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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

GENERAL ORDERS—

2017 WAIRC 00338

RESCIND GENERAL ORDER NO. 15/2016 AND ISSUE A NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 15 JUNE 2017
FILE NO/S	APPL 20 OF 2017
CITATION NO.	

Result General Order issued

Representation

Mr B Entrekin on behalf of the Hon. Minister for Commerce and Industrial Relations

Mr P Moss on behalf of the Chamber of Commerce and Industry of WA (Inc)

Dr T Dymond on behalf of UnionsWA

General Order

HAVING heard Mr B Entrekin on behalf of the Honourable Minister for Commerce and Industrial Relations; Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia (Inc); and Dr T Dymond on behalf of UnionsWA, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders –

(1) THAT each award cited in Schedule A of this General Order be varied by substituting for the location allowances provisions contained in each such award the location allowance provisions in Schedule B of this General Order.

(2) THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2017.

(3) THAT this General Order replace the General Order in Matter No 15 of 2016 which thereby shall be rescinded.

(Sgd.) S J KENNER,
Senior Commissioner,

[L.S.] For and On behalf of the Commission In Court Session.

LOCATION ALLOWANCES

SCHEDULE A

Title of Award or Order	Clause No.
Aerated Water and Cordial Manufacturing Industry Award 1975	31
Aged and Disabled Persons Hostels Award, 1987	28
Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979	20
Animal Welfare Industry Award	14
Artworkers Award	20
The Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002	5.14
Bakers' (Country) Award No. 18 of 1977	20
Breadcarters (Country) Award 1976	27
Building Trades Award 1968	24
Building Trades (Construction) Award 1987	Appendix A
Child Care (Out of School Care - Playleaders) Award	10
Children's Services (Private) Award	12
Cleaners and Caretakers Award, 1969	3.6
Cleaners and Caretakers (Car and Caravan Parks) Award 1975	22
Clerks' (Accountants' Employees) Award 1984	23
Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972	27
Clerks' (Customs and/or Shipping and/or Forwarding Agents) Award	30
Clerks' (Hotels, Motels and Clubs) Award 1979	22
Clerks (Timber) Award	31
Clerks (Unions and Labor Movement) Award 2004 No. A 10 of 1996	37
Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947	28
Clothing Trades Award 1973	22
Contract Cleaners Award, 1986	24
Contract Cleaners' (Ministry of Education) Award 1990	21
Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011	17.6
Dental Technicians' and Attendant/Receptionists' Award, 1982	27
The Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979	32
Dry Cleaning and Laundry Award 1979	22
Earth Moving and Construction Award	25
Electrical Contracting Industry Award R 22 of 1978	22
Electrical Trades (Security Alarms Industry) Award 1980	19
Electronics Industry Award No. A 22 of 1985	24
Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973	25
Engine Drivers' (General) Award	20
Enrolled Nurses and Nursing Assistants (Private) Award No. 8 of 1978	23
Foremen (Building Trades) Award 1991	15
Funeral Directors' Assistants' Award No. 18 of 1962	33
Furniture Trades Industry Award	46
Gate, Fence and Frames Manufacturing Award	21
Golf Link and Bowling Green Employees' Award, 1993	28
Hairdressers Award 1989	31
The Horticultural (Nursery) Industry Award, No. 30 of 1980	6
Industrial Spraypainting and Sandblasting Award 1991	19
Independent Schools Administrative and Technical Officers Award 1993	22
Independent Schools (Boarding House) Supervisory Staff Award	22

Title of Award or Order—*continued*	**Clause No.**
Independent Schools Psychologists and Social Workers Award	21
Independent Schools' Teachers' Award 1976	18
Landscape Gardening Industry Award	18
Licensed Establishments (Retail and Wholesale) Award 1979	31
Local Government Officers' (Western Australia) Interim Award 2011	17.2
Meat Industry (State) Award, 2003	21(1)
Metal Trades (General) Award	5.6
Motel, Hostel, Service Flats and Boarding House Workers' Award, 1976	42
Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980	17
Municipal Employees (Western Australia) Interim Award 2011	19.6
Nurses' (Day Care Centres) Award	22
Nurses (Dentists Surgeries) Award 1977	23
Nurses (Doctors Surgeries) Award 1977	22
Nurses' (Independent Schools) Award	20
Nurses' (Private Hospitals) Award	30
Pastrycooks' Award No. 24 of 1981	11
Pest Control Industry Award	14
Photographic Industry Award, 1980	29
Private Hospital Employees' Award, 1972	40
Quarry Workers' Award, 1969	19
Radio and Television Employees' Award	23
Restaurant, Tearoom and Catering Workers' Award	41
Retail Pharmacists' Award 2004	5.2
The Rock Lobster and Prawn Processing Award 1978	26
School Employees (Independent Day & Boarding Schools) Award, 1980	31
Security Officers' Award	20(3)
Sheet Metal Workers' Award No. 10 of 1973	26
The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977	39
Social and Community Services (Western Australia) Interim Award 2011	18.10
Teachers' Aides' (Independent Schools) Award 1988	17
Timber Yard Workers Award No. 11 of 1951	28
Transport Workers (General) Award No. 10 of 1961	5.13
Transport Workers (Mobile Food Vendors) Award 1987	18
Transport Workers' (North West Passenger Vehicles) Award, 1988	28
Transport Workers' (Passenger Vehicles) Award No. R 47 of 1978	24
Western Australian Surveying (Private Practice) Industry Award, 2003	8.4

SCHEDULE B

Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, an employee shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

TOWN	PER WEEK
Agnew	$21.30
Argyle	$57.00
Balladonia	$22.00
Barrow Island	$37.10
Boulder	$9.10
Broome	$34.30

Bullfinch	$10.00
Carnarvon	$17.60
Cockatoo Island	$37.60
Coolgardie	$9.10
Cue	$21.90
Dampier	$29.90
Denham	$17.60
Derby	$35.70
Esperance	$6.20
Eucla	$23.90
Exmouth	$31.30
Fitzroy Crossing	$43.30
Halls Creek	$50.00
Kalbarri	$7.60
Kalgoorlie	$9.10
Kambalda	$9.10
Karratha	$35.90
Koolan Island	$37.60
Koolyanobbing	$10.00
Kununurra	$57.00
Laverton	$21.80
Learmonth	$31.30
Leinster	$21.30
Leonora	$21.80
Madura	$23.00
Marble Bar	$55.20
Meekatharra	$18.90
Mount Magnet	$23.70
Mundrabilla	$23.50
Newman	$20.50
Norseman	$18.80
Nullagine	$55.10
Onslow	$37.10
Pannawonica	$27.80
Paraburdoo	$27.70
Port Hedland	$29.70
Ravensthorpe	$11.30
Roebourne	$41.30
Sandstone	$21.30
Shark Bay	$17.60
Southern Cross	$10.00
Telfer	$50.80
Teutonic Bore	$21.30
Tom Price	$27.70
Whim Creek	$35.50
Wickham	$34.30
Wiluna	$21.60
Wyndham	$53.40

(2) Except as provided in subclause (3) of this clause, an employee who has:

(a) a dependant shall be paid double the allowance prescribed in subclause (1) of this clause;

(b) a partial dependant shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependant is receiving by way of a district or location allowance.

(3) Where an employee:

(a) is provided with board and lodging by his/her employer, free of charge; or

(b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act;

such employee shall be paid $66^{2}/_{3}$ per cent of the allowances prescribed in subclause (1) of this clause.

The provisions of paragraph (b) of this subclause shall have effect on and from the 24th day of July, 1990.

(4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.

(5) Where an employee is on annual leave or receives payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

(6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.

(7) For the purposes of this clause:

(a) "Dependant" shall mean -

(i) a spouse or defacto partner; or

(ii) a child where there is no spouse or defacto partner;

who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.

(b) "Partial Dependant" shall mean a "dependant" as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.

(8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and UnionsWA or, failing such agreement, as may be determined by the Commission.

(9) Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

FULL BENCH—Appeals against decision of Commission—

2017 WAIRC 00301

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 104 OF 2016 GIVEN ON 14 NOVEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2017 WAIRC 00301
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT ACTING SENIOR COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 29 MARCH 2017
DELIVERED	**:**	TUESDAY, 30 MAY 2017
FILE NO.	**:**	FBA 10 OF 2016
BETWEEN	**:**	ROBERT KINNEEN Appellant AND WHELANS Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner D J Matthews**
Citation	**:**	**[2016] WAIRC 00874; (2016) 96 WAIG 1622**
File No.	**:**	**B 104 of 2016**

CatchWords	**:**	Industrial Law (WA) - Appeal against decision of Commission - Claim of contractual benefits - Construction of terms of contract - Principles for ascertainment of the terms of a contract of employment considered - Appellant employed as graduate surveyor under articles of apprenticeship to become a licensed surveyor - Professional training agreement formed part of terms of appellant's contract of employment - No breach of terms of contract of employment - Turns on own facts
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii), s 49, s 49(4)(a)
		Industrial Relations Commission Regulations 2005 (WA) reg 102(2), reg 102(3)
		Licensed Surveyors Act 1909 (WA) s 3, s 3(1), s 7, s 9, s 9(1), s 9(1)(b), s 9(1a), s 16
		Licensed Surveyors (Licensing and Registration) Regulations 1990 (WA) reg 3, reg 4
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	In person
Respondent	**:**	Mr J Lilleyman (of counsel), Chamber of Commerce and Industry of Western Australia (Inc)

Case(s) referred to in reasons:

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570

Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99

Black Box Control Pty Ltd v Terravision Pty Ltd [2016] WASCA 219

Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833; (2001) 117 FCR 424

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337

County Securities Pty Ltd v Challenger Group Holdings Pty Ltd [2008] NSWCA 193

Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407

Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd (2012) 45 WAR 29

Hughes v St Barbara Ltd [2011] WASCA 234

King v Griffin Coal Mining Company Pty Ltd [2017] WAIRC 00102; (2017) 97 WAIG 527

McMahon v National Foods Milk Ltd [2009] VSCA 153

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37; (2015) 256 CLR 104

Royal Botanic Gardens v South Sydney City Council [2002] HCA 5; (2002) 240 CLR 45

Servcorp WA Pty Ltd v Perron Investments Pty Ltd [2016] WASCA 79; (2016) 50 WAR 226

South Sydney Council v Royal Botanic Gardens (1999) NSWCA 478

Terravision Pty Ltd v Black Box Control Pty Ltd [No 3] [2016] WASC 95

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165

Underdown v Dowford Investments Pty Ltd [2005] WAIRC 01243; (2005) 85 WAIG 1437

Case(s) also cited:

Ansett Transport Industries (Operations) Pty Limited v The Commonwealth of Australia (1977) 139 CLR 54

Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600

BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings (1977) 180 CLR 266

Con-Stan Industries of Australia Proprietary Limited v Norwich Winterthur Insurance (Australia) Limited (1986) 160 CLR 226

Gandy Timbers Pty Ltd v Gresty (1986) 66 WAIG 1591

Hotcopper Australia Ltd v SAAB (2002) 117 IR 256

Kinneen v Whelans [2016] WAIRC 00876

Whitlock v Brew (1968) 118 CLR 445

Reasons for Decision

SMITH AP AND SCOTT CC:

The appeal

1 This is an appeal instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the IR Act) against a decision made by the Commission on 14 November 2016 dismissing application B 104 of 2016. Application B 104 of 2016 was referred to the Commission by Robert Kinneen (the appellant) pursuant to s 29(1)(b)(ii) of the IR Act. The appellant was employed by Whelans (WA) Pty Ltd (who later changed its name to Whelans Australia Pty Ltd) trading as Whelans (the respondent) from 21 March 2007 until 25 March 2011.

2 The appellant has a degree in surveying and has for several years attempted to become qualified as a licensed surveyor.

3 A person is entitled to obtain a certificate of competency issued by the Land Surveyors Licensing Board (the Board) and to practise as a licensed surveyor by obtaining a licence under s 7 of the *Licensed Surveyors Act 1909* (WA) if he or she has entered into articles of apprenticeship or pupilage pursuant to the regulations and has passed the prescribed examination and fulfilled all the prescribed conditions (s 9(1) and s 9(1a) of the *Licensed Surveyors Act*).

4 The appellant claims that it was a term of his contract of employment that the respondent train him to become competent to become qualified as a licensed surveyor through a professional training agreement lodged with the Board which included training for him to complete the Board's final field examination at Boya, near the Helena Valley. In March 2011, the appellant attempted the Boya field examination which he failed. Shortly after finding out he had failed the examination he resigned from his employment with the respondent.

5 The appellant claims that the term of his contract of employment was breached by the respondent in that whilst employed by the respondent he did not receive field survey training from the licensed surveyor employed by the respondent who was a party to his professional training agreement. He also argues that the term of his contract of employment was breached on grounds that he received insufficient rural cadastral survey training in the field to be adequately prepared to pass the final field examination.

6 The appellant's particulars of the breach of the alleged term is as follows:

(a) he had insufficient experience in rural cadastral field work which was a fact known to the respondent when he first became an employee of the respondent but his insufficient rural survey field experience was not addressed by it;

(b) his supervisor, and party to the professional training agreement, Mr Philip Jonath, a licensed surveyor, did not go into the field to train and supervise him, especially in relation to rural cadastral field work;

(c) the respondent did not find a new supervising licensed surveyor within its employ to replace Mr Jonath as a party to the professional training agreement when Mr Jonath resigned in January 2011; and

(d) the respondent was not proactive enough, once Mr Jonath had resigned, in ensuring that he (the appellant) was ready for the Boya field examination in March 2011 and effectively left it to him to train himself.

7 The terms of the appellant's contract of employment are in dispute. The respondent in its notice of answer filed on 14 July 2016 pleaded that:

(a) the appellant's terms and conditions of employment were governed by the the respondent's employee collective agreement (which was tendered in the proceedings at first instance as exhibit 4);

(b) the terms of the employee collective agreement did not set out any minimum training requirements as part of the terms and conditions of employment;

(c) the appellant, together with the nominated supervising licensed land surveyor, Mr Jonath, was voluntarily party to a professional training agreement which was registered with the Board. Mr Jonath was at the time employed by the respondent. The professional training agreement incorporated a training program to be undertaken by the appellant, as a graduate surveyor, under the guidance of the supervising surveyor; and

(d) it disputed that the professional training agreement represented (constituted) a contract of employment benefit.

Application to adduce fresh evidence

8 The appellant included in the appeal book a number of documents that were not tendered into evidence in the proceedings at first instance. These documents were as follows:

(a) Appendix A - Field Work Table is a document that contains a summary of time the appellant says he recorded in his diaries as time spent by him in the field whilst employed by the respondent under the direct supervision of a licensed surveyor. The appellant produced the document at the hearing at first instance. The appellant informed the Full Bench that he thought appendix A was in evidence as he had handed a copy to the respondent's counsel and to the learned Commissioner. Whilst he did not give evidence about the document or attempt to tender it, he examined Mr Gregory Ireland, an assistant manager and licensed surveyor employed by the respondent, about the fact that the document records that all of the training in field he (the appellant) received whilst employed by the respondent was not from Mr Jonath but from other licensed surveyors employed by the respondent (ts 36 - 39). When Mr Jonath gave evidence, he conceded that he did not train the appellant in the field (ts 64).

(b) Appendix C - Employee Management Plan is a plan dated 15 October 2009 and refers to a goal of the appellant to obtain license through ongoing training in February/March 2010.

(c) Appendix D and appendix E are letters Mr Jonath wrote to the Board on 24 February 2009 and 28 September 2009 and contain Mr Jonath's observations about the appellant's experience and progress in completing projects.

(d) Appendix F and appendix G are tables found in the annual reports of the Board from 2009 to 2015.

9 After hearing submissions from the parties, the Full Bench informed the appellant that, other than appendix A, the documents would not be received into evidence. The reasons why the Full Bench made this decision are as follows:

(a) Section 49(4)(a) of the IR Act provides that an appeal to the Full Bench shall be heard and determined on the evidence and matters raised in the proceedings before the Commission.

(b) The Full Bench does, however, have a discretion to receive additional evidence within strict confines which is that fresh evidence can only be admitted if:

> The evidence, insofar as it was relevant, and some of it was not, could only be admissible if it were not 'available to the appellant at the time of the trial' and could not by reasonable diligence have been made available. Further, it is only admissible if the evidence sought to be admitted is credible, although it does not have to be beyond controversy. Further, it can only be admitted if it is almost certain that, if the evidence had been available and adduced, an opposite result would have been reached: *Underdown v Dowford Investments Pty Ltd* [2005] WAIRC 01243; (2005) 85 WAIG 1437 [8] (Sharkey P and Kenner C); applied in *Merredin Customer Service Pty Ltd v Green* [2007] WAIRC 01150; (2007) 87 WAIG 2789 [10]; *Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health* [2011] WAIRC 00192; (2011) 91 WAIG 291 [60].

(c) Whilst none of the documents sought by the appellant met the test set out in ***Underdown v Dowford Investments Pty Ltd*** [2005] WAIRC 01243; (2005) 85 WAIG 1437 and the other decisions referred to in the preceding subparagraph, the members were of the opinion that a special circumstance was raised that should allow the admission of appendix A into evidence.

10 Having read the transcript of the proceedings at first instance and having heard the appellant's submissions, it emerges that the appellant when conducting his case did not appreciate that if he wished to rely upon a particular document he should seek to formally tender the document.

11 It appears from the transcript, however, that when the document was produced by the appellant and after Mr Ireland was examined about the document, no inquiry was made by the learned Commissioner as to whether the appellant wished to tender the document. Having regard to these circumstances, the Full Bench determined that it would receive into evidence appendix A. However, the appellant was informed that as he did not give evidence about the contents of the document and how it was prepared and the respondent was not able to test the reliability of the contents of the document, the Full Bench would not give the contents of appendix A much weight.

Terms of professional training agreement entered into by the appellant and Mr Jonath

12 Exhibit 3 records that the professional training agreement made between Mr Jonath, as licensed surveyor, and the appellant as graduate surveyor, was registered by the Board on 12 December 2007.

