting himself into it. He could have told Mr Prentis, without a dramatic compromise of his principles and in a way that showed he understood the flexibility sometimes required of a manager, that he was double-booked or that something had come up or that he simply could not attend. He failed to do this and his employer was entitled to take a dim view of it.

Consideration

130 Having undertaken the above analysis of the evidence, characterising it in certain ways and drawing conclusions from it where necessary to do so, I now turn to the application of the facts to the law.

131 The leading decisions guiding decision-making in relation to a dismissal during a period of probation remain those of the Full Bench of the Western Australian Industrial Relations Commission in *Hutchinson v Cable Sands (WA) Pty Ltd* (1999) 79 WAIG 951 and *East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers* (2000) 80 WAIG 3155.

132 I do not propose to reproduce [49] of the decision in *East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers* (2000) 80 WAIG 3155, which counsel for the respondent relied upon and Mr Grossetti told me he was familiar with, but I will mention some of the principles therein where they are relevant to my decision.

133 I would add to the principles, as Commissioner Kenner, as he was then, did at [18] of *Peter Milford Weston v WA Property Lawyers* (2015) 95 WAIG 1455 the comments of Heydon J at [16] of *Commissioner of Police for New South Wales v Eaton* (2013) 252 CLR 1 as follows:

> Probation involves a process of putting to proof. It is a process of investigation and examination. A probationary period is a period of testing or trial for the purpose of ascertaining whether [a person] has the necessary qualifications for a permanent appointment, and the word 'probation' itself involves the idea of something in the nature of trial and experiment with a view to determining whether an applicant is to be appointed.

134 In my analysis of the evidence I have seen some things differently from the way the respondent saw them. I have attempted to put some of Mr Grossetti's behaviour, and the respondent's reaction to it, in a context that only becomes clear from dispassionate consideration understandably not open to the parties.

135 However, even having done that, there is a "bright line" of conduct running through Mr Grossetti's period of employment which makes the decision to dismiss him one that was not harsh, oppressive or unfair.

136 That line runs from Mr Grossetti writing "crap" on several occasions when giving feedback to rangers, through his conduct toward Ms Brennand on 3 June 2016 and to his conduct on 15 June 2016.

137 The first and second matters would have reasonably given the respondent concern that Mr Grossetti was unable to either give or receive feedback appropriately, surely a bad sign in a middle to upper middle manager.

138 The third matter called into serious, indeed determinative, question Mr Grossetti's judgement and skill, as well as his loyalty to the respondent.

139 If, at his interview for the position he won, Mr Grossetti had been asked the questions and given the answers set out below there is simply no way he would have been successful in his application:

- "If a subordinate gave you work that you considered to be substandard how would you give feedback?---I would write "CRAP" on a post it note and return it."
- "If your superior, during a probationary review, discussed some areas for improvement with you and indicated that a record would be made of having done this how would you react?---I would get very upset, raise my voice and tell them that there would be fire and brimstone if the record was kept".
- "If your superior made it abundantly clear to you that you were not to attend a meeting with a subordinate that you thought you should attend and then the subordinate asked you to attend what would you do?---It would depend on the circumstances but I may go back to my superior to check whether the order stood".

140 I accept that a period of probation goes beyond a notional first interview and extension of the selection process, but there is no context or factual circumstance arising out of the period of probation which reduces the impact of the above. Mr Grossetti actually acted in each of the above ways during his period of probation.

141 It is true that probation is also a time for teaching, training and counselling and that employees on probation need to be informed they are not meeting required standards and given an opportunity to improve.

142 Mr Grossetti did not need teaching or training in the areas relevant to his dismissal.

143 In regards to instruction and counselling, Mr Grossetti got all of the feedback he could possibly have needed. It was given to him by Ms Brennand at the meeting on 3 June 2016. He agreed with me that he had received a message at that meeting that he should "tread lightly or tread lighter" (ts 624).

144 Having received that message, and I find that was sufficient for a person of Mr Grossetti's experience and intelligence in terms of the need for information and counselling, Mr Grossetti did not tread lightly. That same day and again on 15 June 2016, just two weeks later, he confirmed the doubts the respondent had about his ability to do so. He simply did not meet the standard of conduct reasonably required of him.

145 Mr Grossetti's case ultimately asks me to ignore that he was on probation and that the respondent had a big decision to make; that being whether Mr Grossetti had the necessary qualifications for continuing employment in a relatively senior position.

146 Mr Grossetti ultimately asks me to ignore that a probationary period is something in the nature of a test or trial or experiment.

147 Another employer may have seen Mr Grossetti's actions differently. Similar complicating circumstances may not have arisen at different employment. Mr Grossetti's undeniable energy, ability and intelligence may have carried the day with another employer. But there is, determinatively, nothing unreasonable about the respondent taking the view, on the information it had, prominent among it being the three matters I have emphasised, that Mr Grossetti was not suitable for further employment with it.

148 At ts 478 Ms Monkhouse gave a good explanation for Mr Grossetti's dismissal which corresponds largely with what I have found. The evidence of the meeting at which Mr Grossetti was told his employment was terminated (ts 80-82, 205, 210-212, 353-358, 447-450, 511-519) and the confirmatory letter dated 17 June 2016, which became Exhibit 21 in these proceedings, raised those same issues, although in Exhibit 21 the wording was quite general.

149 There is no doubt that Mr Grossetti was dismissed for the reasons which included the three matters I have emphasised and I find that dismissal for those reasons was not harsh, oppressive or unfair.

150 I should add that even though there were factors which were frustrating Mr Grossetti, and perhaps reasonably so, none of them explain or excuse the conduct I see as most relevant and significant.

151 Mr Grossetti also raises various procedural matters.

152 Mr Grossetti says he was never warned that if he did not address matters raised with him that he might be dismissed. This may be rejected out of hand. The evidence is clear that Mr Grossetti well understood the probationary nature of his employment and that he had to successfully complete the period of probation for his employment to continue. There was this exchange between counsel for the respondent and Mr Grossetti in relation to Exhibit 14:

> "And you were upset about the letter because you knew you were on probation and a letter on your personnel file was a threat to your employment. You knew that didn't you?---Ah, yes I did."
>
> (ts 174)

153 There were other examples.

154 Mr Grossetti cannot now successful argue that he was unfairly blindsided by his dismissal.

155 Mr Grossetti says that Ms Hodges' involvement in his dismissal renders it unfair because she was biased against him. Again there is nothing in the point. I have had the opportunity to hear six days of evidence in relation to this matter and I find, on the basis of that evidence, that the respondent was entitled to take the action it did on objectively found facts. Ms Hodges' state of mind has ceased to be relevant.

156 Mr Grossetti says that his dismissal was unfair because he had no support person present at the meeting on 16 June 2016 at which he was asked to explain his actions on 15 June 2016, against a background of his employment, at that time, being in serious jeopardy. The raising of this issue brings no credit upon Mr Grossetti.

157 Mr Grossetti was told by the respondent that he may bring a support person to the meeting (Exhibit 49). Initially in the proceedings Mr Grossetti attempted to portray his response to Exhibit 49 as a request that Ms Hodges attend as his support person (ts 202). In his email response Mr Grossetti wrote "I would like Fiona present when we further discuss this please." (Exhibit 54) "Fiona" was Ms Hodges.

158 Without necessarily admitting that the response did not, and was not intended to, carry the implication that Mr Grossetti wanted Ms Hodges to be his support person Mr Grossetti eventually accepted at the hearing that he did not, in truth, want Ms Hodges there as his support person. Instead, he eventually admitted, he wanted her to think she was in the meeting in that role because, if his dismissal was to be considered, this would force her to remove herself from the decision-making process.

159 That is, Mr Grossetti thought he was placing Ms Hodges in a conflict of interest situation and that she would be forced to recuse herself from decision-making in relation to him because she was his support person (ts 207). He admitted it was a "tactic" (ts 208).

160 Of course the tactic was a hopeless one because neither Ms Hodges, nor anyone else present, thought for a moment that Ms Hodges was attending as Mr Grossetti's support person (no doubt because the emailed response was vague and because everyone knew Ms Hodges could not be Mr Grossetti's support person because of the role she was being paid to play in the management of him).

161 The bottom line is that Mr Grossetti was offered the opportunity to bring a support person to the meeting on 16 June 2016 and, viewed sensibly and substantively, decided not to have one present, it being accepted by him that even if Ms Hodges was to be his support person he did not really want, need or expect her support.

162 Mr Grossetti's submission to me that the respondent conducted the meeting while "intentionally denying me the right to any independent support person" (ts 628) was not well made in all of the circumstances and is rejected.

163 I also find that at that meeting Mr Grossetti was given the opportunity to address the concerns the respondent had about him and that the respondent subsequently properly considered his submissions and were, reasonably, not satisfied by them.

164 Mr Grossetti, in submissions, returned several times to the issue, as he saw it, that the contents of Exhibit 14, his probationary review letter, contained "unsubstantiated allegations" and that those allegations were not "tested or proven through any proper investigative or enquiry process" (ts 628 for example).

165 Mr Grossetti complained about a lack of particulars and claimed that reliance on the issues discussed on 3 June 2016 and noted in Exhibit 14 was procedurally unfair (ts 629).

166 In relation to this I can only say that Mr Grossetti's submissions reveal a lack of understanding about what is required of an employer during a probationary period of employment. An employer does not need to conduct a full investigation into matters formative of its assessment of the compatibility of a probationary employee before it may raise or rely upon them. The respondent did what was required of it by bringing the matters to Mr Grossetti's attention and giving him a chance to improve.

167 There was nothing procedurally unfair about the process leading to Mr Grossetti's dismissal.

168 That leaves for consideration Mr Grossetti's claim that he has not been allowed by the respondent a benefit to which he was entitled under his contract of employment.

169 The Notice of Claim filed 12 July 2016 does not contain a lot of detail (unlike the Notice of Application).

170 If I assume that Mr Grossetti was alleging a breach of contract on the part of the respondent, then, given he seeks by the claim the balance of monies he would have earned to completion of the contract of employment, the breach alleged must be the termination of his employment.

171 The termination of Mr Grossetti's employment was not in breach of his contract of employment. Clause 2.2(f) of the contract of employment (Exhibit 2 in these proceedings) provides that during the three-month probationary period "either party may terminate the contract by one week's written notice to the other party or payment or forfeiture of payment in lieu of notice."

172 The termination complied with this subclause as evidenced by Exhibit 21, the letter confirming termination.

173 There was no breach of contract.

174 It is unfortunate that matters worked out as they did. Mr Grossetti has undeniable skill and experience and may be a good fit with another employer. But I can offer him cold comfort only. He was obviously not a good fit for the respondent a conclusion to which, I have found, it was fairly and reasonably entitled to come.

2017 WAIRC 00231

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CARLO ELIO GROSSETTI
	APPLICANT
	-v-
	CITY OF WANNEROO (ABN 64 295 981 165)
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 26 APRIL 2017
FILE NO/S	U 113 OF 2016, B 113 OF 2016
CITATION NO.	2017 WAIRC 00231

Result	Application and claim dismissed
Representation	
Applicant	In person
Respondent	Mr W Keane of counsel

Order

HAVING heard the applicant on his own behalf and Mr W Keane, of counsel, for the respondent; and

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

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

The application and claim be dismissed.

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

2016 WAIRC 00836

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRETT ARTHUR KING
	APPLICANT
	-v-
	GRIFFIN COAL MINING COMPANY PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 19 OCTOBER 2016
FILE NO.	B 155 OF 2016
CITATION NO.	2016 WAIRC 00836

Result	Direction issued
Representation	
Applicant	Mr M Ritter SC of counsel
Respondent	Mr P Willox of counsel

Direction

HAVING heard Mr M Ritter SC of counsel on behalf of the applicant and Mr P Willox of counsel 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 issue of whether the terms and conditions of *The Griffin Coal Mining Company (Maintenance) Agreement 2012* were incorporated into the applicant's contract of employment be heard as a preliminary issue.

(2) THAT the applicant file and serve any witness statements upon which he intends to rely by no later than 9 November 2016.

(3) THAT the respondent file and serve any witness statements upon which it intends to rely by no later than 30 November 2016.

(4) THAT the parties file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than three days prior to the date of the hearing.

(5) THAT the matter be listed for hearing for one day on a date to be fixed.

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

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

2016 WAIRC 00909

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRETT ARTHUR KING
	APPLICANT
	-v-
	GRIFFIN COAL MINING COMPANY PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 2 DECEMBER 2016
FILE NO/S	B 155 OF 2016
CITATION NO.	2016 WAIRC 00909

Result	Order issued
Representation	
Applicant	Mr T Kucera of counsel
Respondent	Mr A Griffiths of counsel

Order

HAVING heard Mr T Kucera of counsel on behalf of the applicant and Mr A Griffiths 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 respondent's witness, Mr Vanga Vinod Kumar be and is hereby granted leave to appear at the hearing by video link from Delhi, India.

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

2017 WAIRC 00102

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00102
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 19 OCTOBER 2016, WEDNESDAY, 7 DECEMBER 2016
DELIVERED	**:**	MONDAY, 27 FEBRUARY 2017
FILE NO.	**:**	B 155 OF 2016
BETWEEN	**:**	BRETT ARTHUR KING Applicant AND GRIFFIN COAL MINING COMPANY PTY LTD Respondent

Catchwords	**:**	*Industrial Law (WA) - Contractual benefits claim - Preliminary matter - Whether the terms and conditions of The Griffin Coal Mining Company (Maintenance) Agreement 2012 were incorporated into the applicant's contract of employment - Interpretation of contracts - Principles applied - Terms are ambiguous or capable of more than one meaning - What a reasonable person in the position of the parties would have understood the contract to mean - Application dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Fair Work Act 2009* (Cth)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr M Ritter SC
Respondent	**:**	Mr J Blackburn SC
Solicitors:		
Applicant	**:**	Turner Freeman Lawyers
Respondent	**:**	King & Wood Mallesons

Case(s) referred to in reasons:

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570
Australian Workers' Union v BHP Iron Ore Pty Ltd [2001] FCA 3
Black Box Control Pty Ltd v *Terravision Pty Ltd* [2016] WASCA 219
Burgess v Mount Thorley Operations Pty Ltd (2003) 132 IR 400
Byrne v Australian Airlines Ltd (1995) 185 CLR 410
Codelfa Construction Pty Ltd v *State Rail Authority of New South Wales* (1982) 149 CLR 337
Franklins Pty Ltd v Metcash Trading Ltd (2009) 264 ALR 15
Gramotnev v Queensland University of Technology [2015] QCA 127
Hancock Prospecting Pty Ltd v *Wright Prospecting Pty Ltd* (2012) 45 WAR 29
Moama Bowling Club Limited v Armstrong (No1) (1995) 64 IR 238
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Romero v Farstad Shipping (Indian Pacific) Pty Ltd (2014) 231 FCR 403
Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd [2016] FCAFC 161
Soliman v University of Technology Sydney [2008] FCA 1512
Thomas George Hartwig v Interstate Enterprises Pty Ltd t/as ATS Recruitment Services [2016] WAIRC 00741; (2016) 96 WAIG 1359

Case(s) also cited:

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Ammon v Consolidated Minerals Ltd (no 3) [2007] WASC 232
AMWU v Mechanical Engineering Services Pty Ltd [2007] FCA 1736
Australian and International Pilots Association v Qantas Airways Ltd [2011] FCA 1487
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99
AWU v BHP Iron Ore Pty Ltd [2000] FCA 39
AWU v BHP Iron Ore Pty Ltd [2001] FCA 3
BHP Iron Ore Pty Ltd v AWU [2000] FCA 430
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Burgess & Ors v Mount Thorley Operations Pty Limited [2002] NSWIRComm 106
Byrnes v Kendle (2011) 243 CLR 253
CEPU v CJ Manfield Pty Ltd [2011] FMCA 374
City of Subiaco v Local Government Advisory Board [2011] WASC 322
Civil Service Association of Western Australia Inc v Western Australian College of Teaching (2011) WAIRC 1002; (2011) 91 WAIG 2391
Colby Corporation Pty Ltd v Commissioner of Taxation (2008) 244 ALR 71
Elacon Australia Pty Ltd v Brevini Australia Pty Ltd (2009) 263 ALR
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; 88 ALJR 447
Goldman Sachs JB Were Services Pty Ltd v Nikolich [2007] FCAFC 120
Kirshell Pty Ltd v Nilant and Others [2006] WASCA 223
Ledington v University of Sunshine Coast, PR935250, AIRC, 3 September 2003
Mineralogy Pty Ltd v Sino Iron Pty Ltd [2013] WASC 194
Moreton Bay Regional Council v Mekpine Pty Ltd [2016] HCA 7; (2016) 256 CLR 437
Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104
Murray Irrigation Limited v Balsdon (2006) 67 NSWLR 73
Promoseven Pty Ltd v Markey [2013] FCA 1281
Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193; [2000] FCA 889
Soliman v University of Technology, Sydney (No 2) [2009] FCAFC 173
State of South Australia v McDonald [2009] SASC 219
Stratton Finance Pty Limited v Webb [2014] FCAFC 110; (2014) 34 ALR 166
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
Tracey Fergusson v The Salvation Army (Western Australia) Property Trust (2014) 95 WAIG 348
TWU v K & S Freighters Pty Ltd [2010] FCA 1225
Visscher v The Honourable President Justice Giudice [2009] HCA 34; (2009) 239 CLR 361
Wates Construction (London) Ltd v Franthom Property Ltd (1991) 7 Const LJ 243
Yousif v Commonwealth Bank of Australia [2010] FCAFC 8
Zafiriou v Saint-Gobain Administration Pty Ltd [2014] VSCA 331

Reasons for Decision

Application and background

1 The applicant Mr King was employed by the respondent Griffin Coal Mining Company Pty Ltd as a mechanical tradesman/boilermaker since about January 1984. GCM mines and processes coal in the Collie Basin, south of Perth. GCM is one of two coal companies supplying coal principally for domestic power generation in this State.

2 In the course of Mr King's employment, various industrial awards and agreements have had application. These have applied to both the production and maintenance operations of the company. For most of its history, the operations of GCM were subject to awards and industrial agreements of the Coal Industry Tribunal of Western Australia and its predecessors. More recently, industrial regulation of GCM's operations has been subject to the terms of the *Fair Work Act 2009* (Cth) and awards and enterprise agreements made under its terms. The most recent such enterprise agreement was the *Griffin Coal (Maintenance) Collective Agreement 2012*. Another collective agreement applied to the production operations of the company. Both of these collective agreements have been underpinned by a federal award known as the *Black Coal Mining Industry Award 2010.*

3 The situation giving rise to the present proceedings is briefly as follows.

4 In 2012 the Agreement was made and approved by the Fair Work Commission and was given legislative effect under Part 2-4 of the *FW Act*. Sometime later, in about February 2014, GCM contracted out both its production and maintenance operations to an unrelated company, the Carna Group Pty Ltd. The transfer of instruments provisions of the *FW Act* applied to this transaction and therefore Mr King's employment remained covered by the 2012 Agreement.

5 In about December 2014 GCM resumed responsibility for directly employing its production and maintenance workforce when Carna ceased to do so. This transaction again attracted the terms of the *FW Act* dealing with transfer of instruments and therefore the 2012 Agreement continued to apply to Mr King's employment.

6 At the time of this transaction, Mr King, along with all other maintenance employees of GCM, received a letter of offer of employment. It is that letter, which although undated, was signed by Mr King on 30 December 2014, that is controversial in these proceedings. Mr King maintained that the effect of it was to expressly incorporate the terms of the 2012 Agreement into his contract of employment. This was denied by GCM.

7 This contention assumes significance because in January 2016 GCM made an application under the *FW Act* to terminate the 2012 Agreement. At about the same time, employees of GCM were made offers of new contracts of employment. Mr King declined to accept the offer. In July 2016 the FWC terminated the 2012 Agreement with effect from mid-August 2016. As a consequence of these events, Mr King maintained that changes to the terms and conditions of employment, made by GCM, arising from the fresh offers of employment, have breached his contract of employment, the terms of which he maintained, incorporated the 2012 Agreement. Whilst the quantum of these breaches has yet to be particularised, they involve matters such as shift rosters, salary payments, fares and allowances, superannuation and long service leave.

8 Mr King now claims that GCM has denied him contractual benefits in relation to these matters. Whilst the terms of the offer of employment letter the subject of these proceedings may affect many other employees, it is only Mr King's claim that the Commission is dealing with.

9 For the purposes of progressing these proceedings, the parties proposed and the Commission agreed, to consider whether the 2012 Agreement was incorporated into Mr King's contract of employment as a preliminary issue. Affidavits were filed by Mr King and by Mr Kumar, the Executive Director of GCM. Written outlines of submissions were also filed. The Commission has been considerably assisted by the careful and helpful submissions of counsel for Mr King, Mr Ritter SC and for GCM, Mr Blackburn SC.

Relevant principles

Construction of contracts generally

10 The parties made submissions as to the relevant principles to apply in the construction of contracts. There was no real dispute about the approach. It is to be borne in mind that interpretation of a contract, like any other instrument, is a text based activity.

11 Some rules have been developed in the cases as to the approach to adopt in construing the terms of a contract. A recent summary of the relevant principles to be applied was set out by the Court of Appeal (WA) in *Black Box Control Pty Ltd* v *Terravision Pty Ltd* [2016] WASCA 219. In this case, Newnes and Murphy JJA and Beech J observed at par 42:

> **Construction of contracts: general principles**
>
> 42 The principles relevant to the proper construction of instruments are well known, and were not in dispute in this case. In summary:
>
> (1) The process of construction is objective. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean.[50]
>
> (2) The construction of a contract involves determination of the meaning of the words of the contract by reference to its text, context and purpose.[51]
>
> (3) The commercial purpose or objects sought to be secured by the contract will often be apparent from a consideration of the provisions of the contract read as a whole.[52] Extrinsic evidence may nevertheless assist in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding of the genesis of the transaction, its background, the context and the market in which the parties are operating.[53]

(4) Extrinsic evidence may also assist in determining the proper construction where there is a constructional choice, although it is not necessary in this case to determine the question of whether matters external to a contract can be resorted to in order to identify the existence of the constructional choice.[54]

(5) If an expression in a contract is unambiguous and susceptible of only one meaning, evidence of surrounding circumstances cannot be adduced to contradict its plain meaning.[55]

(6) To the extent that a contract, document or statutory provision is referred to, expressly or impliedly, in an instrument, that contract, document or statutory provision can be considered in construing the instrument, without any need for ambiguity or uncertainty of meaning.[56]

(7) There are important limits on the extent to which evidence of surrounding circumstances (when admissible) can influence the proper construction of an instrument. Reliance on surrounding circumstances must be tempered by loyalty to the text of the instrument. Reference to background facts is not a licence to ignore or rewrite the text.[57] The search is for the meaning of what the parties said in the instrument, not what the parties meant to say.[58]

(8) There are also limits on the kind of evidence which is admissible as background to the construction of a contract, and the purposes for which it is admissible. Insofar as such evidence establishes objective background facts known to the parties or the genesis, purpose or objective of the relevant transaction, it is admissible. Insofar as it consists of statements and actions of the parties reflecting their actual intentions and expectations it is inadmissible. Such statements reveal the terms of the contract which the parties intended or hoped to make, and which are superseded by, or merged into, the contract.[59]

(9) An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience.[60] However, it must be borne in mind that business common sense may be a topic on which minds may differ.[61]

(10) An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable.[62] If possible, each part of an instrument should be construed so as to have some operation.[63]

(11) Definitions do not have substantive effect. A definition is not to be construed in isolation from the operative provision(s) in which the defined term is used. Rather, the operative provision is ordinarily to be read by inserting the definition into it.[64]

12 One question addressed in this matter was the most recent debate in the cases in relation to the need for ambiguity or differences in meaning, in order for a court to have regard to extrinsic evidence. This arises from the principles discussed in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. In this case, Mason J, in what is described as the "true rule" said at par 22:

> 22 The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.

13 As to the application of the "true rule", in *Hancock Prospecting Pty Ltd* v *Wright Prospecting Pty Ltd* (2012) 45 WAR 29 McLure P observed as follows at pars 74-80:

> **The scope of the "true rule" of construction**
>
> 74 Both parties rely on extrinsic material in support of their submissions as to the proper construction of the 1984 and 1989 Agreements. Accordingly, it is necessary to enlarge on the scope of the "true rule" in *Codelfa*.
>
> 75 The role of the court in construing a written contract is to give effect to the common intention of the parties. The common intention of the parties is to be ascertained objectively. That is, the meaning of the terms of a contract in writing is to be determined by what a reasonable person would have understood them to mean: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165. The subjective intention or actual understanding of the parties as to their contractual rights and liabilities are irrelevant in the construction exercise.
>
> 76 The practical limitation flowing from the Codelfa true rule is that surrounding circumstances cannot be relied on to give rise to an ambiguity that does not otherwise emerge from a consideration of the text of the document as a whole, including whatever can be gleaned from that source as to the purpose or object of the contract.
>
> 77 The word "ambiguous", when juxtaposed by Mason J with the expression "or susceptible of more than one meaning", means any situation in which the scope or applicability of a contract is doubtful: *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 456 - 457. Ambiguity is not confined to lexical, grammatical or syntactical ambiguity.
>
> 78 Moreover, the extent to which admissible evidence of surrounding circumstances can influence the interpretation of a contract depends, in the final analysis, on how far the language of the contract is legitimately capable of stretching. Generally, the language can never be construed as having a meaning it cannot reasonably bear. There are exceptions (absurdity or a special meaning as the result of trade, custom or usage) that are of no relevance in this context.
>
> 79 Further, on my reading of Codelfa, pre-contractual surrounding circumstances are admissible for the purpose of determining whether a term is implied in fact. That may be because the stringent test for the implication of a term in fact excludes any possibility of an implied term contradicting the express terms.
>
> 80 If extrinsic evidence is admissible, the next issue is the scope of the "surrounding circumstances" for the purpose of construction. Mason J in Codelfa also answered that question. He said:

> "Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although … if the facts are notorious knowledge of them will be presumed.
>
> It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable (352)."

14 I respectfully adopt this summary and the above observations of McLure P in *Hancock Prospecting*, for the purposes of these reasons.

The facts

Some objections to evidence

15 There were arguments put to the Commission as to the use that may be made of the evidence led in these proceedings, consistent with the above principles. I first deal with some objections made to the witness statements. Objections were taken by GCM to pars 45 to 72 of Mr King's statement on the basis that it dealt with events and matters subsequent to the formation of the Contract. Mr King very properly accepted these objections. Evidence of such matters is not generally able to be taken into account in the interpretation of an agreement. The state of the law in Australia in respect to this proposition was set out in the decision of the majority of the High Court in *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at par 35 and also in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15.

16 The qualification to the omission of this evidence was the application by GCM to cross-examine Mr King on some aspects of this material at pars 52 to 58, dealing with when Mr King became aware of the incorporation argument, in relation to the termination proceedings in the FWC. The Commission permitted GCM to raise this matter with Mr King, but I have not found it necessary to have any regard to it.

17 Additionally, objections were taken by Mr King to aspects of the witness statement filed by Mr Kumar. Objections were taken to pars 51(b), 54, 56, 85, 86 (in relation to references by Mr Kumar to the "unreasonableness" of the operation of the 2012 Agreement) 87 and 103 to 105. In response GCM, again quite properly, agreed that pars 56 and 86 be modified to remove references to "unreasonably" but otherwise remain and that pars 87, and 103 to 105 be removed. In order to keep the proceedings moving, as Mr Kumar was giving his evidence by video link from India, the parties agreed to the provisional admission of Mr Kumar's witness statement, subject to a final decision on the objections by the Commission in due course. For the reasons given by Mr King, apart from those agreed, pars 54, 56 and the first sentence of par 86 of Mr Kumar's witness statement are struck out.

18 Whilst not raised by either Mr King or GCM, I also do not take into account pars 22 to 26 of Mr Kumar's witness statement, and the annexures to which they refer, as they also referred subsequent conduct.

Mr King

19 Mr King has been employed by GCM for over 32 years. Most of that time he has been employed in the company's maintenance operations. Mr King said there are currently 39 maintenance employees employed by the company. In addition to being a maintenance employee, Mr King has also been a member of the Automotive Food Metals and Printing and Kindred Industries Union for many years. He has been a union representative, holding one of two site based representative positions for the AMWU, for in excess of 20 years. In that capacity, Mr King has been a member of the negotiating teams in relation to the negotiation of enterprise agreements since about the mid-1990s. He has been involved in at least five enterprise agreement negotiations on behalf of the maintenance workforce.

20 Mr King outlined the changes in conditions of employment for maintenance employees employed by GCM since the 1980s. A major change occurred in the mid-1990s when the company's operations moved from seven hours per day, five days per week to 12 hour shifts on a four days on/four days off basis. Mr King referred to the *Griffin Coal (Maintenance) Enterprise Bargaining Agreement 2005 – 2008*, an agreement made by the Coal Industry Tribunal of Western Australia. That agreement was succeeded by the 2012 Agreement. Mr King noted that apart from the introduction of two 'sportsmen's rosters' and some wage increases, the terms of the 2005 and 2012 agreements were very similar.

21 In about February 2011, the operations of GCM were under administration. The company was purchased by Lanco Infratech Limited via its Australian subsidiary, Lanco Resources Australia Pty Ltd. Mr King said that on the takeover by Lanco, the terms and conditions of employment for maintenance employees did not change. The terms of the then 2005 Agreement continued to apply. What did change however, in about February 2014, was the composition of GCM's workforce. At that time, Mr King said that Lanco advised of its intention to contract out its production and maintenance activities to Carna. Mr King said that as a consequence of this and negotiations between GCM, Carna and the AMWU, all maintenance employees of GCM were offered continued employment with Carna. The offer of employment from Carna was set out in a letter dated 20 February 2014 which was in the following terms:

> Dear Brett
>
> **Transfer of Employment and Acceptance**
>
> On or around the 1st April 2014 Carna Group Pty Ltd will commence operations from the Griffin Coal Mine Site.
>
> On this date:
>
> 1. A transfer of business between the Griffin Coal Mining Company Pty Ltd and Carna Group Pty Ltd will occur in accordance with section 311 of the Fair Work Act 2009;

2. As a result of this transition, your employment with the Griffin Coal Mining Company Pty Ltd will transfer to Carna Group Pty Ltd;
3. Your employment with Carna Group Pty Ltd will continue to be covered by The Griffin Coal Mining Company Pty Ltd (Maintenance) Collective Agreement 2012 as amended, replaced or terminated from time to time; and
4. Carna Group Pty Ltd will recognise the service of transferring employees for all purposes including all leave and redundancy.

On this basis, we are pleased to offer you employment with Carna Group Pty Ltd. Accordingly, please indicate your acceptance below and return a copy of this document to your Supervisor by 1st April 2014.

If you have any enquiries in relation to this matter, please contact me on 9733 7600.

Yours sincerely

[signed]

Kelly Fraser

HR Manager – Carna Group

I, Brett King hereby acknowledge and agree to the terms and conditions of the above offer.

[signed] 26-3-14

Signature Date

Exhibit A1, tab 2

22 Mr King accepted the offer and signed it on 26 March 2014. In addition to the offer of employment from Carna, there was a further commitment then given by GCM, that if the agreement between GCM and Carna terminated, employees would be re-employed by GCM. The letter given to Mr King by GCM in relation to that commitment was dated 17 March 2014 and was in the following terms:

Dear Brett,

On 23 March 2014 Carna Group Pty Ltd (**Carna**) will commence operations from the Griffin Coal mine site.

Accordingly, The Griffin Coal Mining Company Pty Ltd (**GCM**) advises the following:

(a) in the event the Mining Agreement between GCM and Carna is terminated (**Termination of Agreement**); and

(b) you were an employee who transferred from GCM to Carna as at 23 March 2014; and

(c) you remain an employee of Carna at the time of the Termination of Agreement,

your employment and entitlements will transfer to GCM.

Your sincerely,

[signed]

CHRIS GODFREY

Executive General Manager Industrial and Employee Relations
The Griffin Coal Mining Company Pty Ltd

Exhibit A1, tab 3

23 On acceptance of employment with Carna, Mr King testified that he worked under the same terms and conditions of employment performing the same work and nothing changed. The terms of the 2012 Agreement continued to apply to his employment with Carna.

24 It would appear that the relationship between GCM and Carna ran into some difficulties. The long and short of it is that in December 2014, a major contractual dispute arose between GCM and Carna. The result of this dispute was the termination of the contract between Carna and GCM. Mr King said that as a representative of the AMWU, discussions took place between the union and GCM, which led to most maintenance employees being offered re-employment with GCM. The offer of re-employment by GCM to Mr King was set out in an undated letter to him as follows:

Dear Brett

Transfer of Employment and Acceptance

On 4 December 2014, The Griffin Coal Mining Company Pty Ltd ("Griffin Coal") resumed operations at the Griffin Coal mine sites in Collie from the Carna Group Pty Ltd ("Carna").

At that date:

1. A transfer of business between Carna and Griffin Coal will occur in accordance with section 311 of the Fair Work Act 2009;
2. As a result of that transition, Griffin Coal offers you employment with it effect [sic] from 4 December 2014;
3. Your employment with Griffin Coal will be covered by [The Griffin Coal Mining Company Pty Ltd (Maintenance) Collective Agreement 2012]; and
4. Griffin Coal will recognise your service with Carna for all purposes including all leave and redundancy.

If you wish to accept this offer of employment with Griffin Coal on these terms please indicate your acceptance by signing and dating below and return a copy of this document to your supervisor by the 15th December 2014 after which time this offer will lapse.

If you have any enquiries in relation to this matter, please contact HR on 9780 2477.

Yours sincerely

VINOD KUMAR

Vice President Operations

The Griffin Coal Mining Company Pty Ltd

25 At the time of the discussions between GCM and the AMWU regarding the employment of the maintenance workforce, Mr King said that he was on leave and overseas, until about mid-December 2014. Whilst he was away, Mr King was appraised generally of the situation regarding the transfer of employees back to GCM. He also said that he became aware that the AMWU requested a commitment in writing from GCM that all service by maintenance employees with Carna would be continuous for entitlement purposes with GCM. Prior to this issue being clarified, Mr King said that he received a further letter from GCM of 10 December 2014 in connection with the changes. That letter said:

> Dear Brett
>
> Thank you for accepting our offer of re-employment with Griffin Coal. We appreciate that the last few months of your employment with the contractor have been turbulent and uncertain. We thank you for your support and understanding through that period.
>
> As you are aware, the global coal industry has been experiencing very tough times over the past few years which have only worsened in the past months.
>
> The WA coal industry has not been immune from the global downturn but also faces the additional challenges of long term domestic coal contracts which do not cover the cost of production including significant increases in the overburden strip ratio to access the coal.
>
> These factors are severely impacting on Griffin Coal's operations, which is only recovering two thirds of its mining costs and running at a substantial loss. We have only been able to continue operating due to the financial support of the parent company. Such support is unsustainable if the business is unable to return to profitability in the foreseeable future.
>
> In order to make the business sustainable, we are exploring all options including obtaining and uplifting the domestic coal price, increasing productivity and reducing costs.
>
> We are hopeful, with all the parties working together, we will be able to secure the future of the business and put that uncertainty behind us. This will require commitment and understanding from all parties to invest in the future.
>
> I take this opportunity to wish you and your family a Merry Christmas and Happy New Year 2015.
>
> Yours sincerely,
>
> [signed]
>
> VINOD KUMAR VANGA
>
> **Vice President (Operations)**
> **The Griffin Coal Mining Company Pty Ltd**

Exhibit A1, tab 5

26 I note that this letter appeared to have been received by Mr King prior to his signing and lodging his formal acceptance of GCM's offer on 30 December 2014. I will return to this issue later in these reasons.

27 Following the discussions between the AMWU and GCM about prior service, Mr King said that the company declined to amend the offers of employment however, it provided to employees a letter of clarification. In addition to that, GCM extended the time for the acceptance of offers of employment to the maintenance employees to 23 December 2014. The letter of clarification, which was dated 18 December 2014, was as follows:

> Dear Brett,
>
> The transition of Maintenance staff from their current employer Carna Group Pty Ltd ("Carna") to The Griffin Coal Mining Company Pty Ltd ("Griffin") your members have raised concern in respect of the clause below;
>
> > *4. Griffin Coal will recognise your service with Carna for all purposes including all leave and redundancy.*
>
> Griffin would like to affirm to your members that this clause does recognise the entitlements from the employment service provided with both Griffin and Carna.
>
> The process of transferring all employees is a time consuming task. In assisting the payroll team and also ensuring a speedy transition we would like your members to have their completed forms returned to the Human Resources department by Tuesday 23rd December 2015.
>
> Kind regards
>
> [signed]
>
> Dale Kennett
>
> Human Resources

Exhibit A1, tab 6

28 Mr King said that he was further away from work for some days in late December and returned to work and signed the letter of offer from GCM on 30 December 2014. He handed it to GCM's human resources department. He said nobody raised with him the later date on which he had signed the offer. Mr King continued to work in his position receiving the same benefits and entitlements as he had done prior to the initial transfer of employment to Carna. As an aside, whilst GCM took issue with this later signing date in its notice of answer and contended it had implications for Mr King's contractual argument, the matter was not pressed in the hearing. In any event, I am not persuaded any material consequence flowed from it. GCM accepted Mr King's signed acceptance and he resumed work for GCM without demur. If there was any non-compliance by Mr King in relation to acceptance of the offer, in my view, GCM waived it.

Mr Kumar

29 The background circumstances from GCM's position, leading up to the re-employment by GCM of its maintenance workforce in December 2014, was the subject of evidence from Mr Kumar. Mr Kumar initially commenced employment with the company in November 2013 as its Vice President of Operations. Prior to this, Mr Kumar was employed by Lanco Infratech for some years in its coal mining operations and he has over 30 years' experience in the mining industry, mainly in coal mining.

Mr Kumar outlined the company's operations at its Ewington mine and its maintenance operations at both Muja and Ewington. He testified that the operations are now restricted to the domestic coal supply only. GCM stopped exporting coal in the last quarter of 2014, as a result of rising costs and the sharp decline in international coal prices.

30 Mr Kumar testified that in addition to its maintenance workforce, GCM employs 167 production employees most of whom are members of the Construction, Forestry, Mining and Energy Union and whom are employed under the *Griffin Coal (Production) Collective Agreement 2012*. The Production Agreement reached its nominal expiry date on 31 July 2016.

31 Mr Kumar referred to the GCM and Carna relationship. He said that as at 2013, GCM's mobile equipment was ageing and the company did not have the financial capacity to re-invest and upgrade it. On this basis, GCM made the decision to appoint a contractor to manage its operations and to make the necessary capital investment in the repairing and maintenance of its equipment fleet. Mr Kumar said that consistent with this decision, GCM approached Carna in about late 2013. As a result, Mr Kumar said Carna committed to investing in GCM's equipment fleet and a mining services contract was entered into with Carna on 28 January 2014. Under the contract, GCM would continue as the owner of its Ewington 1 and Ewington 2 mine sites and associated maintenance facilities at Ewington and Muja. GCM would also continue to own all equipment and associated infrastructure. Carna's obligations included providing mining services to GCM, which included operating and maintaining the mining processes consistent with GCM's plans.

32 On 13 February 2014, a staff briefing took place at which GCM management informed the production and maintenance employees of the new arrangements with Carna. A second meeting also took place on 20 February 2014. Mr Kumar said he attended both meetings. Whilst he did not have a clear recollection of the matters discussed at the meetings, Mr Kumar testified that employees were informed about financial restraints and that there was a need for Carna to make an investment in the GCM equipment fleet which was ageing. Carna started operations at the GCM sites on 23 March 2014.

33 The state of the coal mining industry generally and GCM's financial position specifically, was the subject of a considerable amount of evidence from Mr Kumar. As at December 2014, Mr Kumar said that based upon his own knowledge and experience in the industry, there were significant global challenges around that time. A major factor was a significant reduction in coal prices since 2011 and what Mr Kumar referred to at GCM as 'inflexible and steadily increasing production costs'. Mr Kumar referred to the fall in thermal coal spot prices for export, having declined since February 2012 from US$120 per tonne to US$58 per tonne over the 2015 year. Mr Kumar also referred to a general oversupply in the market and the weakening in demand from China. In relation to these macro issues, Mr Kumar annexed to his witness statement a copy of the Resources and Energy Quarterly Report prepared by the Department of Industry, Innovation and Science for the December 2014 quarter.

34 It was Mr Kumar's evidence that the significant fall in the international market price for thermal coal was a major factor in GCM's decision to stop exporting coal from the last quarter of 2014. Mr Kumar testified that combined with GCM's high production costs, the continued export of coal by GCM was untenable.

35 As at the time Lanco acquired GCM in February 2011, Mr Kumar said the company's then production was 4 million tonnes per annum. Of this, it was GCM's intention to export 1 million tonnes through the Kwinana Port. As a consequence of the decision to cease the export of coal, GCM's coal production was limited to its domestic supply arrangements which were approximately 2.85 million tonnes per annum. Whilst the company had significant plans for export and projections were positive when the 2012 Agreement was made, the situation had quite dramatically changed over the ensuing period.

36 Mr Kumar also referred to the financial position of GCM by December 2014. He said the company was losing money on every tonne of coal produced and sold. In the year ending 31 December 2014, GCM's losses were $80.7 million. Mr Kumar testified that the activities of GCM were only able to continue with the ongoing financial support from its parent, Lanco Infratech. Mr Kumar's evidence was that the position was no better in the 2015 calendar year, with GCM's losses to 31 December of that year at approximately $37 million. He referred to and annexed to his witness statement the company's unaudited financial statements from March 2011 to 31 December 2015 and the company's audited annual report for the year ending 31 March 2015, in these respects.

37 As to the degree of knowledge of these matters, Mr Kumar testified that the state of the GCM business and the substantial decline in international prices for coal was publicised broadly. He said this was well known amongst the workforce and in and about the town of Collie itself. Mr Kumar referred to newspaper articles in the local 'Collie Mail' in particular, one published on 9 January 2015, with the heading 'Lanco tells Indian media Griffin is 'nearly unviable''. A bundle of news articles over the period 9 July 2013 to 9 January 2015, including the article just referred to, were tendered by GCM as exhibit R2. They touched on some of the matters referred to in Mr Kumar's evidence and also the circumstances of the termination of the mine services contract between Carna and GCM.

38 In light of these various matters, Mr Kumar testified that throughout his involvement with the company, a focus has always been to attempt to improve its operations and its production costs, one component of that being to reduce labour costs. He said that the enterprise agreements covering the company's operations imposed a high cost base on the business and contained many inefficient and inflexible provisions. Whilst the company was attempting to address these issues, Mr Kumar said that neither the AMWU nor the CFMEU were prepared to renegotiate the agreements to address all of GCM's concerns. Mr Kumar expressed the view that the enterprise agreements also had an impact on Carna's operations and its capacity to operate under the mining services contract.

39 By about July 2014, Mr Kumar said that it had become clear to GCM that Carna was unable to make the necessary investments in equipment to properly conduct GCM's mining operations and difficulties emerged in GCM's relationship with Carna. Mr Kumar said there were a number of stoppages at the site.

40 Matters came to a head on 3 December 2014. Mr Kumar said that Carna purported to terminate the mining services contract with GCM. On the same day, GCM wrote to Carna disputing its contentions, maintaining that Carna had repudiated the mining services agreement and accepted Carna's repudiation thereby terminating the contract on that day. Mr Kumar said that

he arrived at the Ewington site on 3 December 2014 in the morning and discovered that Carna had left the site the night before and taken all of its equipment with it. As a result, mining operations at GCM had stopped. Importantly, Mr Kumar said that GCM's priority at that moment was to ensure that it obtained a workforce in order to recommence operations by midnight that same day.