13 The material terms of the professional training agreement were as follows:

1. Purpose

This agreement records the training program to be undertaken by the graduate surveyor (*Rob Kinneen*) under the guidance of the supervising surveyor (*Phil Jonath*).

2. The Supervising Surveyor

Name:	Phil Jonath
Address:	WHELANS (WA) PTY LTD
	P.O. Box 99
	Mt Hawthorn. W.A. 6015
Qualifications:	2006, Dip. Of Business
	2000, Authorised Mine Surveyor Grade 2
	1994, Authorised Surveyor for the Dept. of Minerals and Energy to undertake tenement surveys
	1993, Licensed Surveyor (Land Licensed Surveyors Board WA)
	1992, Licensed Surveyor (The Surveyors Board of Queensland)
	1992, Grad. Dip. in Survey Practice (QUT)
	1990, Bachelor of Surveying (SAIT)
Experience:	15 years as a Licensed Surveyor.
Appointments:	Project Manager - 2 ½ years.
Professional Associations:	Member of the Spatial Sciences Institute (Australia).

3. The Graduate Surveyor

Name:	Rob Kinneen
Address:	66 Reserve Street
	Wembley. W.A. 6014

Qualifications:	Bachelor of Surveying 2000.
Academic Record:	See Attachment A
Surveying Experience:	Employed at WHELANS (WA) PTY LTD on a full time basis as a project surveyor.
	March 2006 - November 2006
	Articled to Paul Nas of NASTECH Surveys (Transferred).
	February 2005 - November 2005
	Articled to Gary Carlton of Carlton Surveys (Transferred).
	December 2003 - January 2004.
	Employed at Richard Lester & Associates (Surveyors) on a full time basis as a survey party leader.
	September 2001 - November 2003
	Recovering from sudden illness
	January 2001 - August 2001
	Employed at Automated Surveys on a full time basis as a survey assistant/technician.

4. The Company

History: Operating for over 40 years, WHELANS provides expertise in all facets of surveying, mapping and town planning, while using state of the art equipment. Over this period our reputation and relationship with government bodies and clientele has cemented our name as a professional, ethical and reliable company.

5. Essence of Agreement

The above named persons agree that:

5.1 The surveying graduate agrees to undertake the remainder of his training from the supervising surveyor to learn the profession of a land surveyor in accordance with the Land Surveyors Licensing Board (LSLB) Guidelines, backdated 6 months from the submission of this agreement.

…

5.3 The supervising surveyor will instruct the survey graduate in the profession of land surveyor or shall cause the survey graduate to be so instructed.

5.4 The supervising surveyor will permit the surveying graduate to attend such lectures and examinations as may be requisite or proper for his better instruction in the profession of land surveyor.

5.5 The period of training shall include the remainder of fifteen (15) months on cadastral surveys, including a minimum six (6) month period of urban surveys.

…

7. Scope of Training

The training will include the subjects listed at guideline 5 of the Land Surveyors' Licensing Board Guidelines for Supervising Surveyors (Guidelines).

8. Level of Supervision

The level of supervision provided will be as stated in guideline 6 of the Guidelines.

9. Time Schedule

Time schedule of Professional Training Program. See Attachment B.

10. Responsibilities of the Supervisor

The responsibilities of the supervising surveyor under this agreement are as stated in guideline 7 of the Guidelines.

11. Accountability and Reputation

It is recognized that the graduate (during this agreement and after licensing) is a reflection on the supervisor and on the company (in field notes, project work and direct relations with clientele and the public). The graduate's training is at least as important to the supervisor as the successful completion of survey jobs. The supervisor and company will provide every possible tuition, guidance and opportunity, but the graduate will only be progressed to the next stage when ability is proven.

Despite any intention of the graduate to specialize once licensed, this training must give a balanced general training in all aspects of cadastral work. Competency in all aspects must be demonstrated before the graduate will be recommended for the license.

14 Whilst the company is not directly defined in the agreement, it is referred to in cl 2 and cl 4 as Whelans (WA) Pty Ltd. Attached to the professional training agreement was a copy of the appellant's Bachelor's degree (ts 6).

15 It is common ground that in January 2011 Mr Jonath tendered his resignation. Prior to Mr Jonath's employment coming to an end with the respondent, Mr Jonath wrote to the Board that it was his and the appellant's opinion that the appellant was ready to sit the practical examination in March of 2011 (exhibit 9, AB 83). Mr Jonath also stated in the letter that he had completed the certificate of professional training and that the appellant in his opinion was fully competent for surveys effected and it was his understanding that all fees had been paid previously when the appellant intended to sit the September 2010 practical examination. Mr Jonath also stated in his letter that he would be ceasing work with Whelans (WA) Pty Ltd, but would keep the professional training agreement under his name until after the appellant sat and completed the March 2011 practical examination. In the certificate attached to Mr Jonath's letter, Mr Jonath certified that the appellant had gained the following experience between 1 August 2010 to 31 December 2010 as follows (exhibit 9, AB 84):

Nature of Practical Experience Obtained by Candidate	Length of Time (in weeks) over which Candidate has Obtained Practical Experience Under Professional Training Agreement				
	Office Experience	Field Experience as a General Assistant	Field Experience as an Instrument Operator	Field Experience as a Party Leader	Total Experience Obtained
Land Boundary Surveys:					
- in Urban Areas	2			4	6
- in Rural Areas	0			0	0
Engineering Surveys	1			5	6
Topographical Surveys	1			1	2
Mining Surveys	1		1	0	2
Control Surveys	1			2	3
Other Surveys	1			1	2
Total Experience Obtained	7	0	1	13	21

Relevant documents – terms of contract of employment

16 In the proceedings at first instance, the respondent tendered a letter written by the appellant on 3 April 2006. The letter was written by the appellant, with a view to obtaining employment with the respondent. At that time, he had been a party to successive professional training agreements whilst working for two other surveying firms, but he had not completed the requisite conditions and examinations to become a licensed surveyor. The letter to the respondent contained an 'offer' by the appellant for his services for a chance to complete 'articles' to become a licensed surveyor. The letter states as follows (exhibit 8, AB 82):

> I am writing to offer my services in return for a chance to complete my articles with your company. Unfortunately, my Professional Training Agreement had to be mutually terminated due to my supervisor's inability to provide me with the necessary training. Pending a new PTA, the Licensing Board will consider granting me an exemption based on work completed during my previous PTA. This will probably mean I will have somewhere between 12 and 15 months to go.
>
> Presently, you would be gaining the benefit of the accumulated skills and training of a person who has two years experience as a party leader. I am at a level where I can be sent out to carry through to completion most cadastral surveys, with only minimum off site supervision. To assist you in understanding my skills level, I have included a summary below for your inspection. A record of my recently completed work will be provided in person in the event of a job interview, as well as a resume.
>
> Using a Leica, Topcon or Sokkia Total Station, I am competent in the following areas:
>
> - Easy to medium difficulty road alignments for subdivisions and re-pegs
> - Calculations for subdivisions, re-pegs and building set outs
> - Pre-calculated re-pegs and set outs
> - Built strata surveys
> - Levelling surveys
> - Topographical surveys
> - Sewer and Water as constructed surveys
> - Civilcad (a little rusty presently)
> - All facets of chainman work

17 Almost a year later, the managing director of the respondent, Mr Brian Hill, made an offer of employment to the appellant. In a letter to the appellant on 21 March 2007, Mr Hill referred to a number of unspecified documents. The letter states as follows (exhibit 1, AB 26):

> Attached are various documents for you to consider, complete and endorse with respect to our offer of employment with Whelans.
>
> As discussed it would be our intention to have you inducted and comfortable with our work processes as quickly as possible with the aim to have you performing a Survey Party Leaders role as soon as you able. To this end training and a mentoring contact will be made available and a formal review of your progress will be made after the 3 months probationary period.
>
> Assuming this review is favourable it would be reasonable to expect that your salary package could be increased and an Articled Position offer made so that you can ultimately become a Licensed Surveyor.
>
> I look forward to receiving back from you confirmation of our offer of employment and should you have any queries at any time please do not hesitate to contact me.

18 In a preliminary hearing at first instance the appellant tendered a document headed 'Whelans Employee Collective Agreement' which at that time he claimed contains his terms and conditions of employment. That document was tendered as exhibit 2. Clause 16 - Training Leave of exhibit 2 contained the following term (exhibit 2, AB 40):

> The employee will be provided with appropriate training, as determined on a needs basis, to ensure adequate practical and professional work competency.

19 However, when cross-examined at a subsequent hearing of the merits of his claim, it was put to the appellant that in fact the terms of his contract of employment were contained in an Employer-Employee Agreement Whelans July 2003 which was tendered as exhibit 4 (the employment contract). The appellant conceded that to be the case. The material terms of exhibit 4 are as follows:

(a) Clause 2 - Intention of Agreement:

> This Agreement shall cover all items and conditions of employment. It shall operate to the exclusion of any other agreements or awards.

(b) Clause 4.1:

> 4.1 The employer - employee shall be employed as an employee and work in accordance with Appendix B - Employer - Employee Agreement.

(c) Clause 5.1(b) [sic]:

> Remuneration shall be in accordance with the Company's salary schedule and employee classification structure (Appendix A), with the rate of pay for an employee party to this agreement detailed in the Employer – Employee Agreement (Appendix B). The salaries detailed in Appendix A will be adjusted from time to time in accordance with wage decisions, made by the State Arbitration Commission, and/or by recommendations made to the Board by The Executive.

(d) Appendix A sets out the salary classifications and annual salaries for each occupational category. Under the category 'Professional' there are two occupational categories, one being for articles at levels 10 and 11 and professional are levels 12 to 15 (AB 76).

(e) Clause 15 provided (AB 66):

> 15.1 The employee will be provided with appropriate training, as determined on a needs basis, to ensure adequate practical and professional work competency.
>
> Where approved courses extend for longer than five days the Divisional Manager may require a quid pro quo from the employee for the additional days.
>
> 15.2 Subject to work and client commitments being satisfactorily met, training assistance may be available to the employee, in accordance with Company's Training and Academic Leave Policy, to complete an academic or training course that is relevant to the current or potential business of the Company.

(f) In cl 24.9 'professional (degree)' classifications in appendix A are defined to mean a person employed to perform duties in the field of either cartography, surveying, photogrammetry, computing, town planning or environmental science and who possesses a recognised degree qualification.

(g) In cl 1 of appendix B it is stated:

> The Employee shall be employed by the Employer on the attached Terms, Conditions and Job Description;

20 There are no documents attached to exhibit 4. In particular, there is no 'attached Terms, Conditions and Job Description' as referred to in cl 1 of appendix B.

Oral evidence about the terms of employment

21 When giving evidence, the appellant described himself as a cadet.

22 The appellant gave evidence that (ts 5):

> [A]t the original interview, um, Whelans - the agreement was that they would put me on three months' probation, um, to see what I was like and so I could see what they were like, and, um, if they decide that, um, that I was acceptable, they would look for one of their employees, a licensed surveyor, to, um, enter into a professional training agreement to train me to become a licensed surveyor. Um, so what happened is after, um, the three months, they accepted my work and they informed me that they would, um, provide me with somebody to train me. And, um, it took a couple of months for them to find somebody and then they informed me that, um, Mr Jonath would, um, enter into an agreement. And so we entered into an agreement in, um, November 2007.

23 The appellant also stated that the terms of the professional training agreement he entered into with Mr Jonath required Mr Jonath to provide the remainder of the training that he, the appellant, required which involved three months of rural cadastral training, training for five projects and training for four examinations, including training in the field (ts 5).

24 When cross-examined, the appellant agreed that the professional training agreement was an agreement between himself and Mr Jonath as supervisor and that the company (the respondent) was not a party to the agreement.

25 When Mr Jonath was cross-examined, he gave evidence that he was approached by Mr Hill to take the appellant on as an articled surveyor and was advised the appellant had had a substantial amount of previous experience, including six months of experience the appellant had gained whilst working at Whelans under the supervision of another licensed surveyor (ts 65).

Evidence about the training provided to the appellant

(a) The appellant's evidence

26 Prior to being employed by the respondent, the appellant had been a party to two prior professional training agreements whilst employed by other employers.

27 The appellant's evidence was that the Board requires a minimum of three months' rural cadastral training and he had no cadastral rural training prior to entering into the agreement with Mr Jonath.

28 Mr Jonath was as an office bound project manager of large-scale subdivisions and who provided the appellant with training in the office. The appellant did not carry out many projects directly under Mr Jonath. He received more training from another licensed surveyor employed by the respondent, Mr Mark Spencer, as most of the work he, the appellant, was given was smaller subdivision work which Mr Spencer was in charge of (ts 7).

29 In June 2010, the appellant informed Mr Jonath that he would like to sit the September Boya field examination and Mr Jonath told him, 'You still need training for the exams', and the appellant agreed. They then both spoke to Mr Hill and told Mr Hill that the plan was that if he (the appellant) completed his projects in time he would be trained for the examinations and sit them. However, the appellant was not able to complete the last of the five projects in time for the September 2010 Boya field examination which meant that he would sit the examination in March 2011. Between September 2010 and March 2011, the appellant says he did not receive any training for the field examination, but by early January 2011 he submitted his completed projects. A week or two later Mr Jonath went on leave and resigned without discussing the professional training agreement with him (the appellant). The Board then arranged for Mr Ireland to become a caretaker/supervisor of sorts with Mr Hill in a support role.

30 In mid-January 2011, shortly after Mr Jonath had resigned, Mr Ireland and Mr David Gibb, a fellow licensed surveyor, invited the appellant into the boardroom and asked him whether Mr Jonath had trained him for the examination. He told them he had not been trained for the field examination. They asked him to explain exactly what he needed training in and he outlined all the different components. Mr Ireland asked him whether he thought he would be able to complete the training himself and he told them that he would give it a go.

31 Because he was working full-time for the respondent, which included overtime, the appellant found it difficult to train himself and he did not realise what was involved. He had only seen an old examination paper of the Boya examination that was 10 years old prior to undertaking the examination in March 2011. About a week prior to the Boya examination, the appellant approached Mr Gibb and asked him if he could take the week off on unpaid leave so that he could complete the training and that was granted.

32 About two or three weeks before the Boya examination in March 2011 he went out to the Boya site with another cadet in order to practise. He said, however, they were not able to find all of the survey marks that they needed so they were not able to complete the survey. During the Boya field examination he fell approximately two and a half hours behind in time. He then tried to rush through the examination, made mistakes and ended up failing. His evidence was that he did have the skills to become a licensed surveyor, but to break the survey down into its different components and bring it all together on the day in the difficult terrain at Boya under pressure of an examination, he was too slow, he rushed, he made mistakes and was interfered with during the examination by another cadet which held him back. Consequently, he says that he needed practice before he went out there so that he could have some idea of how much slower it is out there (ts 31).

33 There were also other examinations that he had to train himself in. There were the two days of the Boya field examination followed by one day of calculations and he had to teach himself a 'staff expansion adjustment'. He said the problem with the Boya examination was there were two surveys you had to carry out. One is a 'field measurement survey' and the other one is a 'levelling survey' and if you fail one, you fail both. The appellant also expressed the opinion that the Boya examination has very low relevance for the normal day-to-day work of a licensed surveyor.

34 After the appellant failed the Boya field examination he became extremely depressed. The Board do not offer supplementary examinations. He, however, could have gone back in six months' time and repeated the Boya examination.

35 This was his third professional training agreement. After he learnt he had failed, he decided he had had enough of the industry so he resigned by sending a letter of resignation to Mr Hill. His resignation 'letter' appears to have been contained in an email which he sent to Mr Hill on 25 March 2011 (exhibit 7). The appellant gave evidence that the reason he was upset with the industry was that during his first professional training agreement he received no training, in the second professional training agreement he did not receive any rural surveying field training and that in total between three registered supervisors he had received about 30 days of training in the field.

36 After the appellant's employment came to an end with the respondent, he later attempted the Boya examination again on two subsequent occasions whilst he was not working but did not pass. As a result, he has been informed by the Board that he would have to repeat all of the ten examinations in total, including the two that he had failed and to do so he would have to enter into another professional training agreement.

37 The appellant's complaint is that he contends that as soon as Mr Jonath resigned the respondent should not have asked him to complete the training himself and should have provided him with an opportunity for training in rural cadastral field work prior to the March 2011 Boya field examination as he needed training in 'position fixing'. When cross-examined, the appellant conceded at no time did he make a request of Mr Jonath or any other licensed surveyor employed by the respondent for rural cadastral field training.

38 The appellant also conceded that even if he had the training that he thought he ought to have had, he was unable to prove that he would have passed the Boya examination (ts 22). He, however, did say that the likelihood of a person who has been trained would be greater that they would pass the examination than a person who had not been trained (ts 23). He also conceded that:

(a) the respondent's representatives at no time informed him that if he did not pass the examination in 2011 that his employment would be terminated; and

(b) he could have put the Boya examination off for another six months.

(b) Mr Ireland's evidence

39 Mr Ireland was called to give evidence on behalf of the appellant. He is a licensed surveyor and one of two assistant managers of the respondent. Whilst Mr Ireland did not give any direct evidence about the terms and conditions of the appellant's employment, he did give evidence about the training that the appellant received as a 'cadet' employed by the respondent and how the appellant's training was carried out and supervised by the respondent in a way to comply with professional training agreements that cadets employed by the respondent enter into by way of articles.

40 Mr Ireland said that the appellant worked in the field with several licensed surveyors employed by the respondent and that a professional training agreement does not require the supervising licensing surveyor himself to provide that training. After Mr Jonath resigned he undertook to be primary caretaker/supervisor of the appellant. By that time, all of the appellant's projects had been submitted and the final phase of the appellant's training was to prepare for the field test examination.

41 Mr Ireland also gave evidence that after Mr Jonath resigned, whilst the professional training agreement was deemed to continue with Mr Jonath as the supervisor for the purposes of completing the examinations, the appellant's office examination and the submission of those papers to the secretary of the Board prior to the appellant undertaking the field examination at Boya, the appellant was supervised by him in his capacity as an assistant manager (ts 41).