41 There was a flurry of activity. Mr Kumar referred to a meeting in the early evening of 3 December 2014 at the CFMEU union office in Collie to provide an update as to what was going to occur. The upshot at that time was that by 4 December 2014, some 223 production and 87 maintenance employees recommenced employment with GCM. Mr Kumar said that production was uninterrupted and employees had returned to site even before formal offers of employment had been issued and accepted. In relation to the contract letters, Mr Kumar said that he took some advice and provided the form of the letter to be sent to both maintenance and production employees to GCM's human resources department, to be sent out. Mr Kumar confirmed that the letter received by Mr King was in standard form and was sent to all maintenance employees. Furthermore, Mr Kumar referred to the letter of 10 December 2014 sent to all of the company's employees including Mr King, a copy of which is set out above. Mr Kumar's evidence was that the content of this letter was not new to GCM employees and was common knowledge.

42 Reference was also made by Mr Kumar to the issue raised by the AMWU, the subject of Mr King's testimony, that being clarification that GCM would recognise employees' prior service with Carna for all purposes. Mr Kumar approved the company's response of 18 December 2014, which confirmed that this would be the case. In relation to this, Mr Kumar said that he was aware that under the *FW Act* there was no legal obligation on GCM to recognise employees' prior service with Carna, as Carna was not an associated entity of GCM. However, "Griffin wanted a smooth transition. Even though Griffin was in financial trouble it wanted to protect the employees' entitlements by honouring them in good faith".

Contentions of the parties

43 In their written outlines of submissions, senior counsel for both Mr King and GCM made a number of key points. Mr King contended that in applying the relevant principles for the construction of contracts, the subjective intentions, beliefs or understandings about its terms are not relevant to the Commission's determination. Furthermore, any actions, thoughts or strategies of GCM or its senior management, which were not directly communicated to Mr King or determined in his absence, are not relevant and may not be taken into account.

44 The broad submission put by Mr King was that award, collective agreement and employer policy terms may be incorporated into written contracts of employment by express reference. In this respect, Mr King relied upon observations by the Full Court of the Federal Court of Australia in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403 where at pars 34 – 35, the Court observed:

> 34 One point that is clear is that whether or not a policy will be incorporated into a contract of employment will depend upon the parties' intentions as objectively ascertained: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (at [40]-[41]).
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> 35 In approaching the task of ascertaining the parties' intention, the starting point will be the language of the contract. The language adopted is to be viewed in context, not in abstract isolation. Further, regard must be had to the purpose and object of the transaction.

45 In this connection, Mr King submitted that the terms of cl 3 of the Contract letter was plain. To the extent that the 2012 Agreement provides for mutually enforceable promises as between Mr King and GCM, including matters such as pay rates, working hours and shift work provisions, they were terms of the Contract. It was emphasised in Mr King's submissions, that cl 3 of the Contract does not just mention the 2012 Agreement. Rather, taken in its context, the expression 'covered by' as used in the letter of offer, must mean that the terms of the 2012 Agreement 'applied to and were included in' the Contract. The clause is plain in meaning and unambiguous. Whilst context is important, it cannot be used to alter the meaning of the words used by the parties to the Contract.

46 Mr King contended that context in this case goes to the purpose and object of the transaction. There were two elements to it. The first was the evidence that the working relationship between GCM and Carna broke down to the extent that Carna left GCM's site without notice. As a result, GCM had no employees to mine and process its coal reserves or to operate and maintain its equipment. GCM needed to obtain a workforce with urgency. It was the company's "number one priority". This priority was separate to the financial issues in the past and the offer had to be seen in this light. GCM achieved this purpose by offering an employment contract on the terms as specified, which expressly included the terms of the 2012 Agreement.

47 The second point was employees of GCM, including Mr King, were placed in the position whereby an inference would be open that they would be concerned to secure their terms and conditions of employment, in a time of considerable uncertainty. This was particularly so because the company had previously referred to the possible termination of the 2012 Agreement after its expiry and a return to the award, with the attendant loss of entitlements. On this basis, given both the parties had this in their contemplation, the further submission of Mr King was that taken in its context, having regard to these two key factors, it would be objectively reasonable that the parties to the Contract intended the promissory obligations contained in the 2012 Agreement to be contractually binding.

48 Allied to this point was the submission that cases such as *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 and *Australian Workers' Union v BHP Iron Ore Pty Ltd* [2001] FCA 3 were distinguishable. This was on the footing that the awards there under consideration would be very difficult to cancel by the unilateral action of one party. On the other hand, as the submission went, in the case of this matter, it would be open to GCM to apply to have the 2012 Agreement terminated under the *FW Act*, as was mentioned as a possibility. This later in fact occurred.

49 Furthermore, Mr King contended that the words 'covered by' were not inserted into the Contract for the purpose of the meaning in s 53 of the *FW Act*. There were three submissions in this respect. Firstly, the context was important and that was this was a contract between Mr King and GCM. Secondly, such a reference would be unnecessary, as the coverage of the 2012

Agreement is set out in the document itself. Finally, construed correctly, and in context, cl 3 of the Contract set out Mr King's terms and conditions of employment. A statement that an agreement 'covers' an employee in the same sense as s 53 of the *FW Act*, does not confer any benefits or entitlements to the agreement. For that to occur, the agreement also needs to 'apply to the person': s 52(1) *FW Act*; *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* [2016] FCAFC 161 per White J at par 110.

50 Accordingly, as the submission went, to give meaning to the words 'covered by' consistent with s 53 of the *FW Act*, would not only be unnecessary, but an inapt way to describe the application of the 2012 Agreement. To secure that purpose, that is to prescribe the terms and conditions of the 2012 Agreement as conferring benefits on Mr King in the context of the letter, would be achieved by incorporating its terms by reference. An extension of his argument was that there was no need for Mr King to agree to the terms of the 2012 Agreement, as it would cover his employment anyway. Thus the only reason to include it in the offer would be to incorporate its terms.

51 On the other hand, GCM submitted that giving the language in the Contract its ordinary and natural meaning, and assuming there was no ambiguity in its terms, leads to the conclusion that it would be inconceivable to conclude that there was an intention to incorporate the 2012 Agreement. Having regard to evidence of surrounding circumstances, and construing the contract in accordance with business common sense, it was clear on the evidence that the global coal mining industry was experiencing a severe and worsening situation in 2014 and this materially impacted on GCM. Furthermore, GCM was not covering its costs of production and was losing millions of dollars each quarter. The company contended that these surrounding circumstances included GCM's attempts to make the business more financially sustainable and hitherto, it had been relying on its parent company to continue to operate.

52 Another factor GCM said was also known to both parties, as a part of the surrounding circumstances as at the time of the offer to Mr King, was the abrupt cessation of work by Carna and the corresponding need for GCM to urgently employ a workforce, in order that its operations not be interrupted. This was of course, the same point made by Mr King, but for different purposes. A further relevant circumstance, as contended by GCM, and which can be taken into account in construing the contract according to its case, was that the letter provided to Mr King was in the same terms as that provided to other employees of GCM.

53 As to the ordinary and natural meaning of the words 'covered by', GCM contended that when read naturally, these words are not words of incorporation. The submission of GCM was that rather than incorporate, the words were used to advise Mr King that the 2012 Agreement would have application to his employment.

54 Furthermore, to the extent that Mr King sought to refer to and draw some support for his case from the Carna letter, also set out above, that was misguided. The omission of words such as 'will continue to be governed by' and 'as amended, replaced or terminated from time to time' when referring to the 2012 Agreement, if any evidentiary regard can be had to them, would be unsafe to support a conclusion of express incorporation. This was so because GCM contended that it is somewhat speculative to offer an explanation as to the difference in wording. In any event, the submission was that Mr King's Contract letter was, on the evidence, adapted from the Carna letter, following Mr Kumar taking legal advice. The Carna letter was therefore a template for the contract.

55 As to the words 'on these terms' the submission was that they should not be construed as only identifying contractually enforceable terms, as properly construed, their reference also includes the provisions of the 2012 Agreement which operate by statute. In any event, in order to negative an argument that such words would be superfluous if nothing in the letter to Mr King had contractual force, GCM pointed to par 4 by which GCM would recognise prior service with Carna for all purposes, despite such an obligation not being imposed by the *FW Act*.

56 GCM further contended that despite the plain and ordinary meaning of the language of the contract, if regard is had to circumstances in existence and known by both parties prior to the entering into the Contract, the conclusion that the 2012 Agreement was not intended to be contractually binding, is compelling. In this respect, GCM submitted that it would be inconceivable that the company would intend, having regard to circumstances in existence and known by both parties, that being the parlous state of the coal mining industry and GCM's severe financial difficulties, that there would be an intention to 'lock in' the terms of existing industrial instruments into contracts of employment applying to all of GCM's production and maintenance employees.

57 Finally, having regard to the circumstances of the cessation of the Carna contract, GCM contended that what it did, by moving quickly to retain a workforce, amounted to a 'quick fix'. That is, Mr King's employment was secured. The submission thus was that these factors are able to be taken into account by the Commission as a part of the objects and purposes of the transaction in question. Had it been GCM's intention to, in the circumstances existing at the time, incorporate expressly the terms of the 2012 Agreement, then very clear words to that effect would have been used.

Consideration

58 Coming to a conclusion in this matter, in the context of all of the evidence available to be taken into account, has not been straightforward. In adopting an objective approach to interpretation, the ascertainment of the views of a reasonable observer, in the position of the parties at the material time, from their mutual dealings, can be elusive. In *QBE Insurance Australia Ltd v Vasic* [2010] NSWCA 166, when discussing the scope of permissible material to which regard may be had in the interpretation of an agreement, Allsop P (Giles and MacFarlan JJA agreeing) said at pars 26-28:

> 26 The notion of what is known to the parties does not require the facts to be present to the mind and consciousness of the contracting parties at the time of contracting. But the whole construct is one that places the reasonable person, whose understanding is critical, in the mutual position that the parties were in. This involves attributing to the reasonable person what the parties knew in the context of their mutual dealings. I do not take the analysis of Macfarlan JA in *The Movie Network Channel v Optus* as stating a principle otherwise than in conformity with the essential elements of the binding High Court principles to which I made reference in *Franklins v Metcash* at [14]-

[24] and to which Macfarlan JA himself referred in *The Movie Network Channel v Optus*. The relevant circumstances in that process are those with which the reasonable person should be attributed in order that **one** objectively correct meaning can be ascribed to the text.

27 Were it not for the misconceptions (if I may say so, without intending disrespect) in the submissions on behalf of QBE and MMI, I would not find it necessary to say any more. In the circumstances, however, the matter should be put beyond doubt by reference to binding High Court authority.

28 It is appropriate, first, to set out the passages from Lord Wilberforce in *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989 at 996-997 (relevant parts of which were set out by Macfarlan JA in *The Movie Network Channel v Optus* at [100]). The relevant passages that have been deeply influential in Australia are as follows:

> "It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. It is in this sense and not in the sense of constructive notice or of estopping fact that judges are found using words like 'knew or must be taken to have known' (see, for example, the well-known judgment of Brett LJ in *Lewis v Great Western Railway Co* (1877) 3 QBD 195.
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> [His Lordship then referred to *Hvalfangerselskapet Polaris Aktieselskap Ltd v Unilever Ltd* (1933) 39 Com Cas 1 and *Charrington & Co Ltd v Wooder* [1914] AC 71 and summarised the position as follows.]
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> … what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicitly to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed."

59 Furthermore, his Honour continued at par 35 as follows:

> 35 It is clear from the binding Australian authorities that the scope of the surrounding circumstances, knowledge of which is to be attributed to a reasonable person in the situation of the contracting parties (not one or some only of them), is to be understood by reference to what the parties knew in the context of their mutual dealings. As Lord Wilberforce said, this does not involve a species of constructive notice. Constructive notice implies a degree of enquiry by reference to some external standard. Just because something is available to be found does not make it relevant, if the parties did not know of it. The reasonable person may be taken to know of things that go beyond those that the parties thought to be important or those to which there was actual subjective advertence by the parties. Further, the circumstances may include such things as the legal context to the transaction, especially if a market is involved. Nevertheless, the scope of the relevant material is necessarily bounded by the objective task of the reasonable person giving meaning to the words used by the parties in the circumstances in which the contract came to be written, by reference to what the parties knew in the sense stated by Lord Wilberforce in Reardon Smith, by Mason J in Codelfa and by the High Court in the various cases since Codelfa. This is how I read the reasons of Macfarlan JA in The Movie Network Channel v Optus, with which I agree.

60 There have been a number of recent employment cases, both at first instance and on appeal, that have dealt with the question of whether an industrial instrument of some kind, such as an award, agreement or a policy document, is expressly incorporated into a contract of employment. Whilst each case will turn on its own facts and circumstances, in *Soliman v University of Technology* Sydney [2008] FCA 1512, Jagot J commented at pars 64-65 as follows:

> 64 *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193; [2000] FCA 889 (North and Mansfield JJ) confirmed the principles applying to incorporation of documents by reference into employment contracts (adopting the principles identified by Weinberg J in *McCormick v Riverwood International (Australia) Pty Ltd* (1999) 167 ALR 689; [1999] FCA 1640 at [70] to [78]). First, it must be assumed that the contract of employment was made in good faith with the object of at least potential mutual benefit by due performance. Secondly, the meaning of the contract is to be determined objectively, the essential question being what reasonable business people in the position of the parties would have taken the clause to mean (citing *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VR 834 at 840). Thirdly, parties may be bound by the meaning to be reasonably inferred in the circumstances even if that meaning is not advanced by either party. Fourthly, the meaning of contractual terms is ascertained by considering them in context (including the "objective background of the transaction…its factual matrix, genesis and aim, and the common assumption of the parties" (citing *Chesire & Fifoot's Law of Contract*, 7th Aust ed, 1997). Fifthly, the terms of the contract are those the parties intended to incorporate including express terms, inferred terms based on actual intention, and implied terms based on presumed intention. Sixthly, "it is not enough that it is reasonable to imply a term; it must be necessary to do so to give business efficacy to the contract" (citing *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346). Seventhly, "evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning" (citing *Codelfa* at 352).

65 In *Goldman Sachs JBWere Services Pty Ltd v Nikolich* (2007) 163 FCR 62; [2007] FCAFC 120 at [287] Jessup J described the approach in Riverwood as one where "all the facts and circumstances surrounding the making of the contract in question" should be considered in ascertaining whether any terms should be inferred based on intention. Black CJ, also in *Goldman Sachs* at [23], observed that:

> The principles to be applied in determining whether any, and if so what, parts of WWU were terms of the contract of employment are not in doubt. It is well established that if a reasonable person in the position of a promisee would conclude that a promisor intended to be contractually bound by a particular statement, then the promisor will be so bound. This objective theory of contract has been repeatedly affirmed as representing Australian law by the High Court. Thus, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, 179, the Court said:
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> > It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

61 Relevant to the present case also, are observations of mine in *Thomas George Hartwig v Interstate Enterprises Pty Ltd t/as ATS Recruitment Services* [2016] WAIRC 00741; (2016) 96 WAIG 1359 when I said at par 18 as follows:

> 18 It is trite to observe that awards and industrial agreements are independent from contracts of employment, as was made clear in *Byrne v Australian Airlines Limited*; *Frew v Australian Airlines Limited* [1995] HCA 24; (1995) 185 CLR 410. Incorporation of the terms of industrial instruments into contracts of employment will not be lightly inferred. Notably, in *Byrne*, the issue was whether relevant terms of an award that bound the parties was implied or imported into the contract of employment. Even in the case where an employer is a party to a relevant award or industrial agreement, which is not the case here, as I observed in *Tracey Louise Fergusson v The Salvation Army (Western Australia) Property Trust as the trustee for the Salvation Army (WA) Social Work trading as Salvos Stores* [2014] WAIRC 01042; (2014) 95 WAIG 348 at [16]:
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> > 16 ... The mere mention of an award, or a provision of one, will not provide a basis to conclusively determine that the award is contractually binding. As the learned authors in Sappideen C, O'Grady P, Riley J and Warburton G, *Macken's Law of Employment* (7th ed, 2011) 266 say:
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> > > Nevertheless, mere mention of the existence of an award or enterprise agreement which binds the parties will not conclusively determine that the award or agreement clauses are incorporated into and binding in contract. It may be that on proper construction of the contract document, the reference to the award or agreement manifests nothing more than an acknowledgment by the parties of the statutory instruments which will also govern their relationship, according to the terms of the statute. Mention of industrial instruments in a contract document may serve to identify 'relevant information capable of affecting the parties contractual relations rather than documents intended to be binding and enforceable as part of their contractual relations'.
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> > 17 Thus, the reference to industrial instruments in contracts of employment in terms such as "are prescribed by"; "are as prescribed"; "subject to and governed by", have been held to be insufficient to constitute words of incorporation: *Gramotnev v Queensland University of Technology* [2013] QSC 158; *Australian Workers' Union v BHP Iron-Ore Pty Ltd* [2001] FCA 3; (2001) 102 IR 410; *Soliman v University of Technology, Sydney* [2008] FCA 1512; (2008) 176 IR 183.

62 The first issue I consider is the terms of the Contract letter, read in its ordinary and natural sense. There are four operative parts. The initial paragraph of the letter records the resumption of operations by GCM from Carna from 4 December 2014. This paragraph is not in any sense promissory and simply notes what occurred as a matter of fact.

63 The first numbered paragraph notes that on the resumption of operations by GCM, a transmission of business for the purposes of the *FW Act* will take place. In my view, this is not a promissory obligation. It simply notes the statutory impact under the *FW Act*, of the resumption of operations by GCM.

64 The second numbered paragraph is plainly contractual. By its terms, GCM made an offer to Mr King of employment, with an effective commencement date of 4 December 2014. This offer was capable of acceptance and was accepted by Mr King and a contract of employment was formed. Paragraph 4 stated that GCM would recognise Mr King's prior service with Carna which was also promissory in nature. There was no automatic transfer of such service for entitlement purposes under the *FW Act*, because Carna and GCM were not related entities. Although it appeared that there was some dispute about the terms of this paragraph, this promise appeared to be consistent with GCM's prior undertaking, referred to in its letter of 17 March 2014, set out above. However, at that time, Mr King's contract of employment was with Carna and not GCM. GCM's commitment did not have contractual effect at that time. It was an undertaking as to what would occur in the future.

65 Returning then to par 3, the controversial provision in this case. The word "cover" in the sense of a verb, as used in the letter, may have a number of meanings. The *Shorter Oxford Dictionary* defines the word relevantly to mean "1. to overlay, overspread with something so as to hide or protect. 2. to put a covering on. 3. to clothe…to wrap, wrap up". Similarly, as referred to by GCM in its submissions, the *Oxford Dictionaries Online* refers to one version of the word "cover" as being "3.3 (of a rule or law) applied to (a person or situation):" The Macquarie Dictionary definition includes "to put something over or upon as for protection or concealment…to be or serve as a covering for; extend over; occupy the surface of…"

66 It may be said that taken in their ordinary and natural sense, the use of the words "will be covered by" meant that the 2012 Agreement would apply to or extend to Mr King's employment on his acceptance of the GCM offer. As a statement of fact and of law, this was true. The 2012 Agreement, by the operation of the terms of the *FW Act*, did so cover and apply to GCM and Mr King. This was because of the operation of the transfer of business provision to which the letter initially referred. That did not change as a consequence of the resumption of operations by GCM.

67 Furthermore, the ordinary and natural meaning of the words may also be consistent with the terms of the 2012 Agreement "extending over, clothing or wrapping around" the contract of employment formed by the offer and acceptance. This is because as a trite principle of law, an award or industrial agreement, although operating by statutory force, can only operate on and may modify a contract of employment, once the contract comes into existence.

68 It could be said therefore, that the language of the Contract letter, read in its ordinary and natural sense, without more, is incapable of sustaining the conclusion that the 2012 Agreement was expressly incorporated into the Contract. The language used does not contain clear words such as "this Agreement will be incorporated into and will form part of your contract of employment", or words to a similar effect (cf *Moama Bowling Club Limited v Armstrong (No1)* (1995) 64 IR 238). Similarly, it does not put this proposition in the negative sense either. Taken in isolation, it could be said that the words are used for the purposes of the identification of the industrial instrument which would continue to apply to Mr King's employment, despite the transition back to employment by GCM.

69 Regardless of these observations however, as consideration needs to be given to the context, I will turn to this issue now. For the purpose of these proceedings, I proceed on the basis that the terms of par 3 of the Contract are ambiguous or are capable of more than one meaning. It is therefore necessary to consider objectively, in accordance with the authorities referred to earlier, what a reasonable person, in the position of the parties, from their mutual dealings, would have understood the Contract to have meant. This requires an analysis on the evidence, of the state of common knowledge of both Mr King and GCM leading up to and as at the time of the making of the Contract. It also requires some consideration of what a reasonable bystander, armed with the knowledge of the parties, may objectively infer from their conduct, even though they may not have had particular matters at the forefront of their minds at the material time.

70 On the evidence, it must be accepted that the situation as it unfolded on 3 and 4 December 2014 was quite exceptional. As a result of a major contractual dispute between GCM and Carna, Carna left GCM's sites without notice. Carna took its equipment with it. GCM needed to secure a production and maintenance workforce quickly in order to continue its operations and to meet its contractual obligations to its customers. Furthermore, it was a common fact that on 4 December 2014 production and maintenance employees recommenced employment with GCM and that they did so prior to signing and returning the letters of offer of re-employment by GCM.

71 Thus an object and purpose of the transaction, given these unusual circumstances, was to promptly secure a workforce, in order that production would continue uninterrupted. A further obvious purpose, was that the employees, formerly of Carna, would have ongoing security of employment with GCM. Not all employees returned to GCM, but most did. Some remained with Carna.

72 As to these events, I am satisfied that a reasonable person in the position of the parties understood that Carna ceased its operations on site on the night of 3 December 2014 without notice to GCM. Furthermore, all of Carna's mining equipment was removed from site and accordingly to continue with its operations GCM needed to urgently secure a production and maintenance workforce in order to meet its contractual obligations to its clients.

73 Mr King was taken in his evidence quite extensively to his knowledge of the state of the coal mining industry and GCM's situation in particular. Annexure BAK5 to Mr King's witness statement was the letter of 10 December 2014 from Mr Kumar, set out above. The letter refers to the difficulties experienced in the coal mining industry globally and the effect on the industry in Western Australia. The letter also specifically refers to GCM's operations and its poor financial position. Reference was made to the need to explore ways of increasing productivity and reducing cost, amongst other things. Mr King confirmed that he received this letter prior to accepting the offer of re-employment by GCM. Importantly, he further testified that "nothing in the letter was new to him".

74 Additionally, Mr King was taken through exhibit R2, which included the news articles published over the period July 2013 through to January 2015. These various articles, a number of which were from the local newspaper "The Collie Mail", concerned the poor financial state of GCM's operations; reductions in staff; ongoing financial losses, and disputation and disruption to its operations following the contracting out to Carna. This included various stoppages of work. I do not propose to traverse the material article by article. It is fair to say however, that Mr King was aware of the majority of these reports and read them. Furthermore, his evidence was that there was considerable "chit chat" on the shop floor about the circumstances facing the company and the various events to which the press articles refer.

75 This material of course, refers to events leading up to and the cessation of operations by Carna immediately prior to Mr King's re-engagement by GCM. Much of the evidence adduced through Mr King, including the letter of 10 December 2014, and the material reflected in the news reports, was also referred to in the evidence of Mr Kumar. There was also evidence that both parties were aware of the difficult relationship between GCM and Carna and that there were disputes between them. This resulted in stoppages of work on site on at least a couple of occasions.

76 The thrust of Mr King's testimony was confirmed by Mr Kumar when commenting on the 10 December 2014 letter to all employees. Mr Kumar also said that its content was not new to employees. The workforce followed industry news and regular meetings took place with both production and maintenance staff, including union delegates, about the state of the global coal industry and the company's options to keep the business sustainable. Mr King said he did attend meetings between company representatives and employees where the financial position of the company was discussed. That being so, it is open to reach the view that a reasonable bystander, from all of the surrounding circumstances in existence as at December 2014, would be taken to have accepted the content of the letter from GCM of 10 December 2014, as not being news to them either.

77 Consequently, the parties would have been aware that in the two or so years leading up to the re-employment of Mr King under the Contract, GCM faced increasingly difficult financial circumstances. The global coal mining industry was in a poor state. World prices for coal had fallen by 50%. Whilst it might be said that the news articles and the letter of 10 December 2014 were not material produced by Mr King himself, it was not established, nor put to GCM, that the content of this material was in any material sense, misleading or false. On the contrary, its general tenor was confirmed on the evidence.

78 Furthermore, I am satisfied that it was known by the parties that GCM's export plans, as a part of its business improvement strategy, were no longer viable from 2014. I am also satisfied on the evidence that a reasonable person in the position of the parties would be aware, from their mutual dealings, that GCM was losing millions of dollars, was not able to cover its production costs and was reliant on its parent company, Lanco Infratech, for its continued survival. I am also satisfied on the evidence that a reasonable person, in the position of the parties, would be aware of GCM's oft stated need to improve productivity and lower the costs of its mining operations.

79 There is a further matter that relates to this that I comment on now. As at the time of the original contracting out, as I have mentioned above, an undertaking was given by GCM to the workforce, including Mr King, by letter of 17 March 2014, to the effect that if the GCM/Carna agreement terminated, then employees' employment and entitlements would transfer back to GCM. This was plainly a letter of comfort to the GCM workforce. The possibility of the resumption of operations by GCM at some future point, is an inference clearly open to a bystander from the terms of this letter, with knowledge of the subsequent events known to both parties. Otherwise what would be the purpose of it?

80 Taking this fact, with the common knowledge between the parties of the turbulent period of Carna's time onsite, as the months passed after March 2014 and leading to December 2014, it would be objectively reasonable to conclude that at some point in the future, GCM may be required to re-engage its work force. Thus, whilst the specific circumstances of the cessation of work by Carna on 3 December 2014 were not then notified to or anticipated by GCM it seems, objectively considered, it was a possible outcome in the future not to be discounted in my view. Also, this letter known to both parties, can provide a basis, again objectively, for a lessening of any uncertainty surrounding the transfer back to GCM. GCM had already given an undertaking to re-employ Mr King and to recognise his prior service and entitlements.

81 Taking a step back to earlier events, I am also satisfied on the evidence that a reasonable person in the position of the parties would have been aware of the circumstances of the outsourcing of GCM's operations to Carna in late January 2014 and the offers of employment by Carna to GCM employees, including Mr King, of 20 February 2014. On both Mr King and Mr Kumar's evidence, I am satisfied a reasonable person would be aware that there was a need for GCM to bring in an operator who could refurbish GCM's ageing fleet of mining equipment by investing in GCM's operations. This was the evidence in common from both Mr King and GCM.

82 Whilst there were also submissions made by Mr King about the terms of the Carna letter set out above, and how it differed from the Contract, I have reservations about whether reference to it can be made in the context of these proceedings. The contract of employment the subject of the Carna letter, was between Carna and Mr King. It did not involve GCM. Carna and GCM are not related entities. Mr Kumar's evidence was that he did not know who produced the Carna contract letter and did not recall seeing it before it was given to employees. He testified it was "dealt with internally by Carna without any consultation with Griffin." Mr King did not give any evidence about the Carna letter of offer other than he received and signed it. In my view, in these circumstances, it would be unsafe to draw any specific conclusions, by way of a comparison between the two offers.

83 In the alternative, if I am incorrect and regard can be had to the Carna letter, both it and the Contract letter were drawn in very similar terms. The operative pars 1 to 4 of both letters are virtually identical, save for the change of company name, the use of "governed" instead of "covered" and the removal of the words "continue" and "as amended, replaced or terminated from time to time" in par 3. Furthermore, it would be open to a reasonable person, in the position of the parties, having some knowledge of the industrial relations system, to understand that in ordinary circumstances, the 2012 Agreement, as a single enterprise agreement, would not apply to Carna. It was a GCM agreement. It only had application in the circumstances of the outsourcing of GCM's operations, by the operation of s 311 of the *FW Act*.

84 It is in this context, that the use of the words "will continue to be governed by", with reference to the 2012 Agreement in Carna's letter, made sense. Bearing in mind that the particular factual matters do not necessarily need to be consciously in the forefront of the minds of one party or both at the time of contracting, to be part of the objective background and context, in my view it is open to conclude that a reasonable person, considering the material objectively, in the context of the background facts then known, leading up to the offer of re-employment by GCM to Mr King, would conclude that the Contract letter was a modification of the earlier letter offering Mr King employment with Carna.

85 As to the deleted words, in particular the words "as amended, replaced or terminated from time to time", as was contended by GCM, it is difficult to draw any firm conclusions from the deletion of forms of words from one document that may have been used in the drafting of a later document, in the absence of clear evidence: *Mopani Copper Mines Plc v Millenium Underwriting Ltd* [2008] EWHC 1331. This is particularly so where the two documents in question are not drawn by the same parties and for the same transaction. This is opposed to the case for example, of prior agreements expressly referred to by parties in a later agreement, that may be referred to as part of the background circumstances, as an aid to construction: *Hancock Prospecting* per McLure P at par 81.

86 It was understood by both parties, that the 2012 Agreement made under the *FW Act*, would continue to apply to and cover Mr King's employment on his re-engagement by GCM after the cessation of operations by Carna. Mr King said that he took advice from the AMWU Perth office about this. As to the broad issue of the presumed knowledge of the statutory effects, whilst in *Gramotnev v Queensland University of Technology* [2015] QCA 127, a decision of the Queensland Court of Appeal, Jackson J (McMurdo P and Holmes JA agreeing) took the view that the statutory effect of an enterprise agreement is not a matter that can or should be taken into account in determining what a reasonable bystander would conclude a contract to mean,

the present matter is distinguishable on its facts. In that case a lecturer Mr Gramotnev, contended that relevant terms of the University's enterprise agreements, along with other documents including policies, were express terms of his contract of employment.

87 However, the background circumstances of the present case are quite different to those in *Gramotnev*. Also, the relevant test is what a reasonable person in the position of the particular parties, from their mutual dealings, would be taken to understand what a contract, or part of it, means. In this case, it is notorious that the operations of GCM have a very long history of collective industrial regulation, in both the State and federal jurisdictions. Mr King had been extensively involved in negotiations for enterprise agreements over many years and had a good understanding of the bargaining process. His evidence was also that he knew that the 2012 Agreement would continue to apply to him under the *FW Act*, when he transferred back to GCM from Carna. He was also aware that being made under the *FW Act*, it was not open to GCM to pay less than the rates of pay provided in the 2012 Agreement.

88 Additionally, the evidence was that prior to December 2014, Mr Kumar had made himself aware of the industrial relations system in operation in Australia and specifically, that enterprise agreements operated outside of contracts of employment and if terminated, the relevant award would then apply. Mr Kumar was also aware that on the resumption of operations by GCM, the enterprise agreements would continue to apply to the GCM workforce. The conclusion that some regard can be had to the "statutory effect" issue, on the facts of this particular case, is consistent with the outcomes reached in both *BHP* and in *Burgess v Mount Thorley Operations Pty Ltd* (2003) 132 IR 400.

89 Returning to the terms of the Contract letter, I am not persuaded that the use of the words "on these terms" in the penultimate para of the Contract, alter the view expressed above, as to the statutory effect. Given my earlier outline of other parts of the Contract, "these terms" are capable of being construed as a reference to the operative parts of the letter containing promises by GCM. Firstly, the offer of employment took effect from a date earlier than its acceptance in Mr King's case and despite him not recommencing in employment until 15 December 2014. Secondly, par 4 contemplated, consistent with the prior undertaking, that despite no statutory obligation to do so, GCM would recognise all service with Carna as service with GCM. In my view, the words "on these terms", taken in context, record what is set out in the preceding pars, and include the reference to the 2012 Agreement, that would operate in accordance with the *FW Act* in any event.

90 In relation to the argument of Mr King that both *Byrne* and *BHP* are distinguishable, because both dealt with awards more difficult to cancel, it is not the case that the provisions of the *FW Act* are necessarily straightforward in relation to termination of enterprise agreements either. An application must be made to the FWC and the requirements of s 266 of the *FW Act* must be met. In this case, it is a matter of record that GCM made such an application and it was defended by the AMWU with some vigour. The decision of the FWC terminating the 2012 Agreement went on appeal to the Full Bench of the FWC.

91 The terms of the *FW Act* in this respect, stand in contrast to this Commission's jurisdiction under the *IR Act*. In this jurisdiction by way of comparison, a party to an industrial agreement can simply retire from it, after its expiry, by the giving of 30 days' notice. This step is not open to appeal or review. In these circumstances, I do not consider this contention adds great strength to the incorporation argument. I should also add that I refer to these matters only in the context of Mr King's submission in relation to the *Byrne* and *BHP* cases and not as an aid to construction, given that the termination of the 2012 Agreement by the FWC was an event subsequent to the making of the Contract.

Conclusion

92 I have carefully considered all of the evidence in relation to the background circumstances and context, and the purposes and object of the entry into the Contract in December 2014. Having regard to the language used in the Contract, objectively, as to what a reasonable person in the position of the parties would have considered the Contract to mean, despite Mr King's attempt to persuade me to the contrary, I cannot come to the conclusion that the terms of the 2012 Agreement were intended to be incorporated into the Contract and to have contractual effect. In my view, the language used by the parties and the use of the words "covered by" was, considered in context, to advise and inform that on the resumption of work, employees such as Mr King would continue to receive the entitlements set out in the 2012 Agreement. Nothing further was necessary to be specified as this was the effect of the *FW Act*, a fact known to the parties. The 2012 Agreement had applied to and covered Mr King's employment with GCM from its making, during the time of the Carna contract, and continued to do so on the resumption of operations by GCM.

93 Despite the obvious need for GCM to secure its workforce to resume operations and to continue to supply its customers, it was not necessary to incorporate the 2012 Agreement to achieve this purpose. An offer and acceptance of employment was all that was needed. In my view, considered in context, that is what the Contract letter was intended to, and did achieve.

94 By reason of the prior letter of comfort, which required some clarification, Mr King was to carry over all of his entitlements back to GCM. This was known. Employees continued to work in their jobs. Mr King continued in his position on the GCM site, which he has been in since about 1989, without change, when he returned from leave. The only real change was the identity of his employer.

95 In addition to all of the foregoing, I do not consider a reasonable bystander would consider that it was intended that the terms of the 2012 Agreement be secured contractually, unable to be varied without the agreement of both parties, possibly for years ahead, having regard to the mutual knowledge of the situation facing the coal mining industry generally and GCM's economic position specifically, as at December 2014. This is particularly so where it was known to both parties from their dealings, and thus objectively ascertainable, that the same form of offer was made to all of the maintenance workforce of the company. On Mr King's argument, this would necessarily mean that the terms of the 2012 Agreement would be taken to bind contractually both GCM and its entire maintenance workforce. To reach that conclusion, would be a bridge too far, both in Mr King's case and more generally, in my opinion. Furthermore, any possible inference available as to the prospect of termination of the 2012 Agreement at some point in the future would, in my view, be more than outweighed by the other objectively ascertainable factual context to which I have earlier referred.

96 Given that absent the incorporation of the 2012 Agreement into Mr King's contract of employment, there can be no foundation for his present claims, the appropriate order to make would be to dismiss the application.

2017 WAIRC 00103

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRETT ARTHUR KING
	APPLICANT
	-v-
	GRIFFIN COAL MINING COMPANY PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 27 FEBRUARY 2017
FILE NO.	B 155 OF 2016
CITATION NO.	2017 WAIRC 00103

Result	Application dismissed
Representation	
Applicant	Mr M Ritter SC of counsel
Respondent	Mr J Blackburn SC of counsel

Order

HAVING heard Mr M Ritter SC of counsel on behalf of the applicant and Mr J Blackburn SC 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 application be and is hereby dismissed.

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

2017 WAIRC 00233

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00233
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 8 MARCH 2017 (HEARING)
		THURSDAY, 30 MARCH 2017 (WRITTEN SUBMISSIONS)
		WEDNESDAY, 5 APRIL 2017
		MONDAY, 10 APRIL 2017
		WEDNESDAY, 19 APRIL 2017
DELIVERED	**:**	WEDNESDAY, 26 APRIL 2017
FILE NO.	**:**	U 93 OF 2016
BETWEEN	**:**	BARRY LANDWEHR Applicant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Industrial Law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Teacher dismissed for misconduct – Degree of physical contact was not reasonable or necessary to manage student – Whether dismissal was disproportionate to the conduct complained of – Whether the employer failed to properly take account of the teacher's response – Principles applied – Conduct was a breach of the Department of Education Behaviour Management in Schools policy – Dismissal was not disproportionate to the conduct – Admission and apology are not significant factors of mitigation – Length of service and difficult family circumstances do not mean an employee can avoid dismissal where it is otherwise justified – Application dismissed
Legislation	**:**	*Public Sector Management Act 1994* s 80A, s 82A(3)(b)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr D Stojanoski of counsel
Respondent	**:**	Mr J Carroll of counsel

Reasons for Decision

1 Mr Barry Landwehr was employed as a Design and Technology teacher at the Western Australian College of Agriculture, Harvey. On 13 August 2015, a Year 11 student directed a compressed air hose nozzle at Mr Landwehr's buttocks and released compressed air. Mr Landwehr pushed the student backwards into a wall. He continued to push the student after the student had dropped the compressed air hose. Mr Landwehr admonished the student for his dangerous use of compressed air.

2 Mr Landwehr started back to class. The student said something and Mr Landwehr turned back to the student and grabbed him by the shirt.

3 The respondent dismissed Mr Landwehr on the basis that he had misconducted himself by making physical contact with the student that was not reasonable or necessary to manage the student.

4 The grounds of the application as filed were that the dismissal was harsh and unreasonable in the circumstances because:

(1) it was disproportionate to the conduct complained of and is the strongest penalty available to the respondent;

(2) the respondent failed to properly take account of Mr Landwehr's response, including:

(a) his expression of remorse;

(b) at the time of the incident, he was suffering from stress from a range of issues in his personal life, including the illness of his father, who has subsequently died;

(c) his 10 years' service;

(d) that he was employed in a remote area where there may be a difficulty in obtaining teachers;

(e) the positive references from peers and members of the community about his teaching career and his voluntary community activities;

(f) that he did not deny the allegations, he admitted that he had made physical contact with the student and, at the very first opportunity following the incident, apologised to the student.

5 In outlines of submission and during the hearing, the applicant expanded the grounds to include:

(1) The dismissal will affect his prospects of finding other employment such as to constitute a disbarment from teaching, and that is unfair;

(2) The respondent's letter of dismissal indicates that he would receive all entitlements due to him, however, he was not given notice nor paid in lieu. As the dismissal was summary without notice, it can only be for serious misconduct. The letter of dismissal does not say that it was for serious misconduct but contemplated payment in lieu of notice. The summary nature of the dismissal was unfair.

(3) According to the respondent's website, there is a course available that deals specifically with prevention, de-escalation and restraint in respect of physical contact with students. This would have been a more appropriate course for Mr Landwehr as part of his improvement action plan, which arose from a previous incident, than the Accountable and Ethical Decision Making Course he was required to undertake.

6 Mr Landwehr says that had the respondent taken account of all of those matters, she would not have terminated his employment.

7 The respondent says that:

(1) A full investigation was undertaken in which Mr Landwehr was provided with an opportunity to give his account and to make submissions, including as to penalty, following which the respondent terminated his employment;

(2) She conducted as full and proper an investigation as was reasonable;

(3) Mr Landwehr had not complained of any procedural irregularities during the process; and

(4) Only two months prior to the incident of 13 August 2015, on 10 June 2015, Mr Landwehr was issued with a fine of one day's pay, a reprimand and was required to take improvement action relating to a breach of discipline. In this breach, on 29 October 2014, Mr Landwehr used force upon a student which was not reasonable or necessary in that he used his shoulder to push the student back against a wall.

The incident and investigation

8 There is now no dispute that Mr Landwehr pushed the student backwards into a wall. He later grabbed the student by the shirt. After the incident, in the afternoon tea break, Mr Landwehr told Mr Shaun Cantwell, Program Co-ordinator, Trades, about compressed air being blown 'in the close vicinity of his buttocks'. He told Mr Cantwell that he grabbed the student. Mr Cantwell described Mr Landwehr as being angry.

9 Mr Landwehr provided a statement regarding the incident to Mr Dean Pfitzner, the Deputy Principal, within a matter of days after the incident. In it, he said that he 'felt air being squirted towards my bottom. I turned around and several boys were there. [The student] was the one holding the air hose, so I grabbed him and said to him that this is not appropriate and you are putting my life at risk'. He went on to explain about what happened afterwards. Although he mentioned grabbing the student when he saw the student holding the hose, he did not mention pushing or subsequently grabbing the student.

10 In a letter from Mr Mike Cullen, Director Standards and Integrity, to Mr Landwehr dated 1 September 2015, a formal allegation was put to Mr Landwehr that, in effect the physical contact he made with the student was not reasonable or necessary to manage the student.

11 Mr Landwehr provided a response to Mr Cullen dated 4 September 2015 (Agreed document 8, attachment 1). In it, he repeated the exact words he had used in his statement to Mr Pfitzner, which I quoted in [11] above. However, when addressing the particulars of the allegation against him, Mr Landwehr went to say that the student had actually squirted air 'in my bottom'.

12 Mr Landwehr said that he kept the student behind after class and talked about the seriousness of the event. He said that he told the student that he was sorry, that he should not have grabbed him, but that if it had been a situation at work, the person 'being [perpetrated] could have caused [the student] a lot of pain'.

13 He then went on to address the issues raised in Mr Cullen's letter. He said that he had originally tried to reduce the seriousness of what had happened by saying that the student had squirted air 'towards' his bottom when what had occurred was that the student had 'squirted air up my anus'. He then wrote that the student might have killed him by doing this and he yelled at the student.

14 He responded to the particular of the allegation 'd', that he had grabbed the student and pushed him backwards into a wall, saying that 'I agree I did this. As I pushed him holding his upper arms between his shoulder and elbows. I yelled at him saying you may have just killed me or you have put my life at risk. As he hit the wall I let him go. I then turned and walked away.'

15 He responded to particular 'e', that he had then grabbed the student on the top of his shoulder whilst yelling at him, by saying that 'I do not agree with this at all I never changed my hold and grabbed his shoulders'. In respect of particular 'f', that the physical contact was not reasonable or necessary to manage the student, he described the contact he made with the student as 'very minor and I did not use excessive force'.

16 He emphasised the dangers of the misuse of compressed air with its potential to cause an embolism or massive bleeding.

17 The Standards and Integrity Directorate of the Department conducted an investigation. It included interviews with a number of students who had observed the incident or heard of it, and members of staff and others. Mr Landwehr was interviewed as part of that process.