42 Mr Ireland denied that when he met with the appellant and Mr Gibb in early January 2011 in the respondent's boardroom he asked the appellant to explain exactly what he needed training in. At that point in time Mr Jonath had not tendered his resignation but was on leave. They called the meeting because Mr Jonath was on leave and their intention was to interact with the appellant to find out the things that he needed to help prepare for the Boya field examination. Some of those things involved agreement on the field assistant to help the appellant on the day of the examination and questions were asked about other things that the appellant needed to prepare. There was no discussion at that meeting about Mr Jonath not training the appellant. The appellant asked for some leave to help prepare for the examination and that was agreed to and there was also some direction in terms of reference material to help the appellant to prepare for the examination. When Mr Ireland was asked did he ever say to the appellant, 'Can you train yourself?' he denied that he had ever made such a statement.

43 When asked about his own experience with the Boya examination, Mr Ireland said that he sat that examination in 1980. He did not do a practice measurement. He did, however, drive up to Boya during the week before he sat the examination and had a quick walk around the site to gain some familiarity. He noticed that there was a very steep embankment to the hill that they were asked to level up and down. He was aware of the general topography of the site which was rocky and there were some hills on the site which mean the line of sight is a difficulty and, in his view, it is clear that the Board has held examinations at this location for so long because it is an intended test of people's capability to measure under less than ideal circumstances.

44 Mr Ireland said that the purpose of the field examination is to test the practical application of what the Board regards as basic survey measurement techniques. These techniques are taught at school, university and in practical training in the workplace. He also said the test is not necessarily a link to rural experience or rural survey work. It is the only practical test set by the Board. The Boya test is the test of someone's skill in measuring things competently and then doing calculations with that afterwards. The survey is a test of using the equipment, dealing with the difficulties of line of sight, how you choose to set up tripods and instruments, which are all things in your education and during the course of training and working that you become skilled in. It is an independent test of someone's measuring capability, particularly under a bit of pressure. The equipment adjustment survey is a basic application of survey skills that are taught from the beginning at university.

45 Mr Ireland said it is his understanding that the appellant had sufficient training and had sufficient preparation for the March 2011 Boya examination.

46 Mr Ireland has been responsible for the training of a number of cadets and he had not been to Boya with any them. He also said that there was another cadet employed by the respondent who failed the Boya examination. That cadet waited six months and then re-sat those examinations and passed the part that he had previously failed. In his opinion, the training regime that the respondent provides under normal circumstances should equip someone to conduct themselves at those examinations.

47 Mr Ireland was aware that the appellant had previously booked to carry out the Boya field examination in September 2010 and it had been agreed between the appellant and Mr Jonath to postpone that and that involved liaising with the Board and asking the Board to carry forward the payment that had been made by the respondent to March 2011 on the basis that by that time the appellant would be ready to sit the examination.

(c) Mr Jonath's evidence

48 Mr Jonath gave evidence on behalf of the respondent. He said that the professional training agreement he entered into with the appellant required him, together with the provisions of the *Licensed Surveyors Act* and the *Licensed Surveyors (Licensing and Registration) Regulations 1990* (WA), to make sure the appellant fulfilled the requirements to undertake the different components of training, complete the law examination and five major projects. The professional training agreement also required him to engage and liaise with other employees of the respondent to help assist, instruct, tutor and mentor the appellant both in field and in office practices to become a licensed surveyor.

49 Mr Jonath specifically pointed to cl 5.3 of the professional training agreement which he says enabled both himself and any other appropriately qualified licensed surveyors to provide training to the appellant. The professional training agreement was to be for a period of 15 months but it was over three years before they agreed to put the appellant forward for the Boya field examination after the appellant had completed the projects.

50 Mr Jonath explained that a person cannot be nominated to sit the Boya field examination without that being certified by the supervising surveyor. As the appellant had completed the final project by early January 2011 and the appellant wanted to sit the examination in March 2011 he initiated the documentation to submit to the Board.

51 Mr Jonath wrote a letter to the Board in which he certified that the appellant was ready to sit the Boya field examination (exhibit 9). Mr Jonath by that time had formed the opinion that the appellant was ready for the Boya examination. He based his opinion on the practical experience that the appellant had gained both whilst working for the respondent for four years and his previous experience.

52 It was Mr Jonath's understanding that at the time the appellant entered into the professional training agreement in 2007 that he (the appellant) was adequately versed in field methodology to be able to execute the field component with minimal supervision and where required arrangements would be made for licensed surveyors to take him out for rural surveys. Mr Jonath said that the field component of training undertaken by the appellant was not necessarily under the direct supervision in the field by a licensed surveyor but the calculations and documentation generated by the appellant in a survey was under his (Mr Jonath's) immediate supervision and was scrutinised by him. On occasions, he instructed the appellant to carry out further work to complete the survey to his (Mr Jonath's) satisfaction.

53 Mr Jonath was aware that the Boya examination is extremely difficult. However, the appellant did not ask him specifically for assistance in relation to the Boya field examination. They did have some discussions about the Boya examination and he provided the appellant with a copy of a previous examination paper which they went through together with a desktop methodology approach.

54 Mr Jonath said at the time he tendered his resignation suitable arrangements were made to enable the appellant to undertake the field examination. Rather than change the professional training agreement those arrangements were that he remained as the appellant's supervising licensed surveyor and Mr Hill and Mr Ireland would provide support to ensure that the appellant continued through to the field examinations. He later sent the appellant an email to wish him all the best. In the email, he asked the appellant whether he was prepared for the examination and if not to liaise directly with two licensed surveyors who had undertaken the examination to offer and render assistance to him (the appellant) to undertake the examination.

55 Mr Jonath also gave evidence that:

(a) it was the appellant's choice to undertake the examination in March 2011; and

(b) if the appellant had not resigned his employment with the respondent after having failed the Boya field examination he would have been provided with all the support, encouragement, further training and advice from everyone that was within the respondent's organisation that had appropriate skills to guide him through to having another go at the September 2011 Boya examination.

Reasons for decision at first instance

56 In his reasons for decision the learned Commissioner made the following findings:

(a) The relevant documents relating to the contract of employment between the appellant and the respondent were exhibit 1 and exhibit 4. Neither of these documents contain a term whereby the respondent agreed to provide to the appellant the training necessary for the appellant to become a licensed surveyor.

(b) It was within the contemplation of the parties that the appellant wished to become a licensed surveyor and that the respondent would assist with this. This was reflected in exhibit 1 in the letter from Mr Hill in which he stated 'it would be reasonable to expect that … an Articled Position offer [could be] made so that you can ultimately become a Licensed Surveyor'.

(c) No documentation was provided or evidence given specifically about the 'Articled Position' offer and the reference to 'an Articled Position offer' was a reference to entry into a professional training agreement.

(d) However, it was within the contemplation of the parties that the appellant would progress in his employment to becoming a licensed surveyor did not mean that the respondent agreed, as a contractual term of employment, that it would provide the necessary training for this to occur.

(e) The appellant was employed as a survey party leader. That employment operated, as a matter of contract, quite separately from the appellant's progress toward becoming a licensed surveyor. It was common on the evidence that the appellant did not need to become a licensed surveyor for his employment as a survey party leader to continue or, put another way, that his employment would continue, all things being equal, whether or not the appellant became a licensed surveyor.

(f) Crucially, there is no mention of the appellant being trained by the respondent to become a licensed surveyor in exhibit 4. The reference to training in cl 15.1 of exhibit 4 is a reference to training for the role in which an employee is employed and not some other role.

(g) As a matter of law, the appellant was employed as a survey party leader. There is in this industry a scheme whereby a person employed within it may seek further qualifications and is assisted in this by their employment and by their employer. The respondent gave this assistance by employing the appellant in a role that would allow him to build up good relevant experience and by facilitating his entry into a professional training agreement. That assistance was given from day-to-day in the completion of the appellant's ordinary duties and by having Mr Jonath agree to being the appellant's supervising surveyor in a professional training agreement.

(h) None of that assistance and training was given pursuant to the terms of the appellant's contract of employment and any failure to provide it, if there was such failure, could not amount to a breach of the contract of employment.

57 Thus, the learned Commissioner found that:

(a) there was no express term of the sort contended for by the appellant and in all of the circumstances there was no warrant to imply such a term into the contract of employment; and

(b) the contract of employment as a survey party leader was fully effective without it being necessary to imply into it any term relating to training to become a licensed surveyor.

58 The learned Commissioner then found in the alternative that even if there was a term, express or implied, that the respondent would provide the appellant with training to become a licensed surveyor, for the appellant to succeed he would have to establish that the term was that he would be provided with training prior to March 2011. This is because the appellant resigned from his employment with the respondent in March 2011. It was only if the term was that the training had to be completed by this time that the respondent could be in breach of it. In support of this point, the learned Commissioner found:

(a) The appellant put nothing at first instance, even after the point was raised, either by evidence or submissions, to the effect that the respondent had promised to complete his training by March 2011.

(b) The uncontroverted evidence was that, even though the appellant failed the Boya field examination in March 2011, if he had not chosen to resign, his employment would have continued and the respondent would have continued to assist him to become a licensed surveyor. Failure of the Boya examination by prospective licensed surveyors was relatively common and was not considered in any way to be a 'black mark' against an employee who was trying to become a licensed surveyor.

(c) If there was a term of the contract of employment such as that the appellant contends for, it remained operative in March 2011 and had not been breached as at that time, it not being time limited, and the appellant's resignation ended its operation.

(d) No comment is made on the nature or adequacy of the training given to the appellant during his employment or under the professional training agreement. It is not necessary to do so in light of the above findings. It is noted, however, that the appellant failing the Boya examination proves nothing in relation to the adequacy or otherwise of that training. No argument is properly available that because the appellant failed the Boya examination his training must have been inadequate. Exhibit 6 in fact suggests other reasons for the appellant's failure but there is no need to make findings in relation to this issue.

Grounds of appeal

59 The grounds of appeal are largely in the form of a convoluted submission which to some degree is repetitive. However, from the arguments put by the appellant the grounds can be discerned as follows:

(a) Ground 1 and ground 2

60 The learned Commissioner erred in fact and in law in finding that it was not a term of the appellant's contract of employment that the respondent was obligated to train the appellant to become a licensed surveyor. The appellant's particulars of these grounds can be summarised as:

(i) the learned Commissioner misunderstood the duties of the appellant's role as survey party leader;

(ii) in accordance with the terms of exhibit 1 and cl 15 of exhibit 4 the appellant entered into a professional training agreement at which time he became an articled surveyor (cadet) under the supervision of a licensed surveyor employed by the respondent, Mr Jonath; and

(iii) pursuant to s 16 of the *Licensed Surveyors Act* only a licensed surveyor and by extension a surveyor under training can carry out licensed survey work.

(b) Ground 3

61 The learned Commissioner erred in law in finding that the appellant did not need to become a licensed surveyor for his employment as a survey party leader to continue. The particulars of this ground are that the respondent:

(i) asked the appellant to carry out licensed survey work as a survey party leader and to do so the appellant required training through a professional training agreement;

(ii) was required to ensure the appellant was articled to a licensed surveyor who provided the appellant with training in the field; and

(iii) failed to provide or facilitate necessary rural field training to the appellant.

(c) Ground 4

62 The learned Commissioner made an unsupported finding contrary to the evidence that there was nothing before the Commission that the respondent had promised to complete the appellant's training by March 2011. The evidence relied upon by the appellant is the fact that the professional training agreement had a time schedule of two years and ended on 1 April 2009 (exhibit 3).

63 It is also contended in this ground that the respondent's failure to provide adequate training for the field examination in breach of the terms of the contract resulted in the appellant's resignation in March 2011.

(d) Ground 5

64 The learned Commissioner erred by failing to explore the reasons for the appellant's resignation.

(e) Ground 6

65 (i) The learned Commissioner erred by failing to make any finding about the adequacy of training of the appellant when the fact that the appellant failed the Boya field examination showed the appellant lacked adequate training.

(ii) The learned Commissioner erred in referring to exhibit 6 when he made no findings in relation to that document which was an email the appellant sent to a third party.

(f) Ground 7

66 Is not pressed by the appellant.

(g) Ground 8

67 Is not pressed by the appellant.

(h) Ground 9

68 The learned Commissioner erred in that the following matters were not raised at the conference, pre-hearing or hearing:

(i) the respondent accepted the resignation of Mr Jonath without discussing it with the appellant and without ensuring that the appellant had completed the training; and

(ii) the respondent did not accept the appellant's withdrawn resignation.

(i) Ground 10

69 The learned Commissioner did not facilitate mediation between the parties at the conciliation conference.

The appellant's submissions

70 The appellant argues that the finding made by the learned Commissioner that the appellant was employed as a survey party leader and that employment operated, as a matter of contract, quite separately from the appellant's progress toward becoming a licensed surveyor was only true in part. The appellant explained that most of his work was to carry out survey work that was for licensed surveys. Either a licensed surveyor went in the field while he carried out the work and supervised his work directly or he carried out the survey in the field alone and then his work was later checked and authorised by a licensed surveyor.

71 The appellant contends that in order for him to carry out licensed survey work he could only do so by carrying out that work in accordance with the terms of a professional training agreement. In support of this argument, the appellant referred to cl 15.1 of the employment contract which required that he be provided with appropriate training, as determined on a needs basis, to ensure adequate practical and professional work competency (exhibit 4, AB 66). He argues that without training and supervision under a professional training agreement he would not have been able to carry out the work for licensed surveys competently.

72 The appellant also argues it was an express term of his contract of employment that after a three-month probationary period he would be given an offer of an articled position so that he could ultimately become a licensed surveyor (exhibit 1, AB 26). The effect of this argument is to raise a contention that the express terms of his contract were not only set out in the employment contract (exhibit 4), but also in the letter of offer of employment which was written by Mr Hill, the managing director of the respondent, on 21 March 2007 (exhibit 1, AB 26).

73 The appellant points out to become a licensed surveyor a person must obtain a certificate of competency. To do so, reg 4 of the *Licensed Surveyors (Licensing and Registration) Regulations* requires that the person must perform a period of field service under a professional training agreement for a period of 24 months. Regulation 4 also provides that the parties to a professional training agreement shall be a supervising surveyor and the person who desires to obtain a certificate of competency.

74 The appellant says when regard is had to the requirements of the *Licensed Surveyors Act*, in particular s 16 which prohibits a person other than a licensed surveyor from carrying out licensed survey work, together with reg 4 of the *Licensed Surveyors (Licensing and Registration) Regulations*, it follows that the respondent had a duty to provide to him a supervising surveyor who was able to go into the field to complete the training he required.

75 In apparent support of his arguments the appellant tendered into evidence at the appeal a document titled 'Field Work Table', appendix A (AB 85), which is a record prepared by the appellant from his diary of all the training that he received whilst employed by the respondent. This document shows that he received 28 days of training in the field under the supervision of licensed surveyors, none of whom were Mr Jonath. Of those 28 days, 20 days were rural cadastral survey training and eight days were urban cadastral training. It is our understanding that the days of training referred to by the appellant are days when a licensed surveyor was with him in the field when he carried out licensed survey work and does not include licensed survey work carried out by the appellant in the field without a supervising surveyor which was later checked by a licensed surveyor in the office.

76 The appellant, however, does concede that the respondent was not a party to the professional training agreement as the agreement was made between him and Mr Jonath. Notwithstanding this concession, the appellant put a submission that irrespective of the express terms of the professional training agreement that he entered into with Mr Jonath that the respondent was obliged to provide field training to him in accordance with the provisions of the *Licensed Surveyors (Licensing and Registration) Regulations*.

77 The appellant argues that the *Licensed Surveyors (Licensing and Registration) Regulations* do not allow for field service to be supervised by a licensed surveyor other than the licensed surveyor that is the supervising surveyor party to the professional training agreement.

78 The appellant points out that reg 4 of the *Licensed Surveyors (Licensing and Registration) Regulations* only refers to one supervising surveyor, not several or many. Thus, it is argued a cadet is apprenticed to a single licensed surveyor and must learn his or her profession through the work given by that licensed surveyor. He says that the work he carried out predominantly involved field work which means the supervisor must be a field worker and any office training should be relevant to the field work. The appellant points out that the *Licensed Surveyors Act* and the *Licensed Surveyors (Licensing and Registration) Regulations* do not speak of project management. Thus, he says it follows that a supervisor needs to be a field worker, not a project manager as Mr Jonath was. In particular, reg 4 of the *Licensed Surveyors (Licensing and Registration) Regulations* requires that a person seeking to be licensed as a licensed surveyor should be provided with 24 months of 'field service', not project management.

79 Consequently, the appellant argues that 28 days of training in the field by licensed surveyors other than Mr Jonath over four years left him being in the position by January 2011 as having to train himself for the Boya field examination. The appellant also argues the respondent was required to release Mr Jonath from his office duties but the respondent failed to do so. This he says was in breach of the terms of his contract of employment as the respondent had a duty to provide to him a supervisor under a professional training agreement who would go into the field with him and train him.

80 The appellant also put forward an argument that despite the fact that he received insufficient field training, part of the training that he did receive was in accordance with the terms of the contract of employment due to the fact that the respondent did arrange for him to become articled by entering into a professional training agreement. However, the respondent required him to go into the field to carry out work for licensed surveys by himself both prior to and after the registration of the professional training agreement. Yet, on the other hand he says the training he received both in the field and in the office was training required by cl 15.1 of the employment contract. That training was towards ensuring adequate practical and professional work competency (AB 3 - 4). This included training as a graduate to become a licensed surveyor. The only way he could achieve professional work competency was to become a licensed surveyor.

81 The appellant points out that the term 'survey party leader' in the offer of employment is a term that is not explained in the employment contract.

82 The appellant also argues that the finding made by the learned Commissioner that if he had not chosen to resign after he failed the Boya examination in March 2011 his employment would have continued and the respondent would have continued to assist him to become a licensed surveyor is contrary to the evidence. The appellant says he resigned because the respondent failed to honour the terms of the contract by facilitating a workable professional training agreement. One of the reasons he left is that he had not received sufficient training in the field for him to pass the Boya examination. Consequently, he says if he had not resigned he would not in any event have received the training he required.

83 He also argues that there was a time constraint upon when the training to become a licensed surveyor should have been completed and that was not only set out in the professional training agreement but also in reg 4 and is a period of 24 months. Thus, he says by the time the Boya field examinations in March 2011 were undertaken by him, the period for providing professional training as agreed to in the contract of employment had expired.

84 The appellant concedes that it was not an express term of his contract of employment that the respondent train him to become a licensed surveyor but says it was an express term that the respondent would make him an articled position offer.

85 In the circumstances, the appellant says that whilst the respondent did article him by facilitating a professional training agreement between him and Mr Jonath, it failed to facilitate the necessary training through the supervising surveyor in accordance with reg 4. Thus, he says the respondent breached the express term of the 'articled position' as it is implied in that term that he would have received 'appropriate training' within the meaning of cl 15 of the employment contract and that training was to be training in the field to a standard that enabled him to be competent to pass the Boya examination.

86 The appellant also takes issue with the finding made by the learned Commissioner that after Mr Jonath resigned from his employment with the respondent in January 2011 the professional training agreement continued with Mr Jonath as the supervising surveyor. He said this finding was not supported by the facts as Mr Jonath made no further contact with him after Mr Jonath left the employment of the respondent and he, the appellant, assumed the professional training agreement had come to an end for all practical purposes.

87 The appellant also made a submission that the learned Commissioner made inconsistent and irrelevant findings in that having found that it was not necessary for him to make any comment on the nature or adequacy of the training given to the appellant during his employment or under the professional training agreement, he then found that no argument was properly available that because the appellant failed the Boya examination his training must have been inadequate. The learned Commissioner also made an observation about the contents of exhibit 6 which the appellant says was unnecessary as there was no discussion about the contents of exhibit 6 in the learned Commissioner's reasons for decision and that left the reader guessing about what those reasons might be. He says that if no findings were made about the content of exhibit 6 it should not have been mentioned in the learned Commissioner's reasons for decision.

Construction of the terms of the appellant's contract of employment - issues to be determined

88 It is well established that the appellant bears the burden of proof of establishing to the requisite standard on the balance of probabilities what were the terms of his contract of employment.

89 Prima facie, in light of cl 2 of the employment contract which provides that the agreement covers all items [sic] and conditions of employment, it could be said that it is not open to construe the terms of the employment contract as incorporating as express terms the terms of the professional training agreement the appellant and Mr Jonath entered into. This is because the effect of an entire agreement clause is to exclude the construction of a document in a way that is outside the four corners of the document, as it constitutes the whole of the parties agreed terms of contract. However, such a clause only prohibits a court from going beyond the express terms of the contract if the terms of contract on their face record an apparent complete agreement: ***McMahon v National Foods Milk Ltd*** [2009] VSCA 153 [37] - [39] (Nettle JA) and Allsop J in ***Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*** [2001] FCA 1833; (2001) 117 FCR 424 [277] - [286].

90 Although the parties agree that the terms of the appellant's contract of employment were expressly set out in exhibit 4, when regard is had to the terms of exhibit 4 and the matters pleaded by the respondent in its notice of answer:

(a) despite the intention expressed in cl 2 of exhibit 4 to 'cover all items [sic] and conditions of employment', it may be the case that not all terms were set out in that document as cl 4.1 of exhibit 4 and cl 1 of appendix B expressly purports to incorporate the terms of a document titled 'Terms, Conditions and Job Description'. Pursuant to cl 4.1 it appears this document was to set out conditions that the appellant was to work in accordance with. This document, if it existed, however, was not produced in evidence by either party. Nor was any explanation given by either party as to whether such a document was or had been in existence when the parties entered into the contract;

(b) the terms of exhibit 4 can largely be said to contain generic terms, in that the terms are drafted to apply to a number of different classifications of employees of the respondent, including non-professional employees (appendix A - Salary Classification, AB 76);

(c) there is no salary classification for an occupation of 'survey party leader'. However, within the classification of professional (degree) in cl 24.9 there are in appendix A two professional occupational categories, 'professional' and 'articles'; and

(d) it is pleaded by the respondent that the appellant was employed as a graduate surveyor.

91 When regard is had to these matters, it cannot be inferred with any confidence that exhibit 4 sets out all of the appellant's relevant terms of the appellant's contract of employment. It follows therefore that the intention expressed in cl 2 for the terms of exhibit 4 to operate as an entire agreement fails as the document tendered as exhibit 4 appears on its face to be incomplete. Thus, the intention expressed in cl 2 in these proceedings must necessarily fail.

92 In this appeal the questions to be first determined are:

(a) whether the letter of offer (exhibit 1) formed part of the appellant's contractual terms;

(b) whether the conduct of the parties created a term that the appellant was employed in the classification of an articled surveyor on entering into a professional training agreement with Mr Jonath;

(c) whether the conduct of Mr Hill in arranging for the appellant to enter into a professional training agreement with Mr Jonath was an act that was authorised by the terms of the contract of employment (exhibit 4); and

(d) did the terms of the professional training agreement the appellant entered into form part of the terms of the appellant's contract of employment?

Principles - Ascertainment of the terms of the contract of employment

93 The ascertainment of the terms of a contract whether oral or in writing always turns on the words used by the parties and the construction of the words used by the parties are to be judged objectively. In ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 [40] the Full Court said:

> This Court, in *Pacific Carriers Ltd v BNP Paribas* ((2004) 218 CLR 451), has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. 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 (*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22]).

94 Whilst regard can be had to surrounding circumstances where ambiguity is raised, to understand the subject matter of the contract, evidence of or expectations of the parties' subjective intention is not admissible: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337, 352.

95 In ***Terravision Pty Ltd v Black Box Control Pty Ltd [No 3]*** [2016] WASC 95 Le Miere J summarised the following well-established principles of construction of contracts [37] - [40]:

> In *Electricity Generation Corporation v Woodside Energy* [2014] HCA 7; (2014) 251 CLR 640 (*Electricity Generation*) and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 89 ALJR 990 (*Mount Bruce Mining*) the High Court reaffirmed that the rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract) and purpose. In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable business person would have understood those terms to mean: *Electricity Generation* [35]; *Mount Bruce Mining* [47]. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract: *Electricity Generation* [35]; *Mount Bruce Mining* [47].
>
> Ordinarily this process of construction is possible by reference to the contract alone. However, sometimes, recourse to events, circumstances and things external to the contract is permissible and necessary. 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: *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337, 352. The fact that adversaries can formulate and advance materially different constructions of the language of a contract does not itself satisfy the gateway requirement. Having regard to the language of the contract as a whole and what can be gleaned from that source as to the contractual purpose, competing constructions must be reasonably arguable: *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* [2014] WASCA 164 [74] (McLure P). Recourse to events, circumstances and things external to the contract may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating': *Electricity Generation* [35], *Mount Bruce Mining* [49]. It may be necessary in determining the proper construction where there is a constructional choice: *Mount Bruce Mining* [49]. In this case the language of cl 10 of the 2006 Agreement is ambiguous or susceptible of more than one meaning and evidence of surrounding circumstances is admissible to assist in its interpretation. I did not understand either party to argue to the contrary.
>
> Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations: *Mount Bruce Mining* [50].
>
> Other principles are relevant in the construction of commercial contracts such as the 2006 Agreement. Unless a contrary intention is indicated in the contract, the court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties ... intended to produce a commercial result': *Electricity Generation* [35]; *Mount Bruce Mining* [51]. Put another way, a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience': *Electricity Generation* [35]; *Mount Bruce Mining* [51].

96 On appeal in ***Black Box Control Pty Ltd v Terravision Pty Ltd*** [2016] WASCA 219 [27] neither party took issue with Le Miere J's observations relevant to the construction of the contract.

97 It is now accepted that subsequent conduct cannot be looked at to interpret a written agreement. However, evidence of events after a contract was entered into is admissible for determining the question about whether a binding contract was formed: ***Hughes v St Barbara Ltd*** [2011] WASCA 234 [106] (Pullin JA).

98 Regard may also be had to subsequent conduct of the parties for the purposes of determining what were the entire terms of the contract: ***County Securities Pty Ltd v Challenger Group Holdings Pty Ltd*** [2008] NSWCA 193 [21] - [27] (Spigelman CJ).

99 When interpreting an agreement in writing regard must be had to all of the provisions of the agreement with a view to achieving harmony among them: ***Servcorp WA Pty Ltd v Perron Investments Pty Ltd*** [2016] WASCA 79; (2016) 50 WAR 226 [92] (Buss JA), applying Gibbs J in ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** [1973] HCA 36; (1973) 129 CLR 99, 109 - 110.

100 In ***Servcorp*** [66] Buss JA also reviewed legal principles applicable to the implication of terms. His Honour pointed out there are a number of different forms of implied terms, which include:

(a) A term deduced by implication or interpretation from the express terms of the contract. See *Marcus Clark (Victoria) Ltd v Brown* [1928] HCA 12; (1928) 40 CLR 540, 553 - 554 (Higgins J); *Vickery v Waitaki International Ltd* [1992] 2 NZLR 58, 64 (Cooke P, Richardson and Gault JJ agreeing); *Carlton & United Breweries Ltd v Tooth & Co Ltd* (1985) 6 IPR 319, 320 (Hodgson J); *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61; (2001) 53 NSWLR 153 [28] (Heydon JA).

(b) A term which is a legal incident of a particular class of contract. See *Liverpool City Council v Irwin* [1977] AC 239, 254 - 255 (Lord Wilberforce); *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337, 345 - 346 (Mason J, Stephen and Wilson JJ relevantly agreeing); *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410, 448 - 452 (McHugh and Gummow JJ).

(c) A term specifically implied ad hoc in a particular contract. See *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266, 283 (Lord Simon of Glaisdale, Viscount Dilhorne and Lord Keith of Kinkel); *Codelfa* (345 - 347). This term is invariably described as an implied term necessary to give business efficacy to a particular contract. It is implied in fact and based upon the presumed intention of the parties.

101 When construing a contract, it must be construed as a whole. No part should be treated as surplus or inoperative. A clause should not be considered in isolation and the words of every clause must if possible be construed so as to render them harmonious: ***Australian Broadcasting Commission*** (109) (Gibbs J).

What were the terms of the appellant's contract of employment?

102 The statements made in the letter written by Mr Hill dated 21 March 2007, in exhibit 1, are mere statements of subjective intention of future acts; that is Mr Hill simply sets out what he expected would occur after the appellant commenced employment and are statements not capable of being construed as terms of employment. In particular, Mr Hill stated:

(a) it was the 'aim' to have the appellant performing a survey party leader's role. It is notable that there is nothing in the letter that indicates that a 'role' of survey party leader was to be the salary classification of the appellant. In any event, no reference to such a 'role' is contained in exhibit 4;

(b) that training and a 'mentoring 'contact' will be made available and a formal review of the appellant's progress will be made after the three months' probationary period; and

(c) if the review is favourable it would be reasonable to expect the appellant's salary package could be increased and an 'articled position offer' made so that the appellant could ultimately become a licensed surveyor.

103 As the statements made in exhibit 1 are mere statements of subjective intention they cannot be construed as terms of contract and thus did not form part of the appellant’s contract of employment.

104 The uncontradicted evidence of the appellant at first instance was that exhibit 4 set out the express terms of his contract of employment. As set out above, neither the appellant or any other witness gave evidence that attached to exhibit 4 was a document referred to in appendix B of exhibit 4 as 'Terms, Conditions and Job Description'. In the absence of any evidence that such a document was in fact incorporated into the contract of employment or any explanation of the term 'articles' in exhibit 4, the salary classification of professional of which 'articles' is a sub-classification in appendix A is ambiguous. Where a term of an agreement has two or more meanings or where for some reason the intention of a term is doubtful a broader concept of ambiguity arises: ***South Sydney Council v Royal Botanic Gardens*** (1999) NSWCA 478 [35]; affirmed ***Royal Botanic Gardens v South Sydney City Council*** [2002] HCA 5; (2002) 240 CLR 45.

105 To resolve the ambiguity that arises in this matter recourse can be had to events, circumstances and things external to the contract which are known to the parties, including its history, background and context and the market in which the parties were operating: ***Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*** [2015] HCA 37; (2015) 256 CLR 104 [50] (French CJ, Nettle and Gordon JJ).

106 The enquiry requires consideration of the language used by the parties to the contract and the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract: ***Mount Bruce Mining*** [47] (French CJ, Nettle and Gordon JJ).

107 In this matter, the surrounding circumstances known to the parties, the context and business for which the appellant was engaged include the statutory scheme by which surveyors become licensed and the respondent as a provider of survey services can operate.

108 The registration, licensing and control of practices of licensed surveyors is regulated by the *Licensed Surveyors Act* (Long title of *Licensed Surveyors Act*). Pursuant to s 16 of the *Licensed Surveyors Act* a surveyor who is duly licensed and holds a practising certificate to make authorised surveys shall be entitled to practise his profession. An authorised survey is defined among other things in s 3(1) as:

(a) a survey of land authorised or required under any Act dealing with the alienation, leasing or occupation of Crown lands, or under the *Transfer of Land Act 1893*, or any other Act affecting titles to land;

or

(b) by the proprietor, lessee or mortgagee under any Act affecting titles to land.

109 A person is entitled to a licence as a surveyor if he or she has obtained a prescribed certificate of competency (s 7 of the *Licensed Surveyors Act*). A person is entitled to be issued with a certificate of competency by the Board if they pass the prescribed examination and fulfilled all the prescribed conditions or has a degree together with prescribed field service and if they have entered into articles of apprenticeship or pupilage pursuant to the *Licensed Surveyors (Licensing and Registration) Regulations* (s 7 and s 9 of the *Licensed Surveyors Act*).

110 Regulation 4 of the *Licensed Surveyors (Licensing and Registration) Regulations* prescribes:

(a) the period of field service referred to in s 9(1)(b) of the *Licensed Surveyors Act* to be performed under a professional training agreement and subject to the *Licensed Surveyors (Licensing and Registration) Regulations* is to be for a period of 24 months;

(b) the parties to an agreement for professional training are to be a supervising surveyor and the person who desires to obtain a certificate of competency; and

(c) a professional training agreement shall specify the training to be provided under the agreement.

111 A surveyor is defined in reg 3 of the *Licensed Surveyors (Licensing and Registration) Regulations* and s 3 of the *Licensed Surveyors Act* to mean a licensed surveyor whose name appears on the register of licensed surveyors.

112 Whilst little evidence was given about the services that the respondent provided when the appellant was employed, it appears that the respondent provides authorised surveying services and at law it can only do so through licensed surveyors. When regard is had to the statutory requirements for the licensing of surveyors it follows that to become licensed as a surveyor a person must receive training through a professional training agreement which appears to be what is described in s 9(1a) of the *Licensed Surveyors Act* as articles of apprenticeship or pupilage pursuant to the regulations.

113 The surrounding circumstances known to the parties also includes the fact that the appellant was seeking to obtain work whereby he would be able to complete the necessary training to become a licensed surveyor by entering into articles under a professional training agreement.

114 In the letter dated 21 March 2007, Mr Hill expressed a view that if after the three months' probationary period a formal review (of the appellant's performance) was favourable an articled position offer may be offered. Whilst this statement in exhibit 1 cannot be admitted as evidence going to the subjective intention of the parties to construe the terms of the contract of employment, the fact that an offer of articles may or may not be made after the parties entered into the contract of employment formed part of the surrounding circumstances.

115 When regard is had to the statutory scheme of licensed surveying reasonable persons in the surveying business would, in our opinion, form the view that the proper construction of the salary classification in exhibit 4 of professional articles is that it can be implied that the salary classification of professional articles is a classification of persons engaged to work under training to become a licensed surveyor pursuant to a professional training agreement entered into in accordance with the requirements of the *Licensed Surveyors Act* and *Licensed Surveyors (Licensing and Registration) Regulations*. In our opinion, such an implication arises from the express terms of exhibit 4.

116 When cl 15.1 is read together with the salary classification of professional articles, the words 'appropriate training, as determined on a needs basis, to ensure adequate practical and professional work competency' can be construed as a training provided through a professional training agreement, if articles are in fact entered into by an employee party to exhibit 4.

117 It cannot be ignored, however, that pursuant to the statutory scheme that the respondent itself as a company cannot be a party to a professional training agreement as only individual persons can register as licensed surveyors. Yet, the uncontradicted evidence before the Commissioner at first instance is that Mr Hill arranged for a licensed surveyor employed by the respondent, Mr Jonath, to enter into a professional training agreement with the appellant sometime after the appellant's probationary period of employment had expired, that is after the parties had entered into the contract of employment. Whilst this evidence cannot be used to interpret the contract of employment, regard can be had to this evidence to determine what the terms of the entire contract are and whether the parties by their conduct agreed to classify the appellant within the salary classification of professional articles within the meaning of that term in exhibit 4. In our opinion, such an agreement was reached sometime in 2007 after the appellant had been employed for six months. As the salary classification of professional articles was a classification within the express terms of the employment agreement and carried with it a range of salary to be paid whilst articled, the conduct of Mr Hill to arrange for Mr Jonath to become a party to a professional training agreement with the appellant did not effect a second contract of employment, as the entering into articles by the appellant was an act contemplated and authorised the express terms of the contract of employment set out in exhibit 4.

118 We also conclude that the professional training agreement between the appellant and Mr Jonath constituted part of the contract of employment between the appellant and the respondent. The professional training agreement says that it is only between the appellant and Mr Jonath, and the respondent is not formally a party. However, we think that, read in context with the other employment arrangements and subsequent conduct of the managing director of the respondent, Mr Hill and a senior manager of the respondent, Mr Ireland, it formed part of the contract. We say this because both the terms of the professional training agreement and the subsequent conduct involve the respondent in a number of important aspects. Some of those aspects, taken separately, may not be significant, but taken altogether, paint a clear picture:

(a) It was Mr Hill who approached Mr Jonath to take the appellant on as part of the professional training agreement and for Mr Jonath to be the nominated supervising surveyor.