18 In his interview, recorded in the Investigation Report (Agreed document 8), Mr Landwehr said that he grabbed the student and pushed him backwards into a wall. He said:

- I was up near the front of the Building and Construction workshop, bending over a tool rack on wheels when [the student] deliberately grabbed the air hose.
- [The student] put it up my backside and squirted the air.
- I don't know how [the student] put the air up my backside as my back was turned.
- All I could feel is the thing getting inserted into my backside and squirted.
- I felt the end of the air hose being pushed into my backside and then squirted, if that makes any sense.
- You have got a bit of give when wearing clothing. I'm not saying that when it got inserted into my anus that it went right in or anything.
- I am not saying that it penetrated my backside, but the end of it still went in. It sort of went into my anus cavity probably about 4 millimetres, as far as the clothes would allow it.
- You have your pants there and when pushed against my pants, you can see the shape of my backside with my bottom exposed.
- I was wearing long 'hard yakka' safety clothing and bonds underwear.
- I have never had air squirted near my backside, or up my backside before, but that happened to me there and then and made me think, '*It could kill me, or has it killed me?*'
- I turned around and saw [the student] holding the air hose. I grabbed hold of him between the shoulder and elbow of both arms and pushed him backwards about two to three steps in one action into the wall. I probably pushed [the student] backwards about two metres.
- I let him go when he hit the wall or the side of the roller door.
- The wall was made out of bricks and the rudder inside.
- [The student] hit the wall very minor.
- I can't answer what part of [the student's] body hit the wall. It was probably his shoulder.
- I cannot recall how quickly I walked [the student] backwards.

19 He said:

- he did not know why he grabbed the student;
- he yelled at the student that he could have killed him;
- if it had been in a work situation, another person would have just turned around and 'thumped' him;
- he emphasised the dangers of compressed air, and that immediately after the compressed air was expelled, he thought he was going to be killed;
- he did not seek medical attention because there is nothing that can be done.

20 He acknowledged that when he first spoke to Mr Pfitzner, he did not tell him he had 'physically manhandled' the student. He had told Mr Cantwell that the student had 'deliberately squirted air up my backside' – he did not think it was pertinent to go any further. He could not answer why he did not tell Mr Cantwell that he had pushed the student against the wall. Nor did he think it was pertinent that he had grabbed the student. What he thought was pertinent was the student's act.

21 Although he denied using excessive force, Mr Landwehr said he could not answer what constitutes excessive force, but that '[p]ushing somebody back is not really excessive force'. Excessive force is '[p]unching somebody and hitting somebody'.

22 Mr Landwehr talked of the possible catastrophic effects of compressed air entering the bloodstream. He said he thought he was in danger and 'just grabbed' the student, thereby removing the risk. When he grabbed the student, the student dropped the air hose.

23 Mr Landwehr said that if he had realised what was going to happen, he would have told the 'exact truth' about the extent of the actions, but he did not want to put the student in a bad light.

24 He also said:

- I did stuff up; I should have told the truth about [the student] from the start. I am not lying, I am not that type of person.
- I told Mr Cantwell that [the student] put air up my anus.

…

- [The student] dropped the hose as soon as I grabbed him.
- I can't answer why I continued to hold [the student] and push him into the wall after he dropped the air compressor hose.
- I believe that my actions were to re-establish order in the classroom.
- I'll be honest; my mind wasn't really as clear as it could have been at the time. Lots of things were going through my mind at the time of the incident.
- I find it a little bit hard to say 100%, if I re-established order.
- [The student] has the possibility of putting other people at risk.

…

- Particular D – I do agree, I grabbed hold of [the student's] arms and I did yell at him and say that he put my life at risk.
- Particular E – I do not agree with. I never changed my hold on [the student].
- Particular F – I thought in the scheme of things, was not excessive force. If people understood the back ground of compressed air and all that type of stuff, they would have a totally different slant on the dangers of air compressors. It can be fatal.

…

Supplementary agreed document 8, page 13

25 Even though Mr Landwehr said that he told Mr Cantwell that the student 'put air up [his] anus', in Mr Cantwell's report and interview he said that Mr Landwehr told him it was 'towards' or 'in the vicinity of' him.

26 I note too that the records of interview of Mr Landwehr and the student said Mr Landwehr had kept him back after class. However, neither of them said he had apologised to the student, as Mr Landwehr said he had done in his letter to Mr Cullen of 4 September 2015.

27 The Investigation Report analyses all of the material, in particular, Mr Landwehr's two different accounts of the air being directed towards his buttocks and the air compressor gun being inserted in his anus. It considers what he was wearing and concludes that 'it would appear impossible that the end of the air compressor gun could be inserted into a person's anus through two layers of clothing' (Agreed document 8, page 15). It concludes that it was likely based on the various accounts of witnesses that the air gun was at least 30 centimetres from Mr Landwehr's buttocks, and that he was 'now attempting to exaggerate the severity of [the student's] actions to justify his own reaction'.

28 It also concludes that 'whilst holding [the student], Mr Landwehr has pushed him backwards from the air compressor hose toward the steel roller door frame', and that '[d]espite Mr Landwehr admitting that [the student] dropped the hose as soon as he grabbed him, he continued to push [the student] three to four metres to the other side of the workshop and into the wall. Mr Landwehr failed to provide any explanation as to why he continued to push [the student] after there was no alleged risk; just saying "*I can't answer why I continued*".'

29 It also concludes that it is likely that Mr Landwehr grabbed the student a second time around the shoulder and neck.

30 After considering the medical evidence and the circumstances, the report concludes that Mr Landwehr's concern for his life is questionable.

31 The conclusion was that an incident occurred in which Mr Landwehr physically assaulted the student by pushing him backwards into a wall and grabbing him a second time. It says that whilst Mr Landwehr admits that he grabbed hold of the student and pushed him backwards into a wall before letting him go, he denies using an unreasonable degree of force in the circumstances.

32 It also concludes that:

(1) the actions of the student, whilst dangerous, were not of the severity that Mr Landwehr later claimed;

(2) that Mr Landwehr's first account, prior to being advised that his conduct was under scrutiny, appeared to be most accurate, that the release of compressed air from the hose was directed towards him and was not, as he said later, squirted 'up my anus' and that the student had 'inserted it into my anus cavity about four millimetres (4mm) or as far as the clothing would allow it';

(3) the student claimed that after Mr Landwehr had released him and was walking back towards the classroom, the student said that it was not him who had squirted the hose a second time, and he claimed that Mr Landwehr then turned around and walked back to him, grabbed him and pushed him downwards whilst slightly leaning on him with his knee. The report found that it was more likely that Mr Landwehr grabbed the student by the shoulder or by the shirt;

(4) Mr Landwehr had said that he was particularly concerned about the use of the air pressure hose because of the injury that can be caused. There was evidence that compressed air can create a gas bubble which can be released into the vascular system, creating an embolism which may cause death. Alternatively, the pressure of air in the anus could cause massive and potentially fatal bleeding. Mr Landwehr said that his medical documentation demonstrated that he had haemorrhoids and was concerned about bleeding and that the air might enter his blood stream. However, a report by Mr Landwehr's doctor showed no signs of haemorrhoids although there may have been some rectal bleeding some eight months previously which was consistent with mild haemorrhoids;

(5) Mr Landwehr's concern for his life was questionable and he did not seek medical treatment either immediately or any time after the incident, nor did he report the incident or the student's conduct, but went home;

(6) as to the use of excessive force, it noted that Mr Landwehr could not provide an accurate answer as to his understanding of excessive force saying that 'it's punching and hitting somebody and not pushing somebody backwards'. He said that he had never been taught the exact boundaries in relation to not having physical contact with students although he had previously been counselled regarding physical contact with students. The report said that it was expected that Mr Landwehr would have a clear understanding of what was and what was not appropriate physical contact with a student.

33 Following the Investigation Report, the Director General wrote to Mr Landwehr on 9 March 2016 (Agreed document 4) noting that the investigation had been completed and a report submitted. She had considered the report and Mr Landwehr's submission and found that he had grabbed the student and pushed him backwards into a wall. He then grabbed the student at the top of the shoulder whilst yelling at him. The physical contact he made with the student was not reasonable or necessary to manage the student. She enclosed a copy of the report for his information. The letter set out the possible action that might be taken pursuant to s 82A(3)(b) of the *Public Sector Management Act 1994*, but indicated that her preliminary view was that she would be inclined to dismiss him from his employment. She said:

> In proposing this action, I have taken into account the fact that you were previously found to have committed a breach of discipline on 22 June 2015. In particular, this finding was in regards to very similar conduct for which you received a fine, reprimand and improvement action. At the time of concluding that matter, you were informed that the finding may be taken into account in relation to any future breaches of discipline committed by you. I am concerned that you do not appear to have learnt from the previous findings against you and hold strong concerns that should you continue in your position, there is a possibility of you acting in a similar fashion in the future.

34 Prior to coming to a final decision, the Director General provided Mr Landwehr with an opportunity to make a submission which might include any explanation for his conduct or reasons why the proposed action should not be taken against him.

35 Mr Landwehr responded on 8 April 2016 (Agreed document 5). He said that he recognised that his conduct in both occasions had been similar but that the circumstances within which the similar conduct occurred was very different. In the former case, he said, he was trying to restrain a student so as to prevent undue damage to school property and in the latter case he believed, in good faith, that his life had been put at risk.

36 His response was four and a half pages in length. The first page deals with whether the circumstances or the conduct in the two incidents were similar. Pages 2 and 3 and half of 4 deal mainly with the dangers of compressed air to health. Page 4 also reiterates that in his first response, Mr Landwehr had said sorry to the student for having grabbed him. He said he had wanted 'to convey the trepidation and concerns that I felt in being subjected to being sprayed with compressed air, given my background as a tradesman trained in OHS'. He then set out that there were family matters at the time 'that seriously put me on a hedge, including the convalescence and eventual death of my father. I was very stressed.'

37 He went on in page 5 to:

(1) say that the two incidents in 10 years of teaching were out of character and demeanour, not due to him not having learned, but due to the confluence of a number of unfortunate circumstances in which 'I was found vulnerable';

(2) express an assurance that he intended to not repeat the behaviour in the future 'whatever it takes';

(3) comment on Harvey being a small community making it untenable for him to remain there if he was dismissed; and

(4) refer to attached character references.

38 The respondent considered Mr Landwehr's response and confirmed her previous tentative view that dismissal was appropriate.

Issues and Conclusions

The law

39 The law regarding a claim of harsh, oppressive or unfair dismissal is set out by Brinsden J in *Miles & Others t/a The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 385. The question for the Commission is whether the employer's legal right to terminate the contract of employment 'has been exercised so harshly or oppressively against the employee as to be an abuse of that right'.

40 The failure to provide a fair process may lead to a finding that the dismissal was harsh, oppressive or unfair (*Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635) but a lack of procedural fairness may not automatically have that result (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891 at 899 per Nicholson J). The distinction between substantive and procedural unfairness is not always useful. Rather, the test set out in *Undercliffe* is to be applied (see *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36; (2003) 83 WAIG 393 at [72] per Heenan J).

The Department's policy

41 The Department of Education – Behaviour Management in Schools policy (the policy) sets out the extent to which and circumstances under which a teacher may have physical contact with a student.

42 Under the heading **PHYSICAL CONTACT AND RESTRAINT**, at page 10, it says that:

> *School staff may use physical contact to care for a student or to manage their behaviour.*
>
> *Physical contact with students differs from restraint in that it uses little or no physical force and its purpose is to correct or direct a student.*
>
> ...
>
> Before any form of physical contact is used with a student, staff must consider the:
>
> - age of the student;
> - situation in which it is used;
> - the purpose of the physical contact; and
> - the likely response of the student.
>
> ***Guideline***
>
> *When attempting to maintain order it is always preferable for staff to use verbal de-escalation strategies to manage student behaviour. However, it may become necessary for a staff member to use reasonable physical contact to maintain or re-establish order. This may also include situations where teachers are required to defend themselves from physical harm. The application of any form of physical contact towards a student places staff in a vulnerable position.*
>
> Staff must only use reasonable physical contact once other less intrusive alternatives have failed.
>
> ***Guideline***
>
> *Examples of physical contact include escorting a student by the arm or hand, holding, guiding or shepherding.*
>
> Physical contact must not to be used where it is intended to provoke or punish a student or is intended to cause pain, injury or humiliation.
>
> The degree of physical contact must be in proportion to the seriousness of the behaviour or the circumstances it is intended to prevent or manage. The duration of the contact must be the minimum required to achieve the desired result.
>
> ***Guideline***
>
> *Physical contact may also be used where it is required to support compliance with a specific behaviour modification.*
>
> (Documents Referred to in
> Agreed Statement of facts, filed 23 December 2016)

The previous incident

43 Prior to the incident on 13 August 2015, Mr Landwehr breached discipline on 29 October 2014. He was found to have had physical contact with a student that was not reasonable or necessary in managing the student's behaviour. The circumstances were that two students had approached a door through which Mr Landwehr had just gone. The door locked immediately after he had gone through. One of the students banged on the door reasonably hard for a short period of time. Mr Landwehr opened the door and told the student that he was being disrespectful. He pushed the student backwards against a wall. Although he said he had never intended to hurt the student, he admitted that he should not have made contact with the student and his reaction may have caused the student to feel intimidated (see Investigation Report, Agreed document 9, page 9).

44 Mr Landwehr was disciplined in respect of that incident, by the imposition of a fine of one day's pay, a reprimand and the requirement to undertake improvement action. The improvement action required Mr Landwehr to complete an online course on Accountable and Ethical Decision Making and undertake counselling.

The online course

45 Mr Landwehr completed the Department's online Accountability and Ethical Decision Making Course on or about 26 May 2015. He achieved an 80% pass mark on completion.

46 This course covered, amongst other things, the policy, the Code of Conduct, Duty of Care and physical contact with students.

The reprimand and counselling

47 I am unsure as to whether the reprimand was simply the fact of Mr Landwehr being told in the letter from the respondent that he was to be penalised in a number of ways, including a reprimand. Alternatively, it was in the meeting with his Principal, Mr Armstrong, and Deputy Principal, Mr Pfitzner, on 2 July 2015, that he was reprimanded. The minutes of the meeting are very brief and indicate that it went for about 45 minutes.

48 The agreed facts include that 'the Principal did not direct the applicant to attend any further counselling sessions with him in this regard' and that he did not attend any further counselling sessions with the Principal with respect to the Department of Education's policies on physical contact with students.

49 From the agreed facts, I infer that this meeting either issued or reinforced the reprimand and constituted the counselling Mr Landwehr was to receive as part of the improvement action.

50 The minutes also refer to Mr Landwehr having found two sessions of psychological counselling very helpful. The parties agree that this was psychological counselling dealing with the impending death of Mr Landwehr's father, not for the purpose of assisting him in matters of physical contact with students.

Mr Landwehr's explanation

51 I note that in respect of the two explanations Mr Landwehr provided regarding the two incidents, he does not say that he was trying to restrain a student from continuing to do something that the student should not be doing. He says in respect of the first

incident that he was trying to prevent undue damage to school property when in fact the student had already kicked the door. There is no suggestion that the student damaged school property or that he intended to continue.

52 The record of interview in the Investigation Report of the first incident (Agreed document 9) and Mr Landwehr's report of 29 October 2014 (Agreed document 9, attachment 4) show that:

- Mr Landwehr believed the student was mocking him;
- he was annoyed with the student;
- he said to the student 'How would you like to be the door then?' and he dropped his left shoulder and pushed the student into a corner. He had dropped his shoulder to avoid hitting the student, who was shorter than him, in the head; and
- he believed the student was dishonest and it 'got [his] goat'.

53 I also note that in the interview about this incident (Agreed document 9, page 7), Mr Landwehr says that it should never have happened, he should never have touched the student, and '[t]he rule states you are not meant to touch kids'. He also said that as soon as he had done it, he thought 'struth, he might have said something, but I don't know as I was thinking about what I had just done' (Agreed document 9, page 8).

54 He was asked how he could have dealt with the situation differently and he answered, 'I could have walked away and ignored it, but that is not me'.

55 I draw the inference that Mr Landwehr responded by attempting to either intimidate or punish the student. He knew he had acted contrary to the 'rule' not to have physical contact with a student.

56 In the second incident, Mr Landwehr may have genuinely believed, in good faith, that his life had been put at risk. However, he had provided two different explanations as to what the student's conduct had been. The first had been to say that the compressed air was directed towards him and the second was that the nozzle had been pushed into his rectum. He then tried to explain the differences by saying that he had initially tried to down play the seriousness of the student's actions. In any event, in neither case was he trying to manage or restrain the student after the student dropped the hose.

57 While Mr Landwehr said in his interview as part of the investigation of the second incident, that:

- I have no idea why I grabbed [the student]. I just grabbed him because that's what I am going to do. I don't know why I grabbed him.

…

- I can't answer why I did not tell Mr Cantwell that I pushed [the student] against the wall.
- I don't believe I used excessive force.
- I can't answer what excessive force is. It depends on the way you are looking at it … ,

he was unable to identify what excessive force might be, except that it would be punching or hitting somebody. He said he believed that by grabbing the student, he was removing the risk. He thought what he did was right and that by grabbing the student, the student dropped the hose, making the situation safe. However, he could not answer why he continued to hold the student and push him into the wall after he had dropped the air compressor hose.

58 He said he believed that his actions were to establish order in the classroom.

59 He made these comments having undertaken a course which included matters the subject of disciplinary actions arising from his conduct, that is, about physical contact with a student, by pushing him backwards, that was not reasonable or necessary in managing the student's behaviour. He undertook the course on 26 May 2015, less than three months before the incident with the compressed air hose.

60 In both cases, it is apparent that Mr Landwehr was either using his position to punish or intimidate the students, or he simply lost self-control and expressed his anger in a physical way.

61 I think it is important to state that the danger of the misuse of compressed air is not in contention. The issue is Mr Landwehr's response to the conduct of students. It appears to be behaviour which demonstrates either or both of a lack of self-control or a desire to intimidate or punish by pushing and grabbing.

62 Before addressing the specific grounds of the application, I think it is necessary to note that Mr Landwehr's conduct in pushing the student, continuing to push him when any threat had subsided, pushing with force, and subsequently grabbing the student was a breach of the respondent's policy in having physical contact with students. This is because it was not necessary for the management of the student.

63 In those ways, the conduct breached the policy.

Was the dismissal proportionate to the conduct?

64 In the letter of 9 March 2016, the respondent advised Mr Landwehr that if she found he had committed a breach of discipline, her preliminary view was that she was inclined to dismiss him. The following paragraph suggests that the reason for dismissal would be not only to punish him but also was because of this incident and previous incident; that he would appear not to have learnt from the previous findings and she held strong concerns that he would act in a similar way in future. The reasons for dismissal would therefore go to the issues of the actual conduct and confidence in him for the future.

65 The letter of 10 May 2016 also expresses concerns about Mr Landwehr seeking to justify his 'actions rather than accept that your conduct was inappropriate. As such, I remain apprehensive that you may repeat this behaviour in the future'.

66 Therefore, it was not merely a matter of proportionality of punishment but also a matter of confidence. If the employer cannot have confidence in an employee's ability to comply with policies, particularly as they relate to physical contact with a student

and self-control, demonstrated by a repeated failure, within a reasonably short time, and one which resulted in recent disciplinary action, then the employer is not acting unreasonably in no longer wishing to employ the employee.

67 Such conduct strikes at the heart of the contract, in particular, the contract of a teacher who holds a duty of care to students. Conduct that strikes at the heart of the contract is serious misconduct which may justify dismissal (*Blyth Chemicals Ltd v Bushnell* [1933] HCA 8; (1933) 49 CLR 66 at 81).

68 Given that:

(1) Mr Landwehr's conduct in August 2015 was of a very similar nature to his conduct for which he was disciplined less than three months earlier;

(2) that he had, within three months prior to the second incident, undertaken improvement action including training and counselling regarding the proper and improper use of physical contact with a student;

(3) that he had been reprimanded for the previous conduct;

(4) his conduct appears to be punitive or intimidatory or demonstrates a lack of self control and a failure to learn from the past; and

(5) the respondent could not have confidence in his future conduct based on his past conduct,

the dismissal was not disproportionate to the conduct. I will now address whether there were mitigating factors which otherwise make the dismissal unfair.

Mitigating factors – failure to consider length of service, family stresses, to recognise references and disbarment from teaching

Length of service

69 The correspondence to Mr Landwehr does not explicitly indicate that the respondent took account of Mr Landwehr's length of service.

Family circumstances

70 In his response to the Director General, Mr Landwehr said the conduct was out of character but was the confluence of a number of unfortunate circumstances in which he was found vulnerable (Agreed document 5, page 5).

71 In the letter of dismissal, the respondent 'acknowledge[d] that at the time of the incident, you were dealing with family matters, including your father's illness and that this caused additional stress. However this does not assure me that if faced with a significant stress in the future, you would not behave in the same manner.' Mr Landwehr complains that the respondent acknowledged the stress only in a perfunctory way.

Disbarment from teaching

72 Mr Landwehr says that by being dismissed, he is denied his profession as a teacher because of the limitations on him now finding alternative employment as a teacher in the public system in Western Australia.

73 In his letter, Mr Landwehr said that as Harvey is a small community, it would be untenable for him to remain in town should the respondent decide to proceed with dismissal. He did not say why this was so, and he did not refer to job opportunities in particular.

74 I noted earlier that in submissions filed by the applicant, he said that he was employed in a remote area, however, this was not referred to in the letter to the Director General. It must be said that Harvey is not in a remote area, being between Mandurah and Bunbury.

Admission and apology

75 It is true that Mr Landwehr admitted the conduct after initially understating it. He said that he accepted that his conduct was inappropriate. However, a good deal of his response is about the danger of the misuse of compressed air, that is, he was justified in his actions. Therefore, his admissions were largely overshadowed by his efforts to justify the conduct.

76 It is also true that in his letter of 4 September 2015 (Agreed document 8, attachment 1), and again in his letter of 8 April 2016 (Agreed document 5, page 4), Mr Landwehr referred to having apologised to the student for having grabbed him. However, the context was that he then went on to tell the student that if it had been in a work situation, he would have been caused a lot of pain. In his interview, Mr Landwehr indicated that in such a situation the person who sprayed the compressed air 'wouldn't have been standing probably. I'll be honest; they would have just turned around and thumped him' (Agreed document 8, page 10). The inference is that grabbing the student was mild compared with what would have happened in the workplace.