(b) Mr Jonath's letters to the Board were on the respondent's letterhead.

(c) While Mr Jonath was on leave before he resigned from the respondent, Mr Ireland and Mr Gibb met with the appellant to find out what the appellant needed to help him prepare for the Boya field examination.

(d) In terms of the professional training agreement:

(i) The respondent is referred to in the address used in cl 2 which sets out the details of the supervising surveyor.

(ii) It is referred to in cl 3 which sets out the graduate surveyor's details, specifically that he is '[e]mployed at Whelans (WA) Pty Ltd on a full time basis as a project surveyor'.

(iii) In cl 5.3, the supervising surveyor 'will instruct the graduate surveyor in the profession of land survey *or shall cause the survey graduate to be so instructed*' (emphasis added). This demonstrates that there was no requirement for Mr Jonath to exclusively and personally instruct the appellant. Where the appellant complains that Mr Jonath did not supervise or provide particular training, it is clear that it did not have to

be undertaken by him personally. There were other licensed surveyors employed by the respondent, such as Mr Mark Spencer, who also trained the appellant. Mr Ireland took over from Mr Jonath on a de facto basis following Mr Jonath's resignation in the period between Mr Jonath certifying that the appellant 'would be fully prepared to undertake the final practical examination in February/March 2010' and the examination. There was no evidence of Mr Jonath causing any other licensed surveyors beyond those employed by the respondent to provide instruction.

(iv) The professional training agreement provides in cl 4 - The Company, a brief paragraph about the respondent's history and areas of expertise.

(v) Clause 5 - Essence of Agreement also provides for the surveying graduate to perform the work the 'supervising surveyor shall require for the purpose of training'. The evidence suggests that the work involved in this was not separate from or additional to the work the appellant performed in his employment with the respondent.

(vi) Clause 5.4 provides that 'the supervising surveyor shall permit the surveying graduate to attend such lectures and examinations as may be requisite or proper for his better instruction in the profession of land surveyor'. The clear inference we draw is that this permission relates to the surveying graduate requiring time away from his paid employment with the respondent to attend these things. The supervising surveyor would only have authority to permit him to do so as a representative of the respondent. Otherwise there is no indication of why the surveying graduate requires permission; for example, there is no suggestion of out-of-work-hours training arrangements with Mr Jonath that the appellant needs permission to absent himself from.

(vii) Clause 11 - Accountability and Reputation refers to the graduate as 'a reflection on the supervisor and *the company*' and that '[t]he supervisor *and the company* provide every possible tuition, guidance and opportunity…' (emphasis added).

119 Therefore, we conclude that the professional training agreement constituted an important part of the employment contract. Even though the respondent was not formally party to it, it was impliedly so. Therefore, we would uphold grounds 1 and 2.

120 The finding made by the learned Commissioner that the appellant as a matter of law was employed as a survey party leader was in error. There is no such classification in exhibit 4. Further, the finding is contrary to the respondent's pleaded fact that the appellant was employed as a graduate surveyor. For this reason, ground 3 of the appeal must in part succeed, but the particulars of ground 3 do not succeed as they are not relevant to the error that is demonstrated. Having made this finding, we do not agree, however, that the learned Commissioner erred in finding that the appellant did not need to become a licensed surveyor for his employment to continue. To the contrary, for reasons that follow, we are of the opinion that this finding was not only correct, but once accepted as correct it is clear this appeal must necessarily fail as the evidence clearly established it was not necessary for the appellant to become a licensed surveyor for his employment to continue. He could have continued to work while he undertook training.

121 Whilst we agree that it was a term of the appellant's contract of employment that the appellant was employed as an 'articled' professional whereby training would be provided to him to assist him to become a licenced surveyor, we are not satisfied that the evidence before the learned Commissioner established a breach of this term or any other condition of his contract of employment. To succeed in this appeal and to be entitled to relief ground 4 must succeed.

122 At the heart of the appellant's case in ground 4 is a contention that the training he received was inadequate for him to pass the final Board examinations which has been referred to as the Boya examination. However, even if the learned Commissioner had found the appellant had not been provided with enough rural cadastral training in the field to enable him to be sufficiently prepared for the March 2011 Boya examination, such a finding (if it had been made) would not be sufficient to find the respondent breached a term of the appellant's contract of employment.

123 The reason why the appellant's arguments must fail is that:

(a) The following matters were conceded by him at first instance:

(i) even if he had the training he thought he should have received, he is unable to prove he would have passed the March 2011 Boya examination; and

(ii) he could have delayed undertaking the Boya examination for another six months.

(b) The evidence given by the appellant's witness, Mr Ireland, established that if an employee of the respondent fails the Boya examination that they are able to re-sit the examination at a later time.

(c) The evidence given by Mr Jonath is that if the appellant had not resigned his employment in March 2011 he would have been provided with further training to enable him to re-sit the Boya examination in September 2011.

124 Significantly, if the contract required the respondent to train the appellant, nothing in the employment contract required the respondent to train the appellant to the point that he would pass the examination and assessments required by the Board. It was to provide training but could not guarantee success.

125 Clause 15 - Training leave of the employment contract related to the performance of the appellant's substantive role, not to the professional training agreement whereby he was being assisted to become a licensed surveyor. He was not a licensed surveyor, nor did the professional training agreement require the respondent to train him to successfully become one.

126 Most importantly, nothing in the professional training agreement or elsewhere in the employment contract says any more than that training will be given and undertaken. Clause 11 - Accountability and Reputation specifically provides that 'the surveyor and company will provide every possible tuition, guidance and opportunity, but the graduate will only be progressed to the next stage when ability is proven'.

127 It would be unusual for a training agreement to provide any guarantee that the training will be continued to the point where the trainee passes the necessary examinations and assessments to gain the relevant qualification. All that is required is that the training provider provide the training. The employment contract did not require the respondent to train the appellant to the point where there was a guarantee that he would be a licensed surveyor.

128 The professional training agreement was not time-limited. There is no requirement for it to have been completed by a given date. Where an employee fails the Boya examination, they are able to re-sit the examination at a later time. The end of the arrangement came about because the appellant resigned from his employment in March 2011, otherwise he would have been provided with further training to enable him to re-sit that examination in September 2011.

129 Although the professional training agreement has a time limit, this does not mean that the respondent would cease providing training to the appellant after that period, and nor does it mean that it was obliged to train him to the point where he would be successful in the completion of his professional requirements within that time or any other time.

130 The fact that the professional training agreement set out a time schedule of 24 months in cl 9 and attachment B of attaining a professional competence of particular topics is irrelevant (AB 55). The conduct of the parties to the professional training agreement and the conduct of the respondent was to treat that term as merely aspirational as the professional training agreement did not come to an end after 24 months. In respect of ground 4, while the professional training agreement had a time schedule of two years, it was quite clear that this was extended and, further, that the respondent would have continued to train the appellant had it been necessary.

131 When all of these matters are considered, as it is patently clear that there was no evidence before the Commission that the respondent was obliged by any contractual term to complete the appellant's training by March 2011, ground 4 must necessarily fail.

132 In respect of ground 6, we think the assertion made in (i) of this ground, that the appellant failed the Boya field examination showed the appellant lacked adequate training, lacks logic. There are a number of reasons why a person may fail an examination, and the failure does not necessarily mean that the person was inadequately trained. The evidence does not demonstrate that this was so in this case. In any event, there was further training available to the appellant had he wished to continue. Consequently, the matters raised in ground 6 are irrelevant because if the appellant required further rural field survey cadastral training in March 2011, the learned Commissioner properly had regard to the evidence of Mr Ireland and Mr Jonath that established that such training could have been provided to the appellant if he had continued to be employed by the respondent.

133 Therefore, whilst there is some error in the decision at first instance, it has not been demonstrated that this would have made any difference to the outcome. The reason why the training did not continue was the appellant's resignation.

134 Although we are of the opinion that grounds 1, 2 and part of 3 of the appellant's grounds of appeal have been made out, as grounds 4 and 6 have not been made out, the appeal should be dismissed as the evidence given in the proceedings at first instance was not capable of establishing that the respondent breached a term of the appellant's contract of employment. Consequently, we are not satisfied that the learned Commissioner erred in fact or in law in making an order to dismiss the appellant's claim.

135 As to grounds 5, 9 and 10, it is clear that the learned Commissioner did not err in not explaining the reasons for the appellant's resignation. The only relevant fact going to the terms of the appellant's contract of employment was and is that he resigned effective from 25 March 2011. The reasons why the appellant resigned are not relevant to the claim he referred pursuant to s 29(1)(b)(ii) of the IR Act. Nor does the fact that Mr Jonath resigned in January 2011 without discussing the resignation with the appellant raise any issue relevant to the matters raised in this appeal. Similarly, whether the learned Commissioner facilitated a mediation of the appellant's claim at a conciliation conference is not relevant to the issue whether the appellant's claim that the respondent breached a term of his contract of employment has any merit.

136 For these reasons, we are of the opinion an order should be made to dismiss the appeal.

KENNER ASC:

The appeal

137 The background to the appeal, the appeal grounds, a summary of the evidence and findings at first instance are set out in the reasons of Smith AP and Scott CC which I need not repeat.

138 Whilst the appeal grounds do not comply with the requirements of reg 102(2) and (3) of the *Industrial Relations Commission Regulations 2005* (WA) and I had some difficulty clearly discerning the complaints of the appellant, it seems to me that the two key issues to be determined on the appeal are:

(a) what were the terms of the contract of employment between the appellant and the respondent; and

(b) whether the terms of the contract obliged the respondent to provide training to the appellant to enable him to become a licensed surveyor.

Construction of contracts

139 In *King v Griffin Coal Mining Company Pty Ltd* [2017] WAIRC 00102; (2017) 97 WAIG 527 at pars 10-13, I referred to *Black Box Control Pty Ltd* v *Terravision Pty Ltd* [2016] WASCA 219 and the observations of Newnes and Murphy JJA and Beech J in relation to the construction of contracts generally. I also referred to *Hancock Prospecting Pty Ltd* v *Wright Prospecting Pty*

Ltd (2012) 45 WAR 29 and the observations of McLure P in relation to the use of extrinsic evidence in the construction of contracts. I adopt those observations without repeating them for the purposes of these reasons.

140 Also, it is generally impermissible to have regard to the conduct of parties to a contract subsequent to its formation: *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570; *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407.

Terms of contract

141 As with any contract, the terms of the appellant's contract of employment with the respondent are to be ascertained from the offer and acceptance in the context of the relevant background and circumstances.

142 In this case it was common ground at first instance that the appellant received a letter from the respondent signed by Mr Hill, the Managing Director dated 21 March 2007. The letter was headed "RE: Position with Whelans". The letter referred to various documents to be completed by the appellant "with respect to our offer of employment with Whelans". The next three paragraphs of the letter were as follows:

> As discussed it would be our intention to have you inducted and comfortable with our work processes as quickly as possible with the aim to have you performing a Survey Party Leaders role as soon as you able (sic). To this end training and a mentoring contact will be made available and a formal review of your progress will be made after the 3 months probationary period.
>
> Assuming this review is favourable it would be reasonable to expect that your salary package could be increased and an Articled Position offer made so that you can ultimately become a Licensed Surveyor.
>
> I look forward to receiving back from you confirmation of our offer of employment and should you have any queries at any time please do not hesitate to contact me.

143 It was accepted by the appellant at first instance, and it was common ground, that a document called "Employer – Employee Agreement" (exhibit 4) contained the relevant terms and conditions of employment, even though a signed copy could not be located. This document set out at cl 24.9 "Employee Classifications" which in turn provided five groups of generic classifications. It is not entirely clear which of the broad generic groups would strictly apply to the appellant's employment as a "Survey Party Leader" referred to in the letter of offer of 21 March 2007. The "Management Classifications" in cl 24.10 also were not relevant. It seems the appellant was paid a salary towards the higher end of the scale, from his particulars of claim. However, and in any event, simply because the classifications in cl 24.9 and cl 24.10 may not have neatly fitted the appellant's employment, did not mean in my view, that the remainder of exhibit 4 could not apply as the terms and conditions of the appellant's employment with the respondent, as appeared to be the evident intention of the parties. As noted, it was common ground that exhibit 4 was to be read as the terms and conditions of the appellant's employment with the respondent and the learned Commissioner found to this effect. Such a finding was plainly open on the evidence.

144 It was also common ground that should the appellant progress satisfactorily beyond the three-month probationary employment period set out in the letter of offer, it was the expectation that an "Articled Position offer" would be made, to enable the appellant to progress to become a qualified licensed surveyor.

145 The terms of the contract of employment offer made by the respondent to the appellant in March 2007, need to be understood in the context of the background facts and circumstances. One of those relevant considerations was a letter from the appellant to the respondent tendered as exhibit 8. The letter, which was written some time before the offer of employment by the respondent, set out the appellant's background and experience and outlined his desire to complete his articles with a firm of surveyors. Importantly, by way of context and background, the appellant set out in the second part of the letter, that any prospective employer would gain the benefit of someone who had "accumulated skills and training of a person who has two years experience as a *party leader*." The appellant further said that he was experienced sufficiently to carry out most surveys in the field with minimum supervision. A summary of the appellant's skills, and a record of work recently completed, was further set out in this letter.

146 There was also evidence led before Commission at first instance as to this issue. The appellant testified that he had an interview with Mr Hill and Mr Sullivan, a Senior Licensed Surveyor. This was some months after the letter the appellant wrote to the respondent, referred to above, and the day before he was offered a position. In the interview, the appellant said that he was going to work as "a project surveyor, otherwise called a party leader" (T6). There was also going to be a three-month probation period. The respondent would eventually have a licensed surveyor enter into a training agreement with the appellant, and provide him with training. When exhibit 1 was put to him, the appellant clearly identified the position "Survey Party Leader" as the position discussed in the interview with Mr Hill (T9). Mr Ireland, one of two Assistant Survey Managers of the respondent, whilst not directly involved in the employment of the appellant, confirmed that the position of "Survey Party Leader" was one well known in the firm, that the appellant was employed as such, and it was otherwise described as a "Project Surveyor", as referred to by the appellant (T16).

147 To the extent that there may be said to be any ambiguity in relation to the position to which the appellant was appointed under the contract of employment, consistent with the above authorities, from all of the evidence and in particular exhibits 1, 4 and 8 read in context and having regard to all of the background circumstances, the appellant was employed by the respondent as a Survey Party Leader, and the terms and conditions of his employment were as set out in exhibit 4.

148 It was also not in dispute that the process by which a person becomes a licensed surveyor is prescribed by the *Licensed Surveyors Act 1909* (WA) and the *Licensed Surveyors (Licensing and Registration) Regulations 1990* (WA). This statutory scheme requires a person intending to embark on a course of becoming a licensed surveyor, to enter into a separate contract of training with a qualified surveyor. In this case, the appellant entered into a "Professional Training Agreement" with Mr Jonath, a licensed surveyor employed at the time by the respondent. A copy of this Agreement was exhibit 3 at first instance. The agreement set out the training program to be undertaken by the appellant under the supervision of Mr Jonath. The appellant

was described in the Agreement as a "Graduate Surveyor" and Mr Jonath was described as the "Supervising Surveyor". The training was to be conducted in accordance with the requirements of The Land Surveyors Licensing Board Guidelines for Supervising Surveyors. Notably in cl 6 – The Graduate Surveyor's Competencies, the appellant set out his knowledge, experience and qualifications, which included at (1) (and presumably current) his position as "Survey Party Leader".

149 It is plain that the Agreement was entirely separate to the contract of employment between the applicant and respondent. It was entered into by different parties. The respondent was not a party to it. It was entered into under the specific statutory scheme for the training and licensing of graduate surveyors, to enable them to become "admitted" to the profession of licensed surveyors. I do not consider from the evidence at first instance that the appellant was employed by the respondent as an "Articled Surveyor" or as a "Articled Position". His position for which he was paid his salary was that of Survey Party Leader. The appellant, in conjunction with his employment, also was subject to the Agreement, by which he would be provided the training to enable him to satisfy the statutory requirements to be registered by the Board as a licensed surveyor. The employment contract and the Agreement were separate and one did not depend on the other for the operation of each. The learned Commissioner's conclusions in this respect were not in error and I agree with them.

Obligation to train

150 The complaint of the appellant was that the respondent was obliged to train him to become a licensed surveyor and that this was a benefit denied to him under his contract of employment. To make good this contention, it was necessary for the appellant to establish that it was a term of his contract of employment for him to be so trained. It is therefore necessary to examine the terms of the contract of employment to ascertain whether such an obligation was placed on the respondent by the terms of the contract.

151 The learned Commissioner concluded that the only reference to training in the terms and conditions of employment document in exhibit 4, was cl 15.1. It provided "The employee will be provided with appropriate training, as determined on a needs basis, to ensure adequate practical and professional work competency. … Where approved courses extend for longer than five days the Divisional Manager may require a quid pro quo from the employee for the additional days." I have no doubt that this provision was intended to be general in nature and obliged the respondent to provide training to employees as might be required, to enable them to perform the requirements of their particular positions, on a day-to-day basis. I do not consider that this provision could be reasonably construed, in its ordinary and natural sense, to oblige the respondent to fulfil all of the obligations under the Agreement to ensure that the appellant became a licensed surveyor. For this to be the case, clear language to this effect would be required. Nothing in cl 15.1 is consistent with such a construction in my view. The learned Commissioner was correct to so conclude.

152 Even if, as the learned Commissioner postulated, the terms of the contract between the appellant and the respondent did so provide, then it would be necessary for the appellant to establish that this obligation, that is the obligation to train the appellant to the standard of a licensed surveyor, obliged the respondent to do so by March 2011, which was the month that the appellant resigned from his employment. As there was clearly no such term, and the appellant voluntarily resigned, the appellant was not able to establish a breach of contract to warrant establishing that he had been denied a contractual benefit.

153 For these reasons, I consider that the learned Commissioner was quite correct to reach the conclusions that he did. It is unnecessary for me to deal with other matters raised by the appellant on the appeal. The appeal must be dismissed.