Conclusion regarding mitigating factors

77 The applicant's complaint is that the respondent either failed to take account of these factors or, in effect, gave them insufficient weight.

78 The applicant refers to indicia for claims of harsh, oppressive or unfair dismissals which are include the employee's length of service and family circumstances. He notes that in *Robe River Iron Associates v The Construction, Mining and Energy Workers' Union of Australia – Western Australian Branch* (1989) 69 WAIG 1027 at [6] and [12] length of service, age and family circumstances are, in the words of Sharkey P, 'undoubtedly relevant factors'. Halliwell SC agreed with the reasons and conclusions of Sharkey P, while Kennedy C agreed with the principles set out in the Honourable President's reasons.

79 However, the applicant's submission did not go on to complete the quote. In fact, at [12] his Honour went on to say:

> However, it would not be considered that the longest and best of employment records and the work need[s] of family circumstances could operate to make any employee immune from dismissal for any reason.

80 In this case, where a teacher has 10 years' experience and a history of inappropriate contact with students, contrary to policy, the length of service would not be a significant mitigating factor. Nor would his family circumstances.

81 Although Mr Landwehr gave an assurance that he did not intend to repeat the behaviour in the future, it is not unreasonable for the respondent to have had concerns that this would not be so, and in particular in times of stress. I also note in passing that other evidence contained within the investigators' reports, statements by fellow teachers and students and by Mr Landwehr tend to indicate that Mr Landwehr's approach to dealing with students was robust, and that physical contact with students other than for the purposes of the policy was not out of character.

82 There was no suggestion that his conduct in the first incident, which actually occurred 10 months prior to the second incident, was because Mr Landwehr was under stress associated with his personal circumstances. Yet both incidents were of unreasonable physical contact involving punishing and manhandling a student.

83 It is true that the respondent is the employer of the largest number of teachers in this State, but there is no evidence of Mr Landwehr's options and limitations. Furthermore, and more importantly, a teacher who conducts herself or himself in a way which seriously breaches policy and which leads the employer to reasonably hold strong concerns about her or his future conduct towards students might reasonably be considered unsuitable to teach, without further remedial action. He had already undertaken some remedial action without apparent effect on his behaviour towards students.

84 Mr Landwehr's future prospects as a teacher do not, in the circumstances of this case, override the issue of his conduct, his failure to fully recognise and accept his behaviour, and the respondent's reasonable apprehension about his future conduct towards students in his care.

85 In any event, there is no evidence of his future prospects as a teacher. Mr Landwehr's evidence to the respondent indicates that he is in his mid-40s but had only been teaching for 10 years. He had previously worked as a tradesperson. Therefore, he is not denied the opportunity of making a living because he has a number of strings to his bow.

86 Therefore, while length of service and family circumstances may be relevant considerations, they do not mean that an employee with many years of service and whose family circumstances add to the employee's difficulties can avoid dismissal where otherwise it is justified. I think the same can be said of the employee's difficulties in finding alternative employment.

87 Also seen in context, Mr Landwehr's attempts to explain his conduct and excuse it by reference to the dangers of compressed air, and that his apology was tempered by his expressing that the response would have been worse if the incident had occurred in a workplace, mean the admissions and apology are not significant factors of mitigation.

Character references

88 In his letter of 8 April 2016, Mr Landwehr referred to a number of character references which he enclosed. The respondent's letter in response says that she has considered the investigator's report and Mr Landwehr's submission, but does not explicitly refer to the character references.

89 It is very laudable that Mr Landwehr makes a strong contribution to his community by his activities out of work. That in itself is not sufficient to overcome the issue of his conduct towards students who are in his care and in the care of the Director General. The references from his colleagues likewise do not overcome the findings of fact or the significance of his conduct. If the respondent failed to give this issue the weight Mr Landwehr wanted, it does not render the dismissal unfair, in light of the serious issue of his conduct.

90 In the circumstances, the claims that the respondent failed to consider or give proper weight to his personal circumstances, his length of service, apology, references or 'disbarment', must fail.

Failure to provide pay in lieu of notice and summary dismissal

91 By letter dated 9 March 2016, the Director General informed Mr Landwehr that it was open to her to form the view that he had committed a breach of discipline. He was then to be provided with the opportunity to respond to the action she proposed to take. She set out the possible action she might take under s 82A(3)(b) of the Act, being improvement action or disciplinary action. She then set out the forms of disciplinary action, which are defined in s 80A – **Terms used** of the *Public Sector Management Act 1994* as including a reprimand, a fine, transfer, reduction in monetary remuneration, reduction in classification level, and dismissal.

92 She went on to say, 'should I ultimately make a finding that you have committed a breach of discipline in regard to the conduct outlined above, my preliminary view is that I would be inclined to dismiss you from your employment.' The letter did not give any indication of whether dismissal would be with or without notice.

93 The respondent's letter of 10 May 2016 advising Mr Landwehr of the decision to terminate his employment contains only limited references to the dismissal itself. It refers to the letter of 9 March 2016 in the terms I have referred to above. The letter of 10 May 2016 also says that having considered Mr Landwehr's response, she maintained the view that dismissal from employment was the appropriate penalty. The letter did not specify the date on which the dismissal would take effect or whether it would be with or without notice. It said:

> Please note that any entitlements due to you will be calculated and forwarded to you in the near future.

94 The use of the term 'any' entitlements means that if there were any entitlements due, they would be paid. It did not say that there were entitlements or what they were. This, of course, does not lead to an inference that Mr Landwehr would be paid in lieu of notice. It could just as readily be said that because it was silent on the question of notice, the dismissal was summary.

95 I find that the lack of clear indication of whether the dismissal was with or without notice, or even the date of effect of the dismissal, might be seen to be somewhat unfair. However, it does not automatically flow that there would be notice or pay in lieu thereof, or that there was any particular entitlement that would be paid.

96 Therefore, the argument that the letter led Mr Landwehr to believe that there would be pay in lieu of notice does not hold water. This is because it stated 'any entitlements due' would be calculated and forwarded as opposed to indicating that there were any entitlements due.

97 Mr Landwehr also seeks to use this ground to argue that the dismissal does not warrant being summary. However, the respondent has demonstrated that Mr Landwehr's conduct was a serious breach of the trust necessary for the contract to continue. It struck at the heart of the contract both in terms of constituting a serious breach of policy and being conduct towards those who are in the respondent's care. It was indeed conduct warranting summary dismissal.

The improvement action plan course

98 I enquired of the parties about the improvement action plan Mr Landwehr was required to undertake after the first incident and details of the course he took were provided.

99 It contains eight units. They include **Unit 1 – Your Professional Obligations** and a component on the **Code of Conduct**. **Unit 2 – Personal Behaviour** includes components dealing with **Creating and Sustaining a Positive Work Environment** which covered, amongst other things, bullying. It covers the **Duty of Care for Students**, including not putting students at risk by doing or not doing something that could cause injury or harm.

100 **Physical Contact with students** is set out, including the issues identified in the Code of Conduct about physical contact being permissible for caring for the student such as administering first aid; maintaining order, providing the use of force is reasonable; and for restraint, as a last resort. Restraint can be used to minimise or prevent harm; the teacher should attempt to de-escalate the situation and end the restraint as soon as possible, when the teacher has determined that the student is no longer presenting a safety risk.

101 While Mr Landwehr says that only two pages out of 120 pages deal with physical contact with students, they are to be seen in the context of there being a number of pages dealing with the Code of Conduct, Personal Behaviour and Duty of Care for Students, particularly for their safety and welfare and Physical Restraint.

102 This was a course which included a good deal of information that should have alerted Mr Landwehr to the inappropriateness of the physical contact he made with a student after the first incident and before the second incident. He could not reasonably have said that he did not know what was expected of him by the time of the second incident.

103 Mr Landwehr also says that, according to the respondent's website, there is a course available that deals specifically with prevention, de-escalation and restraint in respect of physical contact with students. He says this would have been a more suitable course for him rather than the Accountable and Ethical Decision Making course he was required to undertake.

104 That is not the point. What is significant is that the course he took, while not focussing solely on the issues Mr Landwehr says were important, was enough to have given him the clear direction to the policy and to the expected conduct in respect of contact with students. In any event, he had already acknowledged in the interview for the first incident that he knew that he should not have physical contact with students in the way he had. It was not new to him. I must say that this argument smacks of the applicant clutching at straws.

105 The application will be dismissed.

2017 WAIRC 00234

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BARRY LANDWEHR
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 APRIL 2017
FILE NO/S	U 93 OF 2016
CITATION NO.	2017 WAIRC 00234

Result	Application dismissed
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr J Carroll of counsel

Order

HAVING HEARD Mr D Stojanoski of counsel on behalf of the applicant and Mr J Carroll of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred by the *Industrial Relation Act 1979*, hereby orders:

THAT the application be, and is hereby dismissed.

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

2017 WAIRC 00227

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIRALY PUGLIESE
	APPLICANT
	-v-
	LINDISFARNE NOMINEES (WA) PTY LTD AS TRUSTEE FOR LINDISFARNE TRUST TRADING AS LINDISFARNE MEDICAL GROUP
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 24 APRIL 2017
FILE NO/S	U 17 OF 2017
CITATION NO.	2017 WAIRC 00227

Result Order issued

Order

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

WHEREAS the Commission has to determine whether the respondent is a trading corporation to determine whether it has jurisdiction to deal with the matter; and

WHEREAS the respondent has provided to the Commission the following:

(1) Lindisfarne Trust Unit Trust Deed;

(2) Deed of appointment of trustee: Lindisfarne Trust; and

(3) Lindisfarne Nominees (WA) Pty Ltd ATF Lindisfarne Trust Financial Statements for the year ended 30 June 2016;

AND WHEREAS those documents contain information relating to the profits or financial position of the respondent; and

WHEREAS the Commission considers this evidence is not to be disclosed except to the Commission.

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

THAT the documents provided by the respondent, listed above, not be disclosed other than to the Commission, and be kept sealed in the Commission's records.

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

2017 WAIRC 00236

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00236
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	ON THE PAPERS (FINAL SUBMISSIONS) MONDAY, 24 APRIL 2017
DELIVERED	**:**	THURSDAY, 27 APRIL 2017
FILE NO.	**:**	U 17 OF 2017
BETWEEN	**:**	KIRALY PUGLIESE Applicant AND LINDISFARNE NOMINEES (WA) PTY LTD AS TRUSTEE FOR LINDISFARNE TRUST TRADING AS LINDISFARNE MEDICAL GROUP Respondent

CatchWords	**:**	Industrial law (WA) - Alleged unfair dismissal - Jurisdiction - Employer a trading corporation - Medical practice with trading activities - No jurisdiction - Application dismissed
Legislation	**:**	*Commonwealth Constitution* s 51(xx) *Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* s 27(1)(l), s 27(1)(m), s 29(1)(b)(i)
Result	**:**	Application dismissed
Representation:		
Applicant:	:	On her own behalf
Respondent	:	Ms L Reed

Reasons for Decision

1 The applicant claims that she was harshly, oppressively or unfairly dismissed from her employment, in accordance with s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

2 The applicant originally named the respondent as being 'Dr Terry Pitsikis and Lucy Reed Lindisfarne Medical Group' as her former employer.

3 However, information was provided that makes it clear that Lindisfarne Medical Group is a trading name and not the entity that employed the applicant. This is the case even though the job description provided to the applicant contained only that trading name. I formed the opinion that it was appropriate, in accordance with s 27(1)(l) and (m) to order that the name of the respondent be amended to 'Lindisfarne Nominees (WA) Pty Ltd as trustee for Lindisfarne Trust trading as Lindisfarne Medical Group' ([2017] WAIRC 00217).

Jurisdiction

4 The issue now requiring determination is whether the employer is a constitutional or trading corporation. This will affect whether the Commission has jurisdiction to deal with the claim. The parties agreed that the issues should be dealt with on the papers, and I agreed to do so.

5 Whether a corporation is a trading corporation is a question of fact and degree. The issues to be considered in this case include identifying the primary focus of the employer's activities. The indicia of a trading corporation include that:

- A corporation is a trading corporation if it substantially engages in trading activities. If a substantial or significant portion of its overall activities are trading, then it is a trading corporation.
- Trading is the activity of providing, for reward, goods or services.
- There may be a desire to earn profit, but that does not require the actual attainment of profit.

Aboriginal Legal Service of Western Australia Incorporated v Mark James Lawrence (No. 2) [2008] WASCA 254

6 The parties provided the following documents to enable the determination of this matter:

(1) The applicant's job description;

(2) Business Name Details extract from the Australian Securities and Investments Commission for Lindisfarne Medical Group;

(3) Lindisfarne Trust Deed;

(4) The Deed of Appointment of Trustee: Lindisfarne Trust showing that Lindisfarne Nominees (WA) Pty Ltd is the trustee for the trust;

(5) Lindisfarne Nominees (WA) Pty Ltd atf The Lindisfarne Trust, Financial Statements for the year ended 30 June 2016; and

(6) The Statutory Declaration of Natalino D'Ignazio of 21 April 2017.

7 I also note that in her Notice of application, the applicant identifies the nature of the respondent's business as being 'Medical / GP Clinic'. The applicant was employed as a Registered Nurse. The job description for that position sets out a Position Profile which is for '[p]roviding nursing care to patients presenting at Lindisfarne Medical Group Practice'. The rest of the job requirements are those typical of a registered nurse working in a medical practice.

8 These documents demonstrate and I find that the respondent conducts a medical practice and employs doctors and nurses for the purpose of providing services to patients for a fee. It receives income from a range of sources, but the most significant for both 2015 and 2016 was income derived from the provision of services by doctors and nurses, being no less than 65% of its income for each of those years. Its most significant expense is wages and salaries, which also constitute more than 65% of its expenditure. Most of its other income and expenditure items clearly indicate that they relate to the general conduct of a medical practice.

9 The financial statements also record that in both 2015 and 2016, the business has returned a profit.

10 In the circumstances, I find that the respondent is a trading corporation for the purposes of s 51(xx) of the *Commonwealth Constitution*. This means that the *Fair Work Act 2009* (Cth) applies to the exclusion of the *Industrial Relations Act 1979* (WA). Consequently, the Commission does not have jurisdiction to deal with the claim and it must be dismissed.

2017 WAIRC 00237

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIRALY PUGLIESE
	APPLICANT
	-v-
	LINDISFARNE NOMINEES (WA) PTY LTD AS TRUSTEE FOR LINDISFARNE TRUST TRADING AS LINDISFARNE MEDICAL GROUP
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 27 APRIL 2017
FILE NO/S	U 17 OF 2017
CITATION NO.	2017 WAIRC 00237

Result	Application dismissed
Representation	**(by written correspondence)**
Applicant	On her own behalf
Respondent	Ms L Reed

Order

HAVING HEARD Ms K Pugliese on her own behalf and Ms L Reed on behalf of the respondent, the Commission, pursuant to the powers conferred by 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 00101

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALDO JOSEPH VALASTRO
	APPLICANT
	-v-
	AV PARTNERS: PERTH CONVENTION & EXHIBITION CENTRE. CROWN CASINO
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 27 FEBRUARY 2017
FILE NO/S	U 12 OF 2017
CITATION NO.	2017 WAIRC 00101

Result	Extension of time granted
Representation	
Applicant	No appearance required
Respondent	Ms I Bernal

Order

HAVING heard Ms I Bernal 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 answer in the herein proceedings be and is hereby extended to 7 March 2017.

SENIOR COMMISSIONER S J KENNER

2017 WAIRC 00210

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALDO JOSEPH VALASTRO
	APPLICANT
	-v-
	AV PARTNERS: PERTH CONVENTION & EXHIBITION CENTRE. CROWN CASINO
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 11 APRIL 2017
FILE NO/S	U 12 OF 2017
CITATION NO.	2017 WAIRC 00210

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Ms C Cahill as agent

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.

2017 WAIRC 00001

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00001
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 14 NOVEMBER 2016, TUESDAY, 15 NOVEMBER 2016
DELIVERED	**:**	MONDAY, 3 JANUARY 2017
FILE NO.	**:**	B 74 OF 2016
BETWEEN	**:**	ROBERT WHOOLEY Claimant AND SHIRE OF DENMARK Respondent

CatchWords	**:**	Claimant purportedly terminated by respondent - Claim termination a breach of contract - Claim for payment of balance of fixed term contract - Claim in alternative for payment of one year's remuneration pursuant to contract - Claim disputed - Respondent contends claimant barred from bringing proceedings due to binding settlement agreement - Held purported termination did not comply with *Local Government Act 1995* - Termination not valid - Alleged settlement agreement relating to termination not binding as subject matter of agreement non-existent - Claimant resigned from employment - Damages limited to period from date of purported termination to date of resignation
Legislation	**:**	*Industrial Relations Act 1979* s 27(1)(a) *Local Government Act 1995* s 5.37(1), 5.37(2)
Result	**:**	Claim allowed in part; payment to be ordered
Representation:		
Counsel:		
Claimant	**:**	Mr D Stojanoski (of Counsel)
Respondent	**:**	Mr J Darams (of Counsel)
Solicitors:		
Claimant	**:**	Slater & Gordon
Respondent	**:**	Jarman McKenna

Case(s) referred to in reasons:

Galloway v. Galloway (1914) TLR 531

Project Blue Sky Inc v. Australian Broadcasting Authority (1998) 194 CLR 355

Svanosio v. McNamara (1956) 96 CLR 186

Case(s) also cited:

ACCC v Baxter Healthcare Pty Limited (2007) 232 CLR 1

Addis v Gramophone Co Ltd [1909] AC 488

Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc) (1999) 79 WAIG 1867

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27

Amourous v Commissioner for Corrections, Department of Corrective Services (2007) 87 WAIG 1468

Attorney-General v Gray [1977] NSWLR 406

Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540

Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435

Baker v Denkara Ashanti Mining Corp Ltd (1903) 20 TLR 37

Balfour v Travel Strength Ltd (1980) 60 WAIG 1015

Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622

Beal v Hall (1870) 9 SCR (NSW) L 285

Belo Fisheries v Froggett (1983) 63 WAIG 2394
Blue Chip Trading Ltd v Helbawi [2009] IRLR 128
Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635
Bradbury v Great Western Real Estate (1995) 75 WAIG 2927
Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153
Breweries and Bottleyards Employees, Industrial Union of Workers Western Australia v Bond Brewing WA Ltd (1989) 69 WAIG 3228
Burton v Litton Business Systems Pty Ltd (1977) 16 SASR 162
Commissioner of Taxation v Consolidate Media Holdings (2012) 250 CLR 503
Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth) (1981) 147 CLR 297
Courtland v Oaklea Pty Ltd (1996) 76 WAIG 2481
Csontos v QT Hotels & Resorts Pty Ltd [2016] FWC 3632
David Ernest Eley v Potato Marketing Corporation of Western Australia (2013) 93 WAIG 1471
Department of Justice v Lunn (2006) 158 IR 410
Diane Elizabeth Shaw v City of Wanneroo (2012) 92 WAIG 275
Diane Elizabeth Shaw v City of Wanneroo (2012) 92 WAIG 318
Dietman v Brent London Borough Council [1987] IRC 737
Dyer v Peverill (1979) 2 NTR 1
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640
Equuscorp Pty Limited v Haxton (2012) 246 CLR 498
Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous (WA Branch) v Uniting Church of Australia (1986) 66 WAIG 1291
Frederick E Rose (London) Limited v William H Pim Jnr & Co Ltd [1953] 2 QB 450
Gane v Shark Bay Resources Pty Ltd (2004) 84 WAIG 1406
Garbett v Midland Brick Co Pty Ltd (2003) 83 WAIG 893
Graske v 5KA Broadcasters Pty Ltd (1988) 55 SAIR 702
Gunton v Richmond-upon-Thames London Borough Council [1981] Ch 448
Gynch v Polish Club Limited (2015) 255 CLR 414
Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648
Heugh v Central Petroleum Ltd [No 5] [2014] WASC 311
Hewitt v Topero Nominees Pty Ltd T/A Micheals Camera Video Digital [2013] FWCFB 6321
Higgins v Gateway Printing (2010) 90 WAIG 529
Hotcopper Australia Ltd v David Saab [2002] WASCA 190
Keane v Lomba Pty Ltd (1998) 78 WAIG 810
Kilburn v Enzed Precision Products (Aust) Pty Ltd (1988) AILR 215
Lavarack v Woods of Colchester Ltd [1967] 1 QB 278
Mackie v Weinholt (1880) 5 QSCR 211
Masters v Cameron (1954) 91 CLR 353
Matthews v Cool or Cosy Pty Ltd & Anor (2004) 84 WAIG 2152
McCasker v Darling Downs Co-op Bacon Assn Ltd (1988) 25 IR 107
McFarlane v Daniell (1938) SR (NSW) 337
McNamara v Loton Holdings Pty Ltd (CAN 009 383 493) (2002) 83 WAIG 1224
Miles v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous (WA Branch) (1985) 65 WAIG 385
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273
Mt Newman Mining Co Pty Ltd v Assn of Draughting, Supervisory and Technical Employees Union (WA Branch) (1986) 66 WAIG 10
Niemann v Smedley [1973] VR 769
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451
Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 787
R v Sussex Justices; Ex Parte McCarthy [1924] 1 KB 256
Railway Appeal Board, Re; Ex Parte WA Government Railways Commission (1999) 21 WAR 1
Rankin v Marine Power International Pty Ltd (2001) 107 IR 117
Re Kenner; Ex Parte Minister for Education [2003] WASCA 37
Ridge v Baldwin [1964] AC 40
Robe River Iron Associates v Construction, Mining and Energy Workers' Union of Australia (WA Branch) (1989) 69 WAIG 1027

Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149
Shire of Esperance v Mouritz (1991) 71 WAIG 891
SST Consulting Services Pty Ltd v Reison (2006) 225 CLR 516
Stylianou v Country Realty Pty Ltd (2010) 91 WAIG 2029
The St Cecilia's College School Board v Carmelina Grigson (2006) 86 WAIG 3146
Thompson v Gregmaun Farms Pty Ltd (2000) 80 WAIG 1733
Thorpe v South Australian National Football League (1974) 10 SASR 17
Toll (FGCT) Pty Ltd v Aplhapharm Pty Ltd (2004) 219 CLR 165
Triantopoulos v Shell Company of Australia Ltd (2011) 91 WAIG 67
Tucker v Australasian Coal and Shale Employee' Federation (1984) 6 FCR 177
Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd [2015] WASCA 21
Waroona Contracting v Usher (1984) 64 WAIG 1500
William Thomas Daly v Chubb Protection Services (2004) 84 WAIG 1177
Yango Pastoral Co Pty Limited v First Chicago Australia Limited (1978) 139 CLR 410
Yetton v Eastwoods Froy Ltd [1966] 3 All ER 353

Reasons for Decision

1 By Notice of Claim filed 29 April 2016 the claimant alleges he was denied benefits to which he was entitled under his contract of employment.

2 The claim was made in alternatives which may be expressed this way:

(1) the purported termination of the claimant's employment was invalid as a matter of law and accordingly he is entitled to the balance of the remuneration payable under his fixed term contract of employment, being remuneration for 825 calendar days which has not been paid; or, in the alternative,

(2) the purported termination of the claimant's employment was valid but was effected under a clause in the contract of employment, clause 11.2, which triggers an entitlement to one year of remuneration which has not been paid.

3 The respondent filed a Notice of Answer on 5 August 2016 in which it says:

(1) the claimant is barred from bringing the current proceedings because a binding settlement agreement previously entered into by the parties has this effect; or, in the alternative,

(2) the claimant's employment was terminated validly and under a clause of the contract of employment, clause 11.3, which has the effect that the claimant was entitled to no payment from the respondent upon termination.

4 The claimant says that the termination cannot have been under clause 11.3 because that is a clause relating to summary dismissal and as the claimant was paid a month's wages when terminated it cannot have been, as a matter of law, a summary dismissal.

5 If the issue of the assessment of damage to the claimant becomes relevant, the respondent says the claimant took up a position as a councillor for the Shire of Denmark on 20 October 2015 and he could not have continued in his employment after that date in any event thus limiting any damage.

6 The matter, not having settled at conference, proceeded to a two-day hearing at which the following persons gave evidence:

(1) the claimant;

(2) Ms Ayen Nyariel, an industrial officer with the Australian Services Union, who represented the claimant at the conference at which the respondent says the agreement barring the present proceedings was reached; and

(3) Mr Dale Robin Stewart, the Chief Executive Officer of the Shire of Denmark at the material time.

7 I find the following as facts as they were not in dispute, or in serious dispute, or they arose out of uncontroverted evidence which I accept.

8 The claimant commenced employment with the respondent on or around 17 October 2005.

9 On 8 September 2014 the parties entered into a three year fixed term contract for the employment of the claimant as the Director of Infrastructure Services for the respondent (Exhibit 1 in these proceedings).

10 The claimant had been designated by the respondent, or belonged to a class of employees which had been designated by the respondent, as a "senior employee" pursuant to section 5.37(1) *Local Government Act 1995*.

11 On 5 June 2015 Mr Stewart wrote the claimant a letter in which he stated words to effect that he was terminating the claimant's employment as at the end of that day for misconduct (Exhibit 3).

12 Section 5.37(2) *Local Government Act 1995* provides:

> "The CEO is to inform the council of each proposal to employ or dismiss a senior employee, other than a senior employee referred to in section 5.39(a), and the council may accept or reject the CEO's recommendation but if the council rejects a recommendation, it is to inform the CEO of the reasons for its doing so."

13 Section 5.37(2) *Local Government Act 1995* was not complied with prior to Exhibit 3 being given to the claimant in that, apart from anything else, Mr Stewart had not informed the council that he was terminating the claimant's employment prior to giving the claimant the letter.

14 Within 21 days of 5 June 2015 the claimant filed an application in the Fair Work Commission alleging that he had been unfairly dismissed.

15 A conference was held by the Fair Work Commission on 15 July 2015 and, although conducted by teleconference, was attended by the claimant and, for him, Ms Nyariel, and Mr Stewart from the respondent and, for it, Brendan Taylor from the Western Australian Local Government Association.

16 By email dated 19 October 2015 (Exhibit 11) the claimant informed the respondent that he was resigning from his employment.

17 The claimant had been elected as a councillor for the Shire of Denmark and councillors may not be employed by the council on which they sit.

18 That is as far as the relevant non-contentious matters go.

19 The parties remain in dispute in the various ways outlined at the start of my reasons.

20 In my view the claim is, as a matter of law, capable of simple resolution.

21 It is only faintly pressed by the respondent that section 5.37(2) *Local Government Act 1995* was complied with. The evidence makes it clear that it was not complied with. Before Mr Stewart terminated the claimant's employment he had not told the council that he was proposing to do this.

22 The respondent says however that, even if there was a failure to comply with section 5.37(2) *Local Government Act 1995*, the failure does not render the purported termination of the claimant's employment invalid and ineffective.

23 Firstly, the respondent made extensive written submissions, elaborated upon orally at the hearing, to the effect that the language of section 5.37(2) *Local Government Act 1995* did not, when read properly, impose a pre-condition upon the appointment or dismissal of a senior employee.

24 I reject those arguments out of hand given that section 5.37(2) *Local Government Act 1995* contains very plain language to the effect that before the CEO appoints or dismisses a senior employee he is to inform the council and the council may accept or reject the proposal.

25 The subsection refers to the CEO informing the council of each "proposal" meaning that something is to occur before the proposal is acted upon. The words "accept" or "reject" only have meaning if they are interpreted as meaning that the proposal is determined, one way or the other, by a decision of council.

26 As a matter of construction the respondent contends that section 5.37(2) *Local Government Act 1995* may be read as merely providing that the CEO is to inform council of his decisions under that subsection with the council having no actual role in the decision-making.

27 Such a construction of the subsection is clearly not available from the ordinary meaning of the text contained therein.

28 Secondly, and this is the respondent's real argument as it was developed during oral submissions, the respondent argued that an appointment or dismissal of a senior employee without a proposal for such having been accepted by a council is not invalid because, properly construed, it is not a purpose of the legislation, or the intention of Parliament, that an act done in breach of the requirements of section 5.37(2) *Local Government Act 1995* is invalid.

29 The respondent relied in this context upon the case it refers me to in its written submissions, *Project Blue Sky Inc v. Australian Broadcasting Authority* (1998) CLR 355, and those decisions which have applied it.

30 The respondent's main argument in support of its position, developed during oral submissions at the hearing, was that it could not have been Parliament's intention that an act done without compliance with section 5.37(2) *Local Government Act 1995* is invalid because it is conceivable that a person might be employed for years despite, due to oversight or poor process, non-compliance and it would be absurd and highly inconvenient if that non-compliance made the person's appointment invalid.

31 The respondent also said that it would be absurd if council acceptance of a proposal was required before the CEO could take effective action because the council might, for some reason, neither accept nor reject a proposal leaving the CEO, and the administration of the council, "in limbo".

32 I reject this second argument also.

33 The only sensible construction of the *Local Government Act 1995* is that a CEO has power and responsibility to employ and dismiss employees but that in relation to some employees, senior employees, the ultimate decision-making power effectively resides with a council.

34 Section 5.41(g) *Local Government Act 1995* provides that:

> "The CEO's functions are to be responsible for the employment, management, supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees)."

35 I have set out section 5.37(2) *Local Government Act 1995* and found that its language clearly creates a pre-condition.

36 I cannot imagine a clearer statement by Parliament that, while it was content to leave the employment and dismissal of employees entirely to the CEO, it was not prepared to leave the employment and dismissal of senior employees entirely to the CEO.

37 Parliament clearly intended that while a CEO might do all of the work leading up to the identification of an appropriate person for appointment or all of the work required to form a basis for the dismissal of a senior employee, and do whatever was administratively required to achieve those things, the final decisions in relation to those matters for senior employees rests with councils.

38 It is clear that Parliament intended councils, and not CEOs, to have ultimate control over the important matter of who is employed or dismissed as senior employees. Given the significance of the role of senior employees, both in terms of their seniority and the financial impact of their employment, and the financial and other potential impacts of their dismissal, it is plain why Parliament intended councils and not CEOs to carry ultimate responsibility for the matters referred to in section 5.37(2) *Local Government Act 1995*.

39 In my view if it was determined that there need not be compliance with section 5.37(2) *Local Government Act 1995* for an appointment or dismissal of a senior employee to be valid the purpose and intent of the legislation would be hopelessly undermined. On such a construction the relevant responsibilities would be in the hands of the CEO, a clearly unintended outcome given that the legislation clearly seeks to put councils in charge of these matters and to take full responsibility for them.

40 The possible inconveniences that may result from this conclusion put up by the respondent are not so great as to make me pause for thought in relation to it. Those inconveniences should not really arise given the clarity of the text of the legislation but even if they were to do so they are, in my view, the price that should properly be paid for ignoring that text.

41 The situation where a council may leave the administration of a council "in limbo" by neither accepting or rejecting a recommendation is unlikely to arise and if it did, and was absurd, that would be a matter for the council allowing it to arise. It should not be cured by an interpretation of the legislation which allows the CEO to take a responsibility that the legislation has given to the council.

42 I also reject for the same reasons any argument that substantial compliance would be enough.

43 In any event, there was not even substantial compliance in this case. The respondent seemed to assert that if council members, or at least senior council members, were aware that an appointment or dismissal might be made, even though there was no proposal before a council meeting to that effect, and that the council, despite never formally accepting the proposal, took no action to undo an action taken without their acceptance, this would amount to substantial compliance.

44 A council choosing not to take action to undo something cannot in any way be equated with the acceptance of a recommendation to do something. The council may have all sorts of reasons for choosing not to undo something which are quite different and separate from considerations that may have exercised its mind if it was considering a proposal to do the thing.

45 My conclusions mean, given that section 5.37(2) *Local Government Act 1995* was not complied with before the claimant received the letter on 5 June 2015, that the purported termination communicated by that letter was wholly invalid and ineffective.

46 There was no evidence that, or argument to the effect that, the claimant was not ready, willing and able to work after 5 June 2015.

47 I find that the claimant remained in employment with the respondent until he resigned by his email dated 19 October 2015 (Exhibit 11).

48 The claimant made an argument in various contexts that the claimant's resignation was not significant in, or relevant to, the current proceedings because it had been caused by what the claimant said was the respondent's breach of contract in terminating his employment.

49 The claimant said he would not have stood for council had he not been terminated and accordingly, but for the respondent's breach, he would have remained ready, willing and able to serve under his contract of employment.

50 This argument must fail. The claimant chose to run for council knowing the implications of this for his employment, if that employment remained on foot (as I have found it did). He was under no compulsion to run for council. His resignation associated with the decision to take up the position of councillor ended his employment and has significance and relevance in that context unaffected by the background circumstances.

51 The respondent breached the contract of employment by not remunerating the claimant in accordance with the contract from 6 June 2015 until 19 October 2015 when the claimant resigned.

52 His damage is the remuneration not paid to him for that period minus the month of salary he was paid upon termination and any money he earned from other work in that period.

53 The issue then becomes whether I should make an order compensating the claimant for the damage suffered in light of the respondent's argument that the current claim is barred by an agreement entered into by him on 15 July 2015.

54 The question here is whether, if there was an agreement reached, I should hold the claimant to it.

55 My conclusion on this point is that as a matter of law the respondent cannot rely upon the "agreement" it refers to.

56 I must accept that, whatever his subsequent conduct revealed about a position he later came to or expressed, when the claimant brought his application to the Fair Work Commission he thought he had been terminated. If he did not think this bringing an application to the Fair Work Commission would make no sense. The claimant was not cross-examined on whether he held this belief at that time.

57 The respondent certainly responded to the application and participated in the proceedings on the basis that it considered the termination of employment to be valid and effective.

58 However, I find that, whatever the claimant and respondent were thinking, as at 15 July 2015 the claimant had not been validly and effectively dismissed and, in fact and as a matter of law, remained in the respondent's employ.

59 What was evidently not known to the parties at the time of the conciliation conference was that the contractual subject matter, the termination of the claimant's employment, was entirely absent.

60 An agreement, if such was reached, that purported to resolve a claim by the claimant that he had been unfairly dismissed when in fact he had not been dismissed is no agreement at all because the specific subject matter of the agreement, even though unknown to the parties at that time, was, as matter of law and fact, non-existent. There was nothing upon which the agreement could fasten.

61 This matter is on terms with the case of *Galloway v. Galloway* (1914) TLR 531 where it was held there could be no agreement arising out of a purported separation deed when the man and woman entering the deed mistakenly thought that they were married when they were, in fact, not married.

62 I note that the deed of release prepared following the conference (Exhibit 2) recites that the claimant was employed only until 5 June 2015 but in my view this simply reflects that the parties were mistaken about the subject matter existing and the recital does not in any way overcome the difficulty with the purported agreement I have identified. It would be similar to the parties in *Galloway v. Galloway* reciting that they were married. Such an "agreement" would not create the subject matter.

63 It may have been different had the agreement been that the claimant resign.

64 This matter is different from that relied upon by the respondent in its written submissions on the point, *Svanosio v. McNamara* (1956) 96 CLR 186, as in that case the subject matter of the agreement existed but there had been a mistake made about certain particulars of the subject matter.

65 Here the subject matter was entirely non-existent. In fact, in the passage the respondent cited, pages 195 and 196, Dixon CJ and Fullagar J quote a previous High Court authority to the effect that a contract is good "unless and until it is set aside for failure of some condition on which the existence of the contract depends."

66 This is such a case.

67 I note here that even though the issue of the effect, if any, on the purported agreement of the claimant not having been dismissed as at 15 July 2015 was not raised by the claimant as part of his Notice of Claim I put the parties on notice at the hearing that I was interested in what they had to say about it and gave them the opportunity to file submissions in relation to it, which both parties did.

68 In conclusion I should add that if I am wrong about any of the findings I have made at [56] to [67] above, and it becomes relevant to decide whether there was an agreement reached on 15 July 2015 which may be pleaded as a bar to the current proceedings, then I would have found there clearly was such an agreement and I would have made an order under section 27(1)(a) *Industrial Relations Act 1979* dismissing the present application.

69 Ms Nyariel gave evidence that an agreement was reached at the conciliation conference. Her evidence was to the effect that the agreement was, relevantly, that the respondent promised to pay the claimant a sum of money and the claimant agreed upon receipt to discontinue the action filed in the Fair Work Commission and to bring no other actions.

70 Ms Nyariel said that she explained to the claimant that as part of the agreement the claimant was agreeing to release the respondent from all claims.

71 Ms Nyariel said such a term "would have to be in the actual deed" (t65) but I did not understand her evidence to mean that it was understood or explained to the claimant that the term was not agreed until the deed was signed. Ms Nyariel was simply saying that she expected such terms as agreed to appear in the deed.

72 I accept that Ms Nyariel understood that an agreement had been reached and I find that she understood this because it occurred. Ms Nyariel was an experienced industrial officer even as at 15 July 2015. She was familiar with conciliation conferences before the Fair Work Commission and what typically occurred at them. She was an impressive witness who gave her evidence that an agreement of the type set out above had been reached clearly and confidently. Her evidence was not challenged in the proceedings.

73 I think if there was any sense within Ms Nyariel at the conference, or remaining with her after the conference, that the claimant did not have the key matters explained to him that sense would have stayed with her and she would have volunteered it in evidence. Her evidence was quite to the contrary.

74 I add that also supportive of a finding that an agreement was reached, but not required to make the findings of fact I do, is the evidence of what occurred the day after the conference.

75 Ms Nyariel gave evidence that on the morning after the conference the claimant called her and told him he wanted to "change his mind about what was agreed at conciliation." (t61) We know such a call was made because the claimant also gave evidence about it. The claimant said that he called to tell Ms Nyariel that he wanted to "withdraw from the mediation" (t35) and that he was not calling her to tell her that he wanted to get out of the settlement agreement having thought about it overnight.

76 I prefer Ms Nyariel's account. She was the claimant's representative and was called by him in these proceedings. Her evidence on this point was not challenged.

77 Given that the contact was made so early the day after the conference Ms Nyariel's account has a strong ring of truth about it. If the claimant did not think a deal had been struck on 15 July 2015 there was nothing requiring urgent attention on the morning of 16 July 2015. The claimant could have, as he gave evidence he understood the position to be, simply waited for the deed and decided whether to sign it or not.

78 Ms Nyariel's evidence cannot be impeached on the basis that, as the submission was put to me, Ms Nyariel's recollection may have been affected by the passage of time. Such a proposition was never put to Ms Nyariel and I reject it. Although not relevant to my fact finding, it seems to me, further, that a member ringing her to withdraw from an agreement the day after a conciliation conference would not be a common event for Ms Nyariel and that she would well remember it occurring, even 15 months later.

79 Ms Nyariel's evidence carries with it the clear implication that an agreement had been reached the day before and supports her other evidence on this point.

80 I am firmly of the view that an agreement was reached at the conference by which the parties intended to be bound. I find on the basis of the evidence of Mr Nyariel that insofar as mention was made of a deed it was in the context that the deed would simply reflect the terms of the agreement.

81 I reject the idea that any agreement was conditional upon signing of a deed. It is not consistent with the evidence and is, in any event, highly improbable.

82 The agreement was not a complex or difficult one. There are any number of simple and standard deeds in this area of the law. It is not as if a party would have to pore over a deed to make sure that it properly captured what had been agreed, such that a litigant would ordinarily expressly make it clear that performance was conditional upon the review of and execution of a formal document. In light of Ms Nyariel's evidence I have no hesitation in finding that no such qualification on the agreement was agreed at the conference.

83 I reject the contentions that no agreement at all was reached or that performance of the agreement was conditional upon the signing of a deed.

84 Accordingly, if I am wrong in concluding that the purported agreement reached on 15 July 2015 was not, at law, an agreement at all then I would have found that there was an agreement reached, that it barred the current claim and the present claim ought to be dismissed.

85 I do not consider, in light of the above, that it is necessary for me to comment on whether clause 11.2 or clause 11.3 of Exhibit 1 was relied upon to purportedly terminate the claimant and what consequences might flow from this.

86 I intend to make an order compensating the claimant on the basis of the above reasons for decision but at this time information on money earned by the claimant between 5 June 2015 and 20 October 2015 that the claimant could not have earned if he was attending work with the respondent, which was discussed at the hearing as being required, is not available.

87 At this time I ask the parties to liaise in relation to whether agreement can be reached on the figure to be inserted into my order and ask that they refer back to my chambers within 14 days.

2017 WAIRC 00042

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT WHOOLEY
	CLAIMANT
	-v-
	SHIRE OF DENMARK
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 30 JANUARY 2017
FILE NO/S	B 74 OF 2016
CITATION NO.	2017 WAIRC 00042

Result	Order made
Representation	
Claimant	In person
Respondent	Mr P Graham, of counsel

Order

HAVING heard the claimant on his own behalf and Mr P Graham, of counsel, on behalf of the respondent, on 30 January 2017;

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

1. THAT by Friday 10 February 2017 the claimant is to file and serve a statutory declaration declaring the claimant's income earned for the financial years 2014/15 and 2015/16.
2. THE claimant shall attach to his statutory declaration his Australian Taxation Office Notice of Assessment and any invoices relating to income earned for the financial years 2014/15 and 2015/16.

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

2017 WAIRC 00219

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00219
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 19 APRIL 2017
DELIVERED	**:**	WEDNESDAY, 19 APRIL 2017
FILE NO.	**:**	B 74 OF 2016
BETWEEN	**:**	ROBERT WHOOLEY Applicant AND SHIRE OF DENMARK Respondent

CatchWords	**:**	Assessment of damages on successful claim that contractual benefits had been denied - Order made
Result	**:**	Order for payment made
Representation:		
Counsel:		
Claimant	**:**	In person
Respondent	**:**	Mr A Sinanovic (of Counsel)
Solicitors:		
Respondent	**:**	Sparke Helmore Lawyers

Supplementary Reasons for Decision

1 The parties having been unable to agree the quantum of damages in this matter that question was heard and determined by me on 19 April 2017.

2 I decided at [52] of my substantive reasons for decision that the quantum of damages should be "the remuneration not paid to [the claimant] for the period [from 6 June 2015 to 19 October 2015] minus the month of salary he was paid upon termination and any money he earned from other work in that period".

3 Relevant to this, certain amounts (each for the relevant period) were agreed by the parties as follows:

(1)	Annual salary:	$41,353.96;
(2)	Cash in lieu of vehicle:	$9,496.10;
(3)	Telephone landline:	$175.00;
(4)	Mobile phone:	$550.00;
(5)	Rental subsidy:	$4,857.14;
	Sub total	$56,432.20
(6)	Month of salary paid on termination:	- $11,538.49;
(7)	Money earned by claimant:	- $1,000.00
	Total	$43,893.71

4 As shown this gives an amount of $43,893.71 (which I accept is less than the figure calculated on the run at the hearing).

5 There remained various matter in dispute as follows:

(1) The claimant says he is entitled to the full amounts of the "association allowance", "clothing allowance" and "professional development allowance" provided for in his contract;

(2) The claimant says that, in the ordinary event, when he resigned he would have given three months' notice as required by his contract and that accordingly he is entitled to a further three months of remuneration;

(3) The claimant says he is entitled to sums that would have been earned (or saved) in interest had he been remunerated in accordance with the contract between 6 June 2015 and 19 October 2015; and

(4) The claimant says that he should be reimbursed costs and expenses associated with the pursuit of these proceedings.

6 I reject each of the claimant's claims.

7 In relation to (1), the claimant informed me that these allowances were not paid as part of his salary on a pro rata basis nor were they paid as a lump sum at a certain time each year unrelated to expenditure. The claimant explained that they are paid as lump sums when the expense to which they relate is incurred, that is the joining of an association, the purchase of clothing or the occurrence of professional development.