2017 WAIRC 00302

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT KINNEEN
	APPELLANT
	-and-
	WHELANS
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	ACTING SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 30 MAY 2017
FILE NO.	FBA 10 OF 2016
CITATION NO.	2017 WAIRC 00302

Result	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Mr J Lilleyman (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 29 March 2017, and having heard Mr R Kinneen on his own behalf as appellant and Mr J Lilleyman (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 30 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.]

2017 WAIRC 00323

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 159 OF 2016 GIVEN ON 16 JANUARY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2017 WAIRC 00323
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT ACTING SENIOR COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 9 MAY 2017
DELIVERED	**:**	FRIDAY, 9 JUNE 2017
FILE NO.	**:**	FBA 1 OF 2017
BETWEEN	**:**	SPOTLESS GROUP Appellant AND DENNIS BUCKLE Respondent

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ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner D J Matthews**
Citation	**:**	**[2017] WAIRC 00024; (2017) 97 WAIG 202**
File No.	**:**	**B 159 of 2016**

CatchWords	**:**	Industrial Law (WA) - Appeal against decision of the Commission - Claim of contractual benefit for redundancy pay - Condition of contract providing for redundancy pay uncertain - Condition saved from uncertainty by application of the National Employment Standards for redundancy pay - Contract terminated on grounds 'ordinary and customary turnover of labour' disentitled the employee to redundancy pay - Order made at first instance quashed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii), s 49 *Fair Work Act 2009* (Cth) s 5(3), s 43(1), s 44(1), pt 2-2, s 61(1), s 61(2), pt 2-2 div 3, pt 2-2 div 4, pt 2-2 div 5, pt 2-2 div 6, pt 2-2 div 7, pt 2-2 div 8, pt 2-2 div 9, pt 2-2 div 10, pt 2-2 div 11, s 119, s 119(1), s 119(1)(a), s 119(1)(b), s 119(2), s 120, s 121, s 121(1), s 122, s 122(1), s 122(2), s 122(3), s 123, s 123(1)(c), s 123(4)(a), pt 2-2 div 12
Result	**:**	Appeal upheld
Representation:		
Appellant	**:**	Ms H R Millar (of counsel)
Respondent	**:**	In person
Solicitors:		
Appellant	**:**	Herbert Smith Freehills

Case(s) referred to in reasons:

Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd (2011) 274 ALR 731

Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337

Construction, Forestry, Mining and Energy Union v Spotless Facility Services Pty Ltd [2015] FWCFB 1162

Crawford v Spotless Management Services Pty Ltd [2017] WAIRC 00006; (2017) 97 WAIG 73

Hammond v Vam Ltd [1972] 2 NSWLR 16

Hillas & Co Ltd v Arcos Ltd (1932) 147 LT 503

Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37; (2015) 89 ALJR 990

Woodcock v Spotless Management Services Pty Ltd [2017] WAIRC 00007; (2017) 97 WAIG 83

Reasons for Decision

SMITH AP:

Introduction

1 The Full Bench has before it an appeal instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the Act). The appeal is against an order made by the Commission on 16 January 2017: [2017] WAIRC 00024; (2017) 97 WAIG 202. The order was made following the hearing of an application referred by Dennis Buckle (the respondent) pursuant to s 29(1)(b)(ii) of the Act in B 159 of 2016. The decision is an order that Spotless Group (the appellant), (a name of a group of associated companies one of which is Spotless Management Pty Ltd), forthwith pay to the respondent and former employee of Spotless Management Pty Ltd, the sum of 11 weeks of pay at the respondent's fixed annual remuneration rate as at the date of his termination.

2 Although no issue was taken with the name of the appellant at the hearing at first instance, it is to be noted that for the order to be enforceable against the employer, as the identity of the employer was not in dispute, an amendment of the name of the appellant should have been made. As this issue was not raised on appeal, it is not a matter that needs to be dealt with by the Full Bench.

Background

3 Spotless Management Services Pty Ltd is part of the Spotless Group of companies. It operates a contracting business which operates in a competitive market and derives most of its income from servicing client contracts. It obtains work through a competitive tendering process and recruits the majority of its employees to work on and be 'tied to' specific client contracts. It provides a range of services to clients including catering and hospitality, security, maintenance and cleaning.

4 The respondent was employed by Spotless Management Services Pty Ltd to perform work within one of the appellant's group of companies, SSL Facilities Management Pty Ltd (exhibit 6, AB 40 - 96; exhibit 7, AB 97 - 116), in the performance of a contract held with the Minister for Works to provide facilities maintenance services to a range of government departments and agencies. One of those agencies was Fire and Emergency Services (FESA).

5 The respondent was employed by Spotless Management Services Pty Ltd as a facilities manager from 23 July 2009 until 30 June 2016. His main duties were onsite building operations and facility management at FESA headquarters.

6 The respondent was given notice in a letter dated 19 April 2016 that the contract for the provision of facility maintenance services at FESA was to terminate on 30 June 2016 and if no acceptable alternative employment options could be identified with either Spotless or the incoming contractor his employment would be terminated as a consequence of ordinary and customary turnover of labour (AB 39).

7 In the letter dated 19 April 2016, the respondent was also advised that the appellant would make every effort to identify alternative employment opportunities within the Spotless Group of companies which would utilise his skills and experience and his manager would keep him informed of any opportunities and discuss suitable positions with him as they arise. The letter stated that Spotless' preferred option wherever possible is to redeploy staff and they would be working closely with all parts of the Spotless business to ensure the respondent was given every opportunity to transfer within Spotless. As a result, it appears that the respondent was subsequently sent a weekly recruitment vacancy list (AB 117 - 126).

8 It is common ground that the respondent was not offered a position within the Spotless Group of companies, nor with the incoming contractor. It is also common ground that the respondent was not paid a redundancy payment.

9 On 20 September 2016, the respondent referred a claim of contractual benefits to the Commission pursuant to s 29(1)(b)(ii) of the Act for a redundancy payment pursuant to the express terms of his contract of employment. The appellant in its notice of answer pleaded, among other matters, the respondent was not entitled to be paid a redundancy payment as his employment was terminated on grounds of ordinary and customary turnover of labour following the loss of the contract by the appellant to provide services to FESA.

Terms of the respondent's contract of employment

10 The terms of the respondent's contract of employment are set out in a letter and attachments dated 17 July 2009. The material terms of the respondent's contract of employment are as follows:

> It is with pleasure that I offer you appointment to the position of Facilities Manager - FESA under the following terms and conditions.

Employing Entity

Your contract of employment is with Spotless Management Services Pty Ltd ACN 099 129 790 ('Spotless'). As an employee of Spotless, you may be required to provide services to any company in the Spotless Group, and all entities which are subsidiaries of Spotless.

Contract Term

This contract shall take effect from 23 July 2009 and shall continue until it is terminated in accordance with the termination provisions in this contract or replaced by a new contract.

Duties

Your specific duties and responsibilities in this position are as outlined in the attached position description. You may, however, be required to undertake other duties and responsibilities from time to time in addition to or as variations of the duties and responsibilities of the position. As a consequence, or for other reasons, your reporting responsibility and/or position title may also be altered from time to time.

Remuneration

Your Fixed Annual Remuneration (FAR) will be as set out in Schedule 1 and may be portioned by you between base salary, superannuation contributions which must not be less than that required by law, and other benefits as may be agreed by Spotless in accordance with Spotless remuneration policies.

Re-assignment

Spotless has a policy in which it reserves the right to reassign employees geographically or to other responsibilities from time to time. Such reassignment will occur after consultation and agreement with you, particularly as to your career development and your own circumstances.

Redundancy

If your employment is terminated on the grounds of redundancy, retrenchment benefits payable to you will accord with the terms of the retrenchment policy applicable to Spotless staff at that time. The total payment (including severance payment and notice or payment in lieu) shall not exceed an amount equivalent to 52 weeks FAR.

This provision is subject to the exception that the period of notice of termination on the ground of redundancy (or the period in respect of which payment in lieu of notice will be made) will be the period of notice Spotless must give to you (as set out under 'Termination of Employment' above).

No severance payment will be payable where your position is redundant and you accept or reject an offer of suitable alternative employment within Spotless or with a prospective employer where your continuous service is recognised by the prospective employer.

Spotless Group Policies

You will be required to comply with Spotless Group policies and procedures generally, as established and varied from time to time. The Spotless Group policies are available on the Spotless website 'Fitz'.

You agree that the Spotless Group policies do not form part of your contract of employment and do not vest enforceable rights in you.

Totality of Contract

This contract including the enclosed attachments forms the entire agreement concerning the terms and conditions of your employment and supersedes any prior contracts, agreements, understandings or representations related to your employment.

The evidence

11 The respondent was not alone in making a claim for a redundancy payment. Mr Andrew Crawford in B 138 of 2016 and Mr Dean Woodcock in B 142 of 2016 also made claims. Mr Crawford and Mr Woodcock's claims were heard in a joint hearing with the respondent's application. The terms of the contracts of employment of Mr Crawford and Mr Woodcock were, however, materially different to the terms of the respondent's contract of employment.

12 Whilst the respondent's contract of employment expressly refers to retrenchment benefits payable in accordance with the terms of the retrenchment policy applicable to Spotless staff, the evidence at first instance clearly established the fact that Spotless had at no material time a 'retrenchment policy'. Mr Matthew Potter gave evidence on behalf of the appellant in relation to this issue. He is the national human resources manager for Spotless and is located in Victoria. He is responsible for the implementation of human resources strategies across the Spotless Group of companies in Australia. Mr Potter's evidence was that when a person's employment is terminated they are paid the contractual period of notice, but they are not paid a severance payment if their employment is terminated due to loss of contract. The effect of his evidence was that no payment is made as such an occurrence falls within the category of ordinary and customary turnover of labour exception contained in s 119(1) of the *Fair Work Act 2009* (Cth).

13 Section 119(1) of the *Fair Work Act* provides:

Entitlement to redundancy pay

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

14 Mr Potter was asked by the learned Commissioner when giving evidence whether the appellant has any policies in relation to a formula that would be applied if his position or if his human resources section was to be reorganised. In response, Mr Potter said a redundancy payment would be made in those circumstances and the formula applied would generally follow what is provided for under the National Employment Standards or if there is an industrial instrument that applies to a person's employment the scale provided in the instrument would be applied.

15 Mr Potter elaborated on this issue when cross-examined by the respondent. Mr Potter said that whilst there is not a published redundancy policy, the appellant has always followed what is provided for in employment contracts in terms of the policy at the time of the departure of an employee from the company and would apply the ordinary and customary turnover of labour exception where the loss of employment was due to a loss of a contract (ts 103). He also said this was different to where employment was lost because of a diminution in the scope of work or for some other reason which led to the abolishing of a position then severance pay would be payable in that situation.

The reasons for decision at first instance

16 The finding of facts made by the learned Commissioner were very brief. He found:

(a) It is not in dispute that the respondent's employment was terminated on the grounds of redundancy.

(b) Mr Potter's evidence was as pleaded in the appellant's defence set out in [9] to [11] of its outline of submissions that Spotless in June 2016 did not, and still does not, have a retrenchment or redundancy policy. Further, that Spotless is not aware of and has not been able to identify, any retrenchment or redundancy policy that existed at the time the respondent was employed, or has existed thereafter.

17 The learned Commissioner rejected the appellant's defence that in the absence of a retrenchment policy, the retrenchment clause in the respondent's contract is uncertain and, for that reason, void. The learned Commissioner found that the clause was not uncertain as the clause clearly contemplates that if the respondent's employment is terminated on the grounds of redundancy a payment would be made to the respondent and that was the only conclusion open given the use of the word 'payable' in the first sentence of the first paragraph of the redundancy clause and the words that provide for a cap on the 'total payment' provided for in the second sentence. In light of this finding, the learned Commissioner found it was the intention of the parties to the contract that the respondent, if his employment was terminated on grounds of redundancy, would receive a payment.

18 The learned Commissioner then observed:

(a) If the circumstances permit he must apply objective standards of reasonableness to prevent the intention of the parties being defeated: ***Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd*** (2011) 274 ALR 731 [122] - [123] (Keane CJ).

(b) Where there is a readily ascertainable external standard which is proved, he should have regard to it to add flesh to a provision which on its face is apparently uncertain or illusory: ***Biotechnology Australia Pty Ltd v Pace*** (1988) 15 NSWLR 130, 136 (Kirby P).

(c) Where a promise to pay money appears illusory or uncertain because there is no agreed basis for calculation of the payment, he should strain to find criteria, at least for the minimum performance required of the party promising to make a payment, and he should, if he can, enforce that promise: ***Biotechnology*** (144) (Hope JA).

19 Applying those principles, he found:

(a) In terms of the payment to be made to an employee of a corporation like the appellant where the employment ends for redundancy, there is a readily ascertainable external standard, namely the National Employment Standards, found in s 119(2) of the *Fair Work Act*. The appellant could not have had a policy which provided for anything less than what is provided for by the National Employment Standards.

(b) This case has some similarity to ***Biotechnology***. In ***Biotechnology***, there was no equity sharing scheme, here there was no retrenchment policy. However, unlike in ***Biotechnology***, in this case the identification of an external standard is possible, indeed easy, and its application simple.

(c) The issue of whether the respondent's redundancy arose as a result of the ordinary and customary turnover of labour was not relevant to the respondent's claim. That exception to a redundancy payment was not part of his contract of employment. His contract of employment provided that he would receive a payment of some sort if made redundant. Applying the external standard for calculation of the amount that amount is 11 weeks of pay at the respondent's fixed annual remuneration as at the date of his termination as that is the amount found in the National Employment Standards.

Grounds of appeal

20 The grounds of appeal are as follows:

1. The Commissioner erred in finding that the Applicant had a contractual right to redundancy pay when in fact the provisions in the Applicant's contract regarding redundancy entitlements were uncertain or illusory.

2. The Commissioner erred in quantifying the Applicant's redundancy pay based on the schedule contained in National Employment Standards (s 119 of the *Fair Work Act 2009* (Cth) (the Act)) but disregarding the 'ordinary and customary turnover of labour' exception to redundancy entitlements which also forms part of the National Employment Standards (also s 119 of the Act). Even if regard could be had to external standards, in accordance with case law which allows such recourse in certain circumstances of contractual uncertainty (*Biotechnology*

Australia Pty Ltd v Pace (1998) 15 NSWLR 130), it is not open to the Commission to selectively apply aspects of the external standard while disregarding others.

Relevant provisions of the *Fair Work Act 2009* (Cth)

21 Pursuant to s 61(1) of the *Fair Work Act*, pt 2-2 sets minimum standards that apply to the employment of employees that cannot be displaced.

22 A table of redundancy pay payable to an employee who is made redundant is found in s 119(2) of the *Fair Work Act* which provides as follows:

Amount of redundancy pay

(2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period

	Employee's period of continuous service with the employer on termination	**Redundancy pay period**
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

23 Not all employees to whom the redundancy pay National Employment Standards applies are entitled to be paid redundancy pay pursuant to the table of payments set out in s 119(2).

24 Section 119(1)(a) contains a precondition to payment and one exception. The precondition is that an employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone. Where this precondition is met, the exception which disentitles the employee to redundancy pay is where the termination of employment is due to the 'ordinary and customary turnover of labour'. A second precondition to payment is provided for in s 119(1)(b) which provides that an employee is entitled to be paid redundancy pay if the employee's employment is terminated because of the insolvency or bankruptcy of the employer. As set out in the note that appears under s 119(1), s 121, s 122 and s 123 also describe situations in which the employee does not have an entitlement to redundancy pay in accordance with the table in s 119(2).

25 Section 121(1) of the *Fair Work Act* excludes redundancy payments to employees employed for less than 12 months or to employees of a small business employer.

26 Section 122(1) and s 122(2) of the *Fair Work Act* excludes payments of redundancy pay to employees whose employment is transferred from a first employer to a second employer who is a non-associated employer if service with the first employer counts as service with the second employer. Section 122(3) excludes payments of redundancy pay to employees who reject an offer of employment from a second employer in certain circumstances.

27 Section 123 of the *Fair Work Act* excludes payments of redundancy pay to employees employed in particular categories of employment, for example a casual employ (s 123(1)(c)) and apprentices (s 123(4)(a)).

The appellant's submissions

28 In ground 1 of the grounds of appeal, the appellant puts an argument that the finding by the learned Commissioner that it was the intention of the parties that if the respondent's employment was terminated on grounds of redundancy he would receive a payment was not a finding that was open as it was an unreasonable finding in light of the uncertainty inherent in the redundancy clause.

29 The appellant says that the redundancy provision in the respondent's contract amounted to an illusory promise or was so uncertain as to be unenforceable. It argues that the learned Commissioner's attempt to read an entitlement into the redundancy clause created an unreasonable and unjust result for the appellant.

30 The appellant argues that the redundancy provision in the respondent's contract is uncertain because it contains neither criteria by which to determine an entitlement to redundancy pay nor a means by which to calculate the appropriate amount. Those matters were left by the parties to be addressed by the appellant in a separate redundancy policy. The appellant points out it was open to it to draft a redundancy policy which provided that in certain circumstances an employee would not be paid a redundancy payment. Such conditions could be exclusions from an entitlement to payment unless an employee has worked for a minimum period of employment or where the employee's redundancy was due to the ordinary and customary turnover of labour. For example, it was accepted by the learned Commissioner that the appellant expressly included the ordinary and customary turnover of labour exception in the redundancy provisions in the employees' contracts of Mr Crawford and Mr Woodcock which resulted in the dismissal of their claims: ***Crawford v Spotless Management Services Pty Ltd***

[2017] WAIRC 00006; (2017) 97 WAIG 73 and ***Woodcock v Spotless Management Services Pty Ltd*** [2017] WAIRC 00007; (2017) 97 WAIG 83.

31 Thus, the appellant says in circumstances where the appellant could have drafted a redundancy policy which provided in certain circumstances that an employee would receive no redundancy pay, it is perverse for the Commission to interpret the contractual redundancy provision as requiring payment.