8 Despite being requested to do so the claimant was unable to provide any evidence or information to the effect that he had actually incurred the costs of joining an association or purchasing of uniforms or that professional development had occurred, or would have occurred if he had remained employed until 19 October 2015.

9 I am not prepared to make any orders that might result in a windfall gain to him.

10 In relation to (2), the fact is that the claimant did not give three months' notice when he resigned.

11 In relation to (3), these claims are too remote and do not take account of whether interest will now be earned (or saved) as a result of receipt of the lump sum the claimant is soon to receive.

12 In relation to (4), it is not within my jurisdiction to order the payment of legal costs and in relation to expenses I can only order their payment if the claim was frivolously or vexatiously defended, which it was not.

13 The issue of the payment of accrued annual leave, pro rata long service leave and accrued personal and carer's leave was raised before me but the claimant was unable to point to any contractual entitlement to these payments. It would seem that any entitlement to unused leave, if it exists, will arise under an award or legislation and not under the contract.

14 The issue of superannuation was also raised but my view is that the Western Australian Industrial Relations Commission does not have jurisdiction to enforce such payments as the obligation to make such payments, and what occurs where there is a failure to do so, arises under Commonwealth legislation.

15 I make an order that the respondent pay to the claimant the sum of $43,893.71 forthwith.

2017 WAIRC 00232

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT WHOOLEY
	CLAIMANT
	-v-
	SHIRE OF DENMARK
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 26 APRIL 2017
FILE NO/S	B 74 OF 2016
CITATION NO.	2017 WAIRC 00232

Result	Order issued
Representation	
Claimant	In person
Respondent	Mr A Sinanovic, of counsel

Order

HAVING heard the claimant on his own behalf and Mr A Sinanovic, of counsel, on behalf of the respondent on 19 April 2017;

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

THAT the respondent pay to the claimant the sum of $43,893.71 forthwith.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Brian Ross Murray	Attn Keith Guest All About Hoses	U 118/2016	Commissioner D J Matthews	Discontinued
Caroline Anne Mullins	The Roman Catholic Bishops of WA through the delegated employing authority Catholic Education Office of WA	U 205/2016	Commissioner D J Matthews	Discontinued

CONFERENCES—Matters arising out of—

2017 WAIRC 00241

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00241
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 13 APRIL 2017
DELIVERED	**:**	TUESDAY, 2 MAY 2017
FILE NO.	**:**	C 10 OF 2017
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Applicant's member dismissed by respondent - Refusal to re-employ - Application for interim order for re-employment - Consideration of whether interim order for re-employment within power - Principles applied - Application dismissed
Legislation	**:**	*Criminal Code* *Industrial Relations Act 1979* *Labour Relations Reform Act 2002* *Working with Children (Criminal Record Checking) Act 2004*
Result	**:**	Application for interim order dismissed
Representation:		
Applicant	**:**	Mr M Amati
Respondent	**:**	Mr N van Hattem of counsel
Solicitors:		
Respondent	**:**	State Solicitor's Office

Cases referred to in reasons:

BHP Billiton Iron Ore Pty Ltd v CFMEU [2006] WASCA 49

Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 CLR 672

Mineralogy Pty Ltd v Sino Iron Pty Ltd [2016] WASCA 105

Cases also cited:

Brett v Sharyn O'Neill, Director General, Department of Education [2015] WASCA 66

Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union (2003) 83 WAIG 3314

RGC Mineral Sands Ltd & Anor v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch and Ors [2000] WASCA 162

The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch and Anna Pineira trading as Aunty Joan's Child Care Centre (1990) 70 WAIG 2126

The State School Teachers' Union of W.A. (Incorporated) v Director General, Department of Education (2014) 94 WAIG 1469

The State School Teachers' Union of WA (Incorporated) v The Director General, Department of Education (2016) 96 WAIG 1

The Undercliffe Nursing Home v. The Federated Miscellaneous Workers' Union of Australia, W.A. Branch 65 WAIG 385

Reasons for Decision

1 The applicant's member was a teacher employed by the respondent. In November 2016 the respondent became aware that the applicant's member had been issued with an interim negative notice under the *Working with Children (Criminal Record Checking) Act 2004*. It is unlawful to employ a person in child-related employment, such as teaching, if an interim negative notice has been issued to a person and the notice is current. The applicant's member was informed of this by the respondent and his employment ended.

2 The interim negative notice did not become final and, in fact, the applicant's member was, once the matter was considered by the relevant authorities, issued with what is called an "assessment notice" which allowed him to be employed in child-related employment.

3 The applicant then started to make representations to the respondent that its member be re-employed as a teacher. These were unsuccessful. The respondent's position was that it did not wish to re-employ the applicant's member because he was facing a charge of common assault under the *Criminal Code* (that event being the one that had led to the interim negative notice).

4 In the face of the respondent's refusal to re-employ its member the applicant brought an application to the Western Australian Industrial Relations Commission seeking an order for the re-employment of its member. It seeks an interim order that the

respondent re-employ its member pending the outcome of its substantive application. The application for the interim order is the subject of this decision.

5 The applicant points to sections 44(6)(ba)(ii) and (bb)(i) *Industrial Relations Act 1979* as sources of power under which I might make the interim order sought.

6 In relation to section 44(6)(ba)(ii) *Industrial Relations Act 1979* the applicant says that if its member is gainfully employed when the substantive application is heard he will be in a better frame of mind than if not and that this will better "enable arbitration to resolve the matter in question." I reject that argument as being based on a vague and unconvincing contention.

7 I find myself unable to hold the opinion that an interim order would make a difference to the ability of the Western Australian Industrial Relations Commission to resolve the matter in question at arbitration. The applicant is a union and it will represent its member at the arbitration. It will be responsible for preparation for the hearing. The facts are not complex. There is no evidence that its member will not be able to instruct it properly or that his state of mind will affect the preparation and presentation of the case, let alone that, if there are such complications expected, the interim order would resolve them. The contention is altogether too remote and tenuous.

8 That leave section 44(6)(bb)(i) *Industrial Relations Act 1979*.

9 The subparagraph provides:

> The Commission may, at or in relation to a conference under this section…with respect to industrial matters give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under this Act.

10 This is clearly, by the subparagraph's use of the words "otherwise authorised to give or make under this Act", not a source of original power. The subparagraph simply makes it clear that the Western Australian Industrial Relations Commission may exercise all of its power in relation to industrial matters under the *Industrial Relations Act 1979* at a conference under section 44 *Industrial Relations Act 1979*.

11 The respondent's refusal to employ a person is an industrial matter (see "(c)" of the definition of "industrial matter" in section 7 *Industrial Relations Act 1979*) and it has long been accepted that section 23(1) *Industrial Relations Act 1979*, although it does not expressly say as much, gives the Western Australian Industrial Relations Commission the power to order an employer to employ a person it is refusing to employ (see for instance *BHP Billiton Iron Ore Pty Ltd v CFMEU* [2006] WASCA 49).

12 A question which exercises my mind is whether I may, under section 44(6)(bb)(i) *Industrial Relations Act 1979*, make an interim order for employment of a person whom an employer is refusing to employ. While the Commission is clearly "otherwise authorised" to make an order for employment in the circumstances of this matter, the question is whether it is "otherwise authorised" to make an order for employment which is of an interim nature or which is subject to further review or which depends for its continuation upon the happening of some other event?

13 The respondent says the Western Australian Industrial Relations Commission is not "otherwise authorised" to make such an order. The respondent says this for the following reasons:

(1) section 44(6)(bb)(ii) *Industrial Relations Act 1979* gives the Western Australian Industrial Relations Commission a specific power to make an interim order in certain circumstances (not present here) and it can be implied from this that section 44(6)(bb)(i) *Industrial Relations Act 1979* was not intended to include a power to make interim orders;

(2) the explanatory memorandum for the *Labour Relations Reform Act 2002*, which introduced section 44(6)(bb)(ii) *Industrial Relations Act 1979*, stated at [145] that the new subparagraph had the effect that "interim orders will be available to the Commission but will be limited to those unfair dismissal cases heard through the provisions of section 44"; and

(3) a power to order employment substantively and a power to order employment on an interim basis are discrete and while the Western Australian Industrial Relations Commission has power to order employment on a permanent and substantive basis there is no power under the *Industrial Relations Act 1979* to make an interim order.

14 I remain in two minds about whether the Western Australian Industrial Relations Commission has the power to make an interim order for employment in a refusal to employ case.

15 Section 44(6)(bb)(ii) *Industrial Relations Act 1979* does provide that an interim order may be made in an unfair dismissal case. If the Western Australian Industrial Relations Commission was "otherwise authorised" to make such an order it is arguable there would be no need for section 44(6)(bb)(ii) *Industrial Relations Act 1979* with the attendant argument being that the Western Australian Industrial Relations Commission must not be "otherwise authorised" to make an interim order in the circumstances of this case.

16 But section 44(6)(bb)(ii) *Industrial Relations Act 1979* might be interpreted as providing mere clarification or as importing a different test ("the Commission thinks appropriate") for the exercise of the power to make an interim order in the circumstances to which the subparagraph applies.

17 It might also be noted that the subparagraph is expressed to not limit section 44(6)(bb)(i) *Industrial Relations Act 1979* thus perhaps indicating that it is not to be read as having any particular effect on the proper construction of section 44(6)(bb)(i) *Industrial Relations Act 1979*. (see for instance *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679 per Mason J)

18 The paragraph of the explanatory memorandum cited by the respondent is of clear interest but has not been commented upon by the applicant and there is, of course, much that can be debated in relation to the use of such materials in the interpretation of legislation.

19 The concept of there being a power under section 23(1) *Industrial Relations Act 1979* to order employment in a refusal to employ case, but for such an order to be time limited or subject to the occurrence or non-occurrence of a particular event, seems odd. To order employment subject to any further order of the Western Australian Industrial Relations Commission is

not, at first blush, the kind of order the Western Australian Industrial Relations Commission should or can make under section 23(1) *Industrial Relations Act 1979* (it being remembered that under section 44(6)(bb)(i) I am looking for whether the Commission is "otherwise authorised" under the *Industrial Relations Act 1979* to make the order sought) as it may not bring finality to the dispute.

20 Then again the Western Australian Industrial Relations Commission is not the kind of jurisdiction where the legislative powers to hear and determine industrial matters should be interpreted in a restrictive way.

21 If I had been required to come to a conclusion on the materials and argument available I would have done so but given that, even if I found I had the power the applicant contends I do, I would not have exercised it in its member's favour, I am content to leave the question to another day when the Commission has the benefit of fuller argument on the matter.

22 Assuming I had a power to order interim re-employment under section 44(6)(bb)(i) *Industrial Relations Act 1979* the application of the principles I find relevant could not possibly result in me exercising it.

23 The principles to be applied, as for any application for an interim order where none are set out by legislation, is whether the applicant has made out a prima facie case and whether the balance of convenience favours the grant of the order.

24 This application is one for a "mandatory injunction" rather than a "prohibitory injunction." I accept that this makes no difference to the principles to be applied (see *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105) although I note also the passage from a textbook quoted with approval at [85] in the case just cited that "in the application of the normal tests, often, though not always, the fact that the relief sought is mandatory will tilt the balance of convenience in the [respondent's] favour."

25 Also I note the questions of a sufficient prima facie case and whether the balance of convenience favours the grant of relief are related and not independent questions.

26 In relation to whether the applicant has a prima facie case I accept that the applicant does not have to show that it is more probable than not that it will succeed at arbitration. However, the strength of the probability required does depend upon the practical consequences likely to flow from the order the applicant seeks.

27 In this case an order for the applicant would result in the respondent being forced to employ as a teacher a person who is facing a criminal charge arising out of an incident involving a student. It is possible that by the time the arbitration occurs that the applicant's member may have been found not guilty of the charge and that, if the applicant succeeds, I will not be ordering the employment of a person who is facing such a charge but at the moment the practical consequence of the order sought will be as set out above. Even allowing for the presumption of innocence that would be an undesirable outcome for the respondent in its attempts to discharge, and be seen to discharge, its duties to students and the wider community.

28 Although the applicant's member is obviously suffering the deleterious financial and other effects of having lost his job, and some sympathy may be felt for him given that he lost his job because of an interim negative notice that did not become final against him, as things stand it is my view that this does not, in the scheme of things, outweigh the damage to the standing of the respondent in its attempts to discharge, and be seen to discharge, its responsibility to provide children with a safe and credible environment for care and learning. The balance of convenience is resoundingly against the applicant's member.

29 The circumstance that has led to the respondent's refusal to employ him, that he faces a criminal charge arising out of his conduct toward a student, remains and the respondent, and the community which it serves, would be rightfully concerned about such a person being employed as a teacher even once the presumption of innocence is understood and given full weight.

30 Given the strength of the probability of success required, which I find to be higher than what would normally be required and not present here, and the factors relevant to the balance of convenience set out above I would, even if I had the power to grant it, have no hesitation in deciding not to exercise it in favour of the applicant's member.

31 The application for an interim order is dismissed.

2017 WAIRC 00239

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 2 MAY 2017
FILE NO/S	C 10 OF 2017
CITATION NO.	2017 WAIRC 00239

Result	Application for interim order dismissed
Representation	
Applicant	Mr M Amati
Respondent	Mr N van Hattem of counsel

Order

HAVING heard Mr M Amati for the applicant and Mr N van Hattem, of counsel, for the respondent on 13 April 2017 and having received written submissions on 20 April 2017 and 21 April 2017; and

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

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

THAT the application for an interim order is dismissed.

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

CONFERENCES—Matters referred—

2016 WAIRC 00089

DISPUTE RE REJECTION OF APPLICATION FOR PURCHASED LEAVE DEFERRED WAGES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 FEBRUARY 2016
FILE NO/S	CR 29 OF 2015
CITATION NO.	2016 WAIRC 00089

Result	Order issued
Representation	
Applicant	Mr K Singh
Respondent	Mr R Farrell

Order

HAVING heard Mr K Singh on behalf of the applicant and Mr R Farrell 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 application be and is hereby adjourned to a date to be fixed and the hearing listed on 16 February 2016 be and is hereby vacated.

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

2017 WAIRC 00074

DISPUTE RE REJECTION OF APPLICATION FOR PURCHASED LEAVE DEFERRED WAGES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 15 FEBRUARY 2017
FILE NO/S	CR 29 OF 2015
CITATION NO.	2017 WAIRC 00074

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 on 1 February 2017 Ms J Allen-Rana on behalf of the respondent informed the Commission by email that Mr Mathews has commenced work in another position within a different division of the Public Transport Authority under a different industrial agreement;

AND WHEREAS no response was received from the applicant 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.

PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00255

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	TUESDAY, 9 MAY 2017
FILE NO.	APPL 4 OF 2017
CITATION NO.	2017 WAIRC 00255

Result	Further Direction amended
Representation	(by written correspondence)
Appellant	Mr M Georgiou
Respondent	Mr N John, of counsel

Amended Further Direction

WHEREAS on 5 April 2017, the Commission issued a Further Direction ([2017] WAIRC 00201) granting a further extension of time to 1 May 2017 for the appellant to comply with reg 92 of the *Industrial Relations Commission Regulations 2005* (the IR Regulations); and

WHEREAS on 5 May 2017, the appellant requested an extension for a further four weeks in which to comply with reg 62 of the IR Regulations; and

WHEREAS on 8 May 2017, the respondent advised that he does not object to the request being granted, however, the respondent notes that this is the third such request for adjournment, and that any further delay be dealt with in a directions hearing; 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, 29 May 2017.

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

2017 WAIRC 00221

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER ADAMS
	APPLICANT
	-v-
	MS ANNE NOLAN, DIRECTOR GENERAL DEPARTMENT OF FINANCE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 20 APRIL 2017
FILE NO/S	APPL 13 OF 2017
CITATION NO.	2017 WAIRC 00221

Result Order issued

Order

HAVING heard the applicant on his own behalf and Mr N van Hattem (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) orders –

1. THAT the parties file a statement of agreed facts by 5 May 2017.
2. THAT the applicant file and serve written submissions by 19 May 2017.
3. THAT the respondent file and serve written submissions by 2 June 2017.
4. THAT the applicant may file and serve a reply to the respondent's written submissions by 12 June 2017.

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

2017 WAIRC 00244

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR LESLIE MAGYAR
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 3 MAY 2017
FILE NO/S	APPL 66 OF 2016
CITATION NO.	2017 WAIRC 00244

Result	Order issued
Representation	
Applicant	Mr N Marsh (of counsel)
Respondent	Ms R Hartley (of counsel)

Order

WHEREAS this is a referral to the Commission under the *Public Sector Management Act 1994* (WA);

AND WHEREAS on 12 January 2017 the Commission issued a programming order;

AND WHEREAS the applicant has not complied with the order that he file and serve an outline of written submissions by 11 April 2017;

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

1. THAT the applicant file and serve an outline of written submissions by 4pm on 4 May 2017.
2. THAT the respondent file and serve an outline of written submissions by 4pm on 18 May 2017.

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

2017 WAIRC 00247

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROLINE WINCZA
	APPLICANT
	-v-
	WESTERN AUSTRALIA POLICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 3 MAY 2017
FILE NO.	PSA 18 OF 2016
CITATION NO.	2017 WAIRC 00247

Result Direction issued

Direction

HAVING heard Ms C Wincza on her own behalf and Ms L Middleton (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on her under the *Industrial Relations Act 1979* (WA) directs –

1. THAT the parties file a statement of agreed facts by 17 May 2017.
2. THAT the applicant file and serve witness statements and an outline of written submissions by 31 May 2017.
3. THAT the respondent file and serve witness statements and an outline of written submissions by 15 June 2017.
4. THAT this matter be listed for hearing after 29 June 2017.
5. 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
Aboriginal Legal Service of Western Australia (Inc.) Agreement 2016 AG 4/2017	05/03/2017	Western Australian Municipal Administrative, Clerical and Services Union	Aboriginal Legal Services of Western Australia (Incorporated)	Commissioner D J Matthews	Agreement Registered
Australian Workers' Union (Western Australian Public Sector) General Agreement 2017 - The AG 5/2017	04/24/2017	Director General Department of Parks and Wildlife, Director General Department of Agriculture and Food Western Australia, Director General Department of Education	The Australian Workers' Union West Australian Branch Industrial Union of Workers	Commissioner D J Matthews	Agreement Registered
Building and Engineering Trades (Government) General Agreement 2017 AG 3/2017	05/03/2017	Chief Executive Officer, Zoological Parks Authority, Commissioner, Main Roads Western Australia, Director General, Department of Agriculture and Food Western Australia	The Construction, Forestry, Mining and Energy Union of Workers, The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers Western Australian Branch, The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers	Commissioner D J Matthews	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Executive Transport Services Employees Agreement 2017 AG 6/2017	05/03/2017	The Executive Director Labour Relations and Industry Development of the Department of Commerce, acting as agent for, and on behalf of the Director General of the Department of the Premier and Cabinet	The Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch	Commissioner D J Matthews	Agreement Registered

PUBLIC SERVICE APPEAL BOARD—

2017 WAIRC 00014

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 7 SEPTEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MIHALJ OLMAN

APPELLANT

-v-

DEPARTMENT OF CORRECTIVE SERVICES W.A.

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR K BROWN - BOARD MEMBER
MR K DODD - BOARD MEMBER

DATE WEDNESDAY, 11 JANUARY 2017

FILE NO PSAB 20 OF 2016

CITATION NO. 2017 WAIRC 00014

Result Order issued

Representation (by correspondence)

Appellant Mr S McDade (as agent)

Respondent Mr J Carroll (of counsel)

Order

WHEREAS the parties have conferred and agreed to an adjournment;

AND WHEREAS the Public Service Appeal Board is of the view that it is appropriate to issue an order in the terms of the agreement;

AND HAVING heard Mr S McDade (as agent) on behalf of the appellant and Mr J Carroll (of counsel) on behalf of the respondent, by correspondence;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the appeal be adjourned and relisted on a date no earlier than 13 February 2017 and the hearing date of 2 February 2017 be vacated.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2017 WAIRC 00118

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 7 SEPTEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MIHALJ OLMAN
	APPELLANT
	-v-
	DEPARTMENT OF CORRECTIVE SERVICES W.A.
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR K BROWN - BOARD MEMBER
	MR K DODD - BOARD MEMBER
DATE	FRIDAY, 3 MARCH 2017
FILE NO	PSAB 20 OF 2016
CITATION NO.	2017 WAIRC 00118

Result	Discontinued by leave
Representation	
Appellant	Mr S McDade as agent
Respondent	Mr J Carroll 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 date of 8 March 2017 be and is hereby vacated.

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

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2017 WAIRC 00264

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHIAT LENG TAN
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 12 MAY 2017
FILE NO/S	APPL 62 OF 2016
CITATION NO.	2017 WAIRC 00264

Result	Application dismissed

Order

WHEREAS this is an application pursuant to s 78 of the *Public Sector Management Act 1994*; and

WHEREAS conferences were convened on 21 December 2016 and 23 March 2017 for the purpose of conciliating between the parties; and

WHEREAS the parties were unable to reach an agreement on settlement of the matter; and

WHEREAS on 12 May 2017, the applicant by way of email, advised the Commission that he wishes to withdraw his application.

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

THAT this application be, and is hereby dismissed.

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

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 59/2016	Mark Darryl Nelson	Public Transport Authority of Western Australia	Matthews C	Referral to Commission under Public Sector Management Act 1994		Discontinued

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
Neil Smith	Matt Sharp BIS Industries	Matthews C	RFT 9/2016	04/08/2016 12/08/2016 26/08/2016	Referral of dispute	Discontinued
Rainmark Holdings Pty Ltd T/as Swing Lift Solutions	Owens Transport Pty Ltd	Matthews C	RFT 10/2016	31/08/2016	Dispute re alleged termination of contract	Discontinued