32 The appellant argues that the redundancy clause in the respondent's contract cannot be construed to require payment in all circumstances of redundancy as the words used fall short of a contractual promise to pay a severance payment irrespective of whether the terms of a policy disentitled the respondent to payments in some circumstances. 'Retrenchment benefits' are only payable in accordance with the terms of a retrenchment policy. Yet there was no policy. This contention was, however, qualified to an extent in oral submissions at the hearing of the appeal. Counsel for the appellant informed the Full Bench that:

(a) the evidence established that there was no 'written policy' in respect of redundancy and that the appellant was bound by operation of law to apply the National Employment Standards in relation to redundancy pay in the absence of any contractual provision or enterprise agreement provision which provided for a superior entitlement; and

(b) the appellant applies the redundancy pay National Employment Standards because it is bound to do so by law not by operation of a policy.

33 In ground 2 of the grounds of appeal, the appellant challenges the finding made by the learned Commissioner that a readily ascertainable external standard, namely the National Employment Standards for redundancy pay, found in s 119(2) of the *Fair Work Act*, could be used to calculate the redundancy pay in the absence of a policy made by the appellant. The appellant argues that the learned Commissioner's reasoning is flawed.

34 The appellant submits that where a tribunal finds a contractual promise so uncertain as to require recourse to an external standard in order to determine its meaning and effect, the tribunal must apply the standard in its entirety.

35 The appellant points out that the minimum standard in relation to redundancy pay is one of ten minimum standards applicable to national system employees (s 61(2) of the *Fair Work Act*) and the National Employment Standards for redundancy pay span s 119 to s 123 of the *Fair Work Act*.

36 It also points out that relevantly s 119(1) excludes a payment being made under s 119(2) where the termination of employment of an employee was due to the ordinary and customary turnover of labour.

37 The appellant says the learned Commissioner in applying the standard applicable under the National Employment Standards for redundancy pay should have applied the ordinary and customary turnover of labour exception under s 119(1). Further, it says he erred in failing to consider any of the other provisions in pt 2-2, div 11 of the *Fair Work Act* which are part of the minimum standards of redundancy pay. Instead the learned Commissioner elected to partially apply the National Employment Standards for redundancy pay by adopting the rates of pay in s 119(2) while refusing to apply the ordinary and customary turnover of labour exception in s 119(1) which would act as a barrier to a redundancy payment to the respondent. Thus, it is said the selective application of a standard defeats the purpose of applying a standard as a means of determining entitlements.

The respondent's submissions

38 The respondent was unrepresented. I understand the effect of his contentions in opposition to the grounds of the appeal are as follows:

(a) the 'policy' referred to in the first paragraph of the redundancy clause does not affect an entitlement he has to be paid redundancy pay in circumstances where his employment was terminated on grounds of ordinary and customary turnover of labour;

(b) the fact that his employment was terminated on grounds of ordinary and customary turnover of labour does not exempt the appellant from paying him a retrenchment benefit as such an exemption is not mentioned as an express term of the contract of employment;

(c) a 'big part' of the reasons why he accepted the terms of the contract of employment was because the terms of the contract contains an entitlement to redundancy pay;

(d) he met the conditions for payment of a 'retrenchment benefit' as the terms of the third paragraph of the redundancy clause did not exclude him from payment as he was not offered a job with a prospective employer after the appellant lost the contract to provide services to FESA; and

(e) the termination of his employment on grounds of redundancy could only be effective in accordance with the redundancy clause in his contract.

Legal principles - Are the terms of the redundancy clause void on grounds of uncertainty?

39 The starting point in construction of the terms of a contract is that courts are loath to find a clause void for uncertainty. A provision in a contract will only be found to be void for uncertainty if a provision is so lacking in certainty of meaning that it is incapable of enforcement: ***Hammond v Vam Ltd*** [1972] 2 NSWLR 16, 17 - 18.

40 In this matter, similar to the circumstances considered in ***Biotechnology***, uncertainty is said to arise on grounds that one of the essential terms of the contract was not and is not capable of determination. In particular, the issue is raised whether the term 'retrenchment benefits payable … will accord with the terms of the retrenchment policy applicable to Spotless staff at that time' is an essential term that is incapable of being enforced as at no material time was there in existence a written retrenchment policy.

41 Whilst the evidence clearly established the appellant had at the material time no written retrenchment policy, it appears that the evidence of Mr Potter at its highest could be said that in the absence of a contractual entitlement to a severance payment, or in an entitlement in an enterprise agreement the appellant applies the provisions of the National Employment Standards for redundancy pay. However, in applying the National Employment Standards for redundancy pay such action may not be capable of being characterised action taken pursuant to the requirements of a 'policy' as the appellant as a national system employer is bound by operation of law to apply the National Employment Standards in the absence of any supplementary entitlement (s 5(3), s 43(1) and s 44(1) of the *Fair Work Act*).

42 In ***Biotechnology***, the contractual arrangement between Dr Pace and his employer was payment of a salary package of $36,000 per annum, a fully maintained car and the option to participate in the company's senior staff equity sharing scheme. There was, however, no company senior staff equity scheme. This contractual promise was found by a majority of the Court of Appeal of New South Wales to be illusory and thus unenforceable as the promise of the option to participate in a non-existent equity scheme, being dependent for its formulation on factors special to the particular employment relationship, was incapable of being valued according to any existing or reasonable standards.

43 In ***Biotechnology***, Kirby P summarised the general principles that apply about the task of classification of terms and determining whether a contractual promise is vague, uncertain, ambiguous or illusory. At (135 -136) he said:

1. The determination of every case depends upon its own facts. The meaning of the agreement between the parties must be discovered objectively. Where there is suggested ambiguity or vagueness or where it is urged that a term is illusory, it may sometimes be both necessary and appropriate to have regard to extrinsic evidence in order to give meaning to that to which the parties have agreed: see, eg, *Kell v Harris* (1915) 15 SR (NSW) 473 at 479; 32 WN (NSW) 133 at 136 and *Raffles v Wichelhaus* (1864) 2 H & C 906; 159 ER 375.

2. The court will endeavour to uphold the validity of the agreement between the parties: see *Hillas & Co Ltd v Arcos Ltd.* The court will attempt to avoid frustrating the wishes of the contracting parties so far as those wishes may be ascertained from the agreement between them: see *Meehan* (at 589); see also Barwick CJ in *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at 437 where his Honour said that: '… In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements.'

3. But the court will not do so, where, in effect, it is asked to spell out, to an unacceptable extent, that to which the parties have themselves failed to agree. Nor will the court clarify that which is irremediably obscure. Most particularly, the court will not accept for itself a discretion which the parties have, by their agreement, reserved to one or other of them. To do so would not be to effect the contract but to change it: *Kofi-Sunkersette Obu v A Strauss & Co Ltd* [1951] AC 243 at 250 (PC).

4. Views will differ about the classification of the challenged provision and whether the court can or cannot give effect to it. Usually, there is no objectively right decision in these cases. That fact is illustrated by the frequency with which there are strongly expressed differences of judicial opinion concerning whether the case falls on one side of the line or the other. So it was in *Placer Development* where Kitto, Taylor and Owen JJ found that a clause in an agreement with the Commonwealth relating to a conditional entitlement to a subsidy was unenforceable. Menzies and Windeyer JJ dissented. Likewise in this case, Hope JA and Allen J have reached their respective views that the clause fell on one side of the line. Respectfully, I differ and agree with McHugh JA.

5. Nevertheless, the differences of result are not simply the result of differing judicial opinion based on nothing more than personal predilection. True, it is possible that behind the willingness of courts to fashion with precision a term which the parties have failed or neglected to clarify could be analysed in terms of differing fundamental attitudes concerning the role of courts in disturbing the economic relations of contracting parties. I say no more of that. Alternatively, it has been suggested that the willingness of courts to give content to the expression 'subject to finance' in land title conveyancing transactions derives from the special nature of such transactions. In them, judges, familiar with the incidents of such contracts, feel confident that they can fill the gaps which the parties have left. In other cases, less familiar, they do not: see, eg, the comment by Professor K C T Sutton, 'Certainty of Contract' (1977) 7 Qld Law Soc J 5 at 11. However that may be, the court will pay regard to features of the agreement, of the relationship between the parties and of relevant external reference points in order to determine whether the term which is challenged can or can not be sustained.

6. Matters which have been considered relevant in the determination of these cases include the following:

   (a) The provision in question, although an essential term, may be left in adequately clear terms to be settled by an identified third party who is given power to settle ambiguities and uncertainties: see, eg, *Foster v Wheeler* (1888) 38 Ch D 130 and *Axelsen v O'Brien* (1949) 80 CLR 219.

   (b) But even then, if the term is so vital that leaving it to one only of the parties unacceptably removes certainty in the arrangement, the court may or may not refuse to enforce it as illusory or unacceptably uncertain: contrast, eg, *May and Butcher Ltd v The King* [1934] 2 KB 17(n) and the comment of Gibbs J in *Godecke v Kirwan* (1973) 129 CLR 629 at 646-647.

   (c) Where there is a readily ascertainable external standard which is proved, the court will have regard to it in order to add flesh to the provision which, on its own, is unacceptably vague and uncertain or apparently illusory. This is what happened in *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699: see also *Meehan v Jones* (at 589).

   (d) Where a contract provides a term containing a specified range of possibilities, a court, rather than avoiding the contract will hold the party to providing at least the minimum provision in the range, that is

> to say the one which is the most favourable to it. This is what occurred in *Lewandowski v Mead Carney-BCA Pty Ltd* [1973] 2 NSWLR 640 at 643. The contract had provided for the payment of a salary in the range of $7,000 to $9,000 per annum. This Court (Jacobs P; Hardie and Bowen JJA concurring) held that the effect of the agreement between the parties was to prescribe the minimum of $7,000 so that the contract was not void for uncertainty.

44 When determining the objective meaning of words in a contract, if the terms are ambiguous regard may be had to surrounding circumstances. However, evidence of the expectations of the parties' subjective intention are not admissible: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337, 352. When regard can be had to surrounding circumstances, recourse may be had to events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transactions, including its history, background and context and the market the parties were operating in: ***Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*** [2015] HCA 37; (2015) 89 ALJR 990 [50] (French CJ, Nettle and Gordon JJ).

45 The reason why the respondent entered into the contract of employment (even if it was the subject of evidence given at first instance) is not admissible to construe the terms of the contract.

46 In any event, the terms of the respondent's contract cannot be characterised as ambiguous. The essential terms of the redundancy clause are clear. That does not mean the terms are certain. The conditions that were to attach to the entitlement to retrenchment benefits and if so attracted the quantum of the benefits were left to the sole determination by Spotless Management Pty Ltd through a staff policy. As the appellant's counsel points out the contents of such a policy if made would be dependent upon the preconditions set by the appellant in its discretion. Whilst the terms of such a policy would be required by operation of law to create entitlements no less favourable than the National Employment Standards for redundancy pay, the terms of such a policy cannot be ascertained and as a consequence the term providing for redundancy benefits in the first paragraph of the redundancy clause is uncertain. However, as Kirby P pointed out in ***Biotechnology***, a provision that is unacceptably vague and uncertain or illusory may be saved from being rendered void if a readily acceptable external standard which is proved can be applied. Chief Justice Keane also made this point in ***Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd*** [122] - [123] when his Honour said:

> It is well-established that the courts strive to uphold bargains: *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494. To that end, the courts will construe the terms of an agreement with an inclination to give effect to the intention of the parties, even if that intention has been obscurely expressed: *Australian Goldfields NL (in liq) v North Australian Diamonds NL* (2009) 72 ACSR 132; [2009] WASCA 98, especially at [6]–[8]. Further, the courts may, where circumstances permit, apply objective standards of reasonableness to prevent the intention of the parties being defeated. And where the want of an express provision in an agreement can be supplied by implying a term in order to give efficacy to the bargain, the courts will make the necessary implication: *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2002] 2 NZLR 433 at [64]–[67]; *Moffat Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2009] QCA 60.
>
> But where the parties have not agreed upon the content of essential terms and have not agreed upon the application of an objective standard to measure their obligations or to provide a mechanism to fix the content of essential terms (as by third party determination), it is no business of the courts to foist upon the parties a bargain which they have not made. The trial judge referred to the decision of the Court of Appeal in England in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 (*Pagnan*) as supporting the proposition that a legally enforceable agreement may be made even where issues as to price and quantity of subject matter had not been agreed: at [294]. In this regard, his Honour erred. In *Pagnan*, price and subject matter had been agreed.

47 After finding the clause was not uncertain the learned Commissioner found the table set out in s 119(2) of the *Fair Work Act* was a readily accessible external standard. The effect of his findings were that a retrenchment benefit was an enforceable benefit due and payable. Yet inherent in this finding appears to be a finding that there was a matter that was uncertain in the express terms of the contract and that was the quantum of payment which could be rendered certain by the application of the table of payments in s 119(2) of the *Fair Work Act*.

48 In my respectful opinion, the learned Commissioner erred in finding that the redundancy clause was certain. Notwithstanding this finding, I am of the opinion that the otherwise vague and illusory requirement that retrenchment benefits payable were to accord with a retrenchment policy applicable to Spotless staff could be saved from being rendered unenforceable by the application of the National Employment Standards for redundancy pay.

49 Pursuant to s 61 of the *Fair Work Act* pt 2-2 div 11 (Notice of termination and redundancy pay) constitutes along with pt 2-2 div 3 to pt 2-2 div 10 and pt 2-2 div 12 the National Employment Standards.

50 The standard for redundancy pay is not solely contained in the table in s 119(2) of the *Fair Work Act*. The whole of subdivision B of pt 2-2 div 11 constitutes the National Employment Standards for redundancy pay. This standard is not divisible, in the sense that the amount of redundancy pay in s 119(2) cannot be applied in isolation from the preconditions provided for in s 119(1) and exceptions disentitling payment in s 119(1) (where the employment is terminated due to the ordinary and customary turnover of labour) or the exceptions provided in s 121, s 122 or s 123 of the *Fair Work Act*.

51 Once this construction is accepted it follows that when the National Employment Standards for redundancy pay are applied the criteria to be applied as a retrenchment benefit must be in accordance with the terms of the whole of the National Employment Standards for redundancy pay in the absence of a retrenchment policy. Given that it is not disputed that the respondent's employment was terminated due to ordinary and customary turnover of labour, it follows that the respondent is not entitled to a redundancy payment.

52 The words 'retrenchment benefits payable' and the words that provide for a total cap on notice and severance payments are not to exceed 52 weeks' fixed annual remuneration, cannot be construed without regard to the words that provide that 'retrenchment benefits payable … will accord with the terms of the retrenchment policy'. In the absence of the retrenchment policy, the clause is uncertain and has no effect. It can have effect, however, if the National Employment Standards for redundancy pay are applied. When they are applied the entitlement to retrenchment benefits under the redundancy clause in the respondent's contract must accord with the National Employment Standards for redundancy pay which is an entitlement that is not without preconditions and exceptions.

53 The express exception in the third paragraph of the redundancy clause does not assist the respondent's argument. The fact that the respondent did not receive an offer of suitable alternative employment within the Spotless Group of companies or from the contractor who successfully obtained a contract to provide facility services for FESA from 1 July 2016, does not entitle the respondent to a redundancy payment. The third paragraph simply creates an exclusion from an obligation to pay redundancy pay. In any event, the exception created in the third paragraph of the redundancy clause is substantially reflected in the exclusion provided for in s 122 of the *Fair Work Act*, which is a provision that forms part of the National Employment Standards for redundancy pay.

54 Nor does the decision of the Full Bench of the Fair Work Commission in ***Construction, Forestry, Mining and Energy Union v Spotless Facility Services Pty Ltd*** [2015] FWCFB 1162 assist the respondent's case. That matter concerned the interpretation of an enterprise agreement that provided for ancillary and supplementary entitlements in addition to the National Employment Standards for redundancy pay.

55 For these reasons, I am of the opinion the grounds of appeal have been made out and an order should be made to uphold the appeal and quash the decision in order [2017] WAIRC 00024.

SCOTT C.C.

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

KENNER ASC:

57 The appellant Mr Buckle was employed by one of the Spotless Group of companies on 23 July 2009 as a Facilities Manager. Mr Buckle's employment conditions were set out in writing in a letter dated 17 July 2009. As a Facilities Manager, Mr Buckle was responsible for the management of one of Spotless' contracts with the State Government, in providing facilities management services at the Fire and Emergency Services in Perth. Spotless provides facilities management services under contract to clients nationally.

58 Mr Buckle's employment came to an end on 30 June 2016 because of the termination of Spotless' contract with the State Government in respect of the FESA operations. This resulted from a competitive tender which is the process by which contracts for the provision of services are obtained in this industry. A dispute came before the Commission at first instance as to whether or not Mr Buckle had an entitlement to a redundancy payment under his contract of employment. The relevant provision of Mr Buckle's contract of employment provided as follows:

> **Redundancy**
>
> If your employment is terminated. on the grounds of redundancy, retrenchment benefits payable to you will accord with the terms of the retrenchment policy applicable to Spotless: staff at that time. The total payment (including severance payment and notice or payment in lieu) shall not exceed an amount equivalent to 52 weeks FAR.
>
> This provision is subject to the exception that the period of notice of termination on the ground of redundancy (or the period in respect of which payment in lieu of notice will be made) will be the period of notice Spotless must give to you (as set out under "Termination of Employment" above).
>
> No severance payment will be payable where your position is redundant and you accept or reject an offer of suitable alternative employment within Spotless or with a prospective employer where your continuous service is recognised by the prospective employer.

59 It was common ground that Spotless did not have a policy in relation to retrenchment either at the time of the employment of Mr Buckle or when his employment was terminated. Spotless contended that as there was no entitlement specified in the contract for redundancy payments as such, the clause in the contract should be regarded as being void for uncertainty. The learned Commissioner rejected this and found that the above provision in the contract was not uncertain and it contemplated that in circumstances of a redundancy, a payment would be made. In reliance on the principles set out in ***Biotechnology Australia Pty Ltd v Pace*** (1988) 15 NSWLR 130, the learned Commissioner found that the terms of the redundancy pay scale in s 119(2) of the *Fair Work Act 2009* (Cth), was a "readily ascertainable standard" to flesh out the contract in this case.

60 Accordingly, the learned Commissioner in doing so, found that Mr Buckle had an entitlement to a redundancy payment in the amount of 11 weeks' pay, applying this formula. Spotless now appeals. Whilst the two appeal grounds were not expressed as such, they are both intended to be in the alternative.

Ground 1

61 This ground maintained that the learned Commissioner was in error to conclude that Mr Buckle had a contractual entitlement to redundancy pay because the term of his contract properly construed, gave rise to no such entitlement. Spotless maintained that as the contract of employment did not provide for any means to determine an amount of redundancy pay, then the terms of the contract in this regard, must be held to be uncertain and illusory. Moreover, as Spotless could have introduced a policy at any time, which, given the nature of Spotless' business, would have included an ordinary customary and turnover of labour exemption, it was therefore unreasonable for the learned Commissioner to seek to import the external standard set out in the NES in s 119(2) of the FW Act.

62 I do not consider that the terms of the contract in relation to redundancy in this case were illusory, as being incapable of enforcement. I do consider the clause however, was uncertain. Determining which side of the line a particular term of a contract may fall, as between illusory and unenforceable on the one hand, and uncertain on the other, presents difficulties, as was discussed by Kirby P in ***Biotechnology*** at pp 134 to 137. In this case, the provision in Mr Buckle's contract did contemplate there would be "retrenchment benefits" in the event of a redundancy. Because there was no policy in place at the time of the termination of Mr Buckle's employment, which was unquestionably on the grounds of redundancy, the measure of those "retrenchment benefits" was not immediately ascertainable from the terms of the clause itself.

63 That then leads to the next question whether, on the facts and circumstances of this case, there existed a "readily ascertainable external standard", to flesh out the terms of the contract and to give it meaning and effect: ***Biotechnology*** per Kirby P at p 136. It is well established that courts should try to uphold bargains where this can be reasonably one, without going so far as re-writing them: ***Hillas & Co Ltd v Arcos Ltd*** (1932) 147 LT 503 at 504 (see generally *Chitty on Contracts General Principles* 2-099 to 2-104). Given that Spotless is a "National System Employer" for the purposes of the FW Act and is bound as a matter of law by the NES, it is patently clear that there does exist such a standard which would apply in any event, in the case of an employee of Spotless being made redundant. The learned Commissioner was quite correct to reach this view and no error is demonstrated by Spotless in this regard. However, the scope of the application of this external standard, leads to consideration of the second ground of appeal.

Ground 2

64 This ground asserted that if consistent with ***Biotechnology***, it was open to the Commission at first instance to have regard to an external standard such as the NES, in relation to redundancy, then it was not open to be selective as to those parts of it to apply to Mr Buckle's contract of employment. For the following reasons, which I can briefly state, I agree with this view.

65 The relevant external standard in this case is s 119 of the FW Act. Section 119 deals with "redundancy pay". This provision deals with both the entitlement to pay in s 119(1) and the amount of pay in s 119(2). The learned Commissioner applied the amount in s 119(2), but excluded consideration of the terms of s 119(1), which defines the circumstances of redundancy and importantly for present purposes, excludes the circumstance of an ordinary customary turnover of labour. The learned Commissioner concluded that the ordinary and customary turnover of labour exclusion was not relevant to Mr Buckle's claim, because this was not contained in Mr Buckle's contract of employment.

66 With respect, I consider this conclusion entails an omission to apply the external standard in its entirety. It is s 119 read in its entirety, which gives fulsome meaning to the "retrenchment benefits" as referred to in the redundancy clause of Mr Buckle's contract of employment. Furthermore, the "external standard" as expressed in the NES, in relation to redundancy, is an indivisible standard which is clearly intended by the legislature, to apply as a whole. Whilst "redundancy" is not defined in s 119, s 119(1) prescribes the circumstances in which a person is to be regarded as redundant. The terms of s 119 reflect principles of longstanding in industrial law in Australia. Both ss 119(1) and (2) apply to Spotless by the terms of the FW Act, in any event.

67 I also do not consider any inconsistency in the adoption of the s 119 standard as a whole, arises when read with the language of the redundancy clause in Mr Buckle's contract of employment. In circumstances other than an ordinary and customary turnover of labour, such as a business restructuring for example, a person in the position of Mr Buckle would be entitled to redundancy pay under the contract so construed. That is, a benefit would still be "payable" and it would still be subject to a cap, as set out in the clause of the contract.

68 In all of the circumstances therefore I consider that the appeal on this point should be upheld. As there was no dispute in this case that Mr Buckle's employment did come to an end because of the loss of the FESA contract and was part of Spotless' ordinary and customary turnover of labour, the appropriate order to be made is for the decision of the Commission at first instance to be quashed.

2017 WAIRC 00336

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SPOTLESS GROUP
	APPELLANT
	-and-
	DENNIS BUCKLE
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	ACTING SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 15 JUNE 2017
FILE NO.	FBA 1 OF 2017
CITATION NO.	2017 WAIRC 00336

Result	Appeal upheld
Appearances	
Appellant	Ms H R Millar (of counsel)
Respondent	In person

Order

This appeal having come on for hearing before the Full Bench on 9 May 2017, and having heard Ms H R Millar (of counsel) on behalf of the appellant and Mr D Buckle on his own behalf as respondent, and reasons for decision having been delivered on 9 June 2017, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal be and is hereby upheld.
2. The decision made by the Commission in matter B 159 of 2016 given on 16 January 2017 ([2017] WAIRC 00024) is hereby quashed.
3. By consent the respondent repay the amount paid by the appellant pursuant to the decision within seven (7) days of the date of this order.

By the Full Bench

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

2017 WAIRC 00292

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TOLL IPEC PTY LTD
	APPELLANT
	-and-
	STEVE BURKE TRANSPORT PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 25 MAY 2017
FILE NO.	FBA 3 OF 2017
CITATION NO.	2017 WAIRC 00292

Result	Discontinued

Order

HAVING heard Mr D Fletcher (of counsel) on behalf of the appellant and Mr J Burton (of counsel) on behalf of the respondent; and

WHEREAS on 3 March 2017, the appellant filed a notice of appeal to the Full Bench; and

WHEREAS on 10 March 2017, the appellant filed an amended notice of appeal to the Full Bench; and

WHEREAS on 13 April 2017, the appellant seeks leave to discontinue this appeal; and

WHEREAS on 19 May 2017, the respondent informed the Full Bench that the respondent consents to the appeal being discontinued;

NOW THEREFORE, 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 discontinued by leave.

By the Full Bench

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

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2017 WAIRC 00229

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 26 APRIL 2017
FILE NO/S	APPL 18 OF 2017
CITATION NO.	2017 WAIRC 00229

Result	Order made
Representation	
Applicant	Mr D Anderson of counsel
Respondent	Mr C Fogliani of counsel and with him Ms B Grubor

Order

HAVING heard Mr D Anderson, of counsel, for the applicant and Mr C Fogliani, of counsel, and with him Ms B Grubor for the respondent on 21 April 2017 and by the consent of the parties;

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

1. That the name of the respondent in APPL 18 of 2017 be changed to "The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch".

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

2017 WAIRC 00283

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00283
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	FRIDAY, 21 APRIL 2017 AND WRITTEN CLOSING SUMBISSIONS 1 MAY 2017 & 9 MAY 2017
DELIVERED	**:**	MONDAY, 22 MAY 2017
FILE NO.	**:**	APPL 18 OF 2017
BETWEEN	**:**	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Applicant AND THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Respondent

CatchWords	**:**	Application for true interpretation and variation of clause of industrial agreement - Respondent applied for dismissal pursuant to section 27 (1)(a) *Industrial Relations Act 1979* - Respondent's application dismissed - Dispute relates to whether term "Rostered Day Off" has its defined meaning throughout agreement - Principles of interpretation of industrial instruments discussed and applied - Clause found to be unambiguous - Respondent contends section 30 *Minimum Conditions of Employment Act 1993* enlivened - Contentions not made out to sufficient level to abandon textual approach - No variation ordered
Legislation	**:**	*Industrial Relations Act 1979* *Minimum Conditions of Employment Act 1993*
Result	**:**	Agreement interpreted

Representation:

Applicant	:	Mr D Anderson of counsel
Respondent	:	Mr C Fogliani, of counsel, and with him Ms B Grubor
Solicitors:		
Applicant	:	State Solicitor's Office
Respondent	:	W.G. McNally Jones Staff Lawyers

Cases referred to in reasons:

The Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch (2017) 97 WAIG 354

The Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch (2017) 97 WAIG 361

Cases also cited:

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

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337

Director General, Department of Education v United Voice WA [2013] WASCA 287

Kucks v CSR Ltd (1996) 66 IR 182

Re Harrison; Ex parte Hames [2015] WASC 247

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1987) 67 WAIG 1097

Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd [2014] WASCA 164

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia (2015) 95 WAIG 1503

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WASCA 86

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia (2015) 95 WAIG 545

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Kalgoorlie Consolidated Gold Mines Pty Ltd and Sons of Gwalia (2004) 84 WAIG 2568

United Voice WA v The Minister for Health (2014) 94 WAIG 472

Reasons for Decision

1 Clause 6.1.3 of the *Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2016* gives rail car drivers certain benefits when a public holiday "falls on an employee's rostered day off."

2 A dispute has developed between the applicant and respondent in relation to the meaning of the term "rostered day off" in clause 6.1.3. The applicant seeks a declaration of the true interpretation of the term and, if it is correct in the interpretation for which it contends, a variation to the agreement to reflect it.

3 The dispute may be stated very simply.

4 In clause 1.5.24, part of the clause entitled "Definitions", the following appears:

> "Rostered Day Off" means a period as defined at subclause 3.1.4.

5 Although the term is then used several times in the agreement in each of those cases, including in clause 3.1.4 and clause 6.1.3, the term appears in lower case format. Other than in clause 1.5.24 the words are not capitalised.

6 The applicant says that wherever the term appears it should be taken to have its defined meaning. The applicant says the lack of capitalisation may be safely ignored as it appears to be a clear drafting error.

7 The respondent accepts that where the term is used in the agreement it must on some occasions bear its defined meaning (clause 3.1.4 would be an example) but it says it cannot be assumed that the term bears its defined meaning in every instance. It says, essentially, that whenever the term is used, the reader being unable to simply assume that it bears its defined meaning, the use of the term in each relevant context must be examined to work out whether the defined meaning is, in all of the circumstances, a fair and common-sensical meaning to apply to the term.

8 In relation to the use of the term in clause 6.1.3 the applicant says, consistent with its argument set out above, that the term bears its defined meaning and that, accordingly, the enquiry need go no further.

9 The applicant says that if the enquiry does go further, however, the use of the defined meaning in clause 6.1.3 does not produce results which lack fairness or common sense. The applicant says it produces a fair outcome and that this is demonstrated by some of the examples referred to in evidence and by the fact that it is consistent with a longstanding custom and practice which has only become problematic in the last couple of years.

10 The respondent says that the term in clause 6.1.3. should bear its ordinary meaning of "any day on which an employee is not rostered to work" and should not bear its defined meaning because if it did bear its defined meaning:

(1) this would promote inconvenience and injustice because the applicant could manipulate the roster to make sure public holidays and rostered days off (as defined by the agreement) did not coincide to avoid an employee enjoying the benefits of clause 6.1.3;

(2) two drivers, who each did not work on a public holiday, would receive different payments where, for one, the public holiday was also a rostered day off (as defined) (and thus the benefits of clause 6.1.3. were attracted) and, for the other, it was not (and the benefits of clause 6.1.3 were not attracted); and

(3) this would mean that the agreement breaches, or is inconsistent with, section 30 *Minimum Conditions of Employment Act 1993*.

11 The respondent's argument in relation to section 30 *Minimum Conditions of Employment Act 1993* arises out of a factual situation that may arise on occasions and, as interpreted by the respondent, may lead to an unlawful outcome as follows:

(1) clause 3.6 of the agreement guarantees a full time rail car driver at least 80 hours of work per fortnight;

(2) the hours when a rail car driver is on a public holiday are used as hours for the purposes of clause 3.6;

(3) sometimes, if the 7.6 hours enjoyed as a public holiday are added to the hours actually worked by a rail car driver, this would take the total hours over 80 hours in a given fortnight;

(4) on those occasions the applicant has a practice of using less than the 7.6 hours on the public holiday as part of the total hours worked in that given fortnight;

(5) by way of example:

(i) for the fortnight 21 March 2016 to 3 April 2016 Keith Turner, according to the applicant's records, worked for exactly 80 hours;

(ii) to get to the 80 hour mark, and to not go beyond that mark, the applicant used 6 hours and 59 minutes of the public holiday Mr Turner enjoyed in that fortnight;

(iii) the applicant did not use the full 7.6 hours of the public holiday;

(iv) if the applicant had used the full 7.6 hours Mr Turner would have worked 80 hours and 35 minutes;

(v) this means the applicant has not paid Mr Turner for 36 minutes of work, with 35 of those minutes being payable at the applicable overtime rate because time worked beyond 80 hours attracts overtime; and

(6) a result such as that demonstrated in (5) above is a breach of section 30 *Minimum Conditions of Employment Act 1993* which provides that an employee who is not required to work on a day solely because that day is a public holiday is entitled to be paid as if he or she were required to work on that day (ie be paid for 7.6 hours and not for a lesser period of time).

12 To complete the respondent's argument, it says that to interpret "rostered day off" in clause 6.1.3 as having its ordinary meaning of any day on which an employee is not rostered to work, rather than as having its defined meaning, will avoid:

(1) the possibility of manipulation of the roster to avoid a rostered day off (as defined) and a public holiday coinciding as there will be no financial incentive for the applicant to do this;

(2) the situation where two drivers receive different payments for the same public holiday not worked; and

(3) a potential breach of section 30 *Minimum Conditions of Employment Act 1993*.

13 The applicant disputes that section 30 *Minimum Conditions of Employment Act 1993* applies in the factual scenario pointed to by the respondent and says that clause 6.1.3 provides a benefit to employees who would derive no entitlement from the section. The applicant says far from operating in an unlawful or unfair way, if clause 6.1.3 is interpreted consistent with its contentions, the clause provides those to whom it applies with benefits where none would otherwise exist.

14 On the one hand I have the applicant saying that to interpret the relevant term in clause 6.1.3 consistently with its defined meaning is in accordance with normal principles of construction and there is no reason of equity or good conscience to depart from those principles and on the other hand the respondent says that, even if I were to accept that the normal principles of construction suggest that the relevant term be so interpreted, the results of such an interpretation are so unfair, inconvenient and even unlawful that I should feel compelled to not so interpret it.

Determination

15 I note that the term "rostered day off" is only capitalised in the definitions clause of the agreement. Wherever else it appears, including in clause 3.1 to which the definition directs the reader, and tells the reader what a rostered day off actually is, it is not capitalised.

16 If a situation arose in legislation or some other legally drafted document where this had occurred this might require pause for thought. However, given that allowance must be made for the fact that industrial agreements are drafted by non-professional drafters it seems to me that the failure to capitalise the term throughout the agreement, repeating that it appears in the same way in every case where it is used in the agreement, is a product of non-professional drafting and nothing more.

17 Without more the start and end point of construction of the term "rostered day off" would be a reference to the text of the agreement. The term "rostered day off" wherever it appears in the agreement would have the meaning it is given by the definition clause of the agreement.

18 This outcome does no violence to the language and produces the convenient result that it may be easily understood by the reader. Certainly it is far more convenient and simple than having to work out when the same term, appearing in exactly the same way, bears its defined meaning and when it does not.

19 I am conscious, of course, that the consideration of the text, interpreted in a simple way making allowance for non-professional drafting, will not necessarily end the task of the interpreter if the text produces inconvenient or unjust or unlawful results.

20 No such inconvenient or unjust or unlawful results have been demonstrated by the respondent in this matter.

21 In relation to the potential for manipulation of the roster I find that even if there were such a potential, and even if the manipulation to which the respondent refers might work an unfair result, having considered the evidence of Mr Gearon, and all of the circumstances, I find the scope for such manipulation to be negligible if not non-existent.

22 The operational rosters are disseminated at such a time and in such a way, and the way in which they operate so well known, and so regular, that the chance of some manipulation being attempted, let alone going undetected by an informed workforce and its vigilant union, is virtually nil.

23 In relation to employees receiving different payments in relation to the same day, I am not sure I understand what is inconvenient about that from the point of view of the respondent. Such events are often the product of clauses of agreements working in the way intended. As for any unfairness arising from it I think once clause 6.1.3 and the way the operational roster works are fully understood any force in such an assertion dissipates. I think that in all of the circumstances it would be understood that the system is one of swings and roundabouts that smooths out differences that may appear when a snapshot only is taken.

24 In relation to section 30 *Minimum Conditions of Employment Act 1993* the respondent has not demonstrated, to the level I think would be necessary to abandon a textual approach, that the applicant's interpretation of clause 6.1.3, or its systems, offend the section.

25 I expressly do not decide what section 30 *Minimum Conditions of Employment Act 1993* means generally, or insofar as any factual scenario raised with me is concerned.

26 I am simply unsure, having considered the respondents arguments, whether there is an intersection between clause 6.1.3 of the agreement and section 30 *Minimum Conditions of Employment Act 1993* (or whether the intersection is in truth between the applicant's system in relation to arriving at 80 hours of work) and, even if there were such an intersection, I am of the view that the appearance of the word "solely" in section 30 *Minimum Conditions of Employment Act 1993* opens up debate about the section's meaning and application and the answer to that debate is not so clear as to cause me to abandon a textual approach. It is not my place to resolve it in any event.

27 In light of the above reasons I do not consider there is any need to vary the agreement.

28 I note that I have proceeded to publish reasons for decision despite the respondent's application pursuant to section 27(1)(a) *Industrial Relations Act 1979* that I not hear and determine the matter because there are proceedings in the industrial magistrate's court which touch upon clause 6.1.3 of the agreement and the dispute in relation to it. I must say the contended intersection between these proceedings and those is not entirely clear to me but in any event I dismiss the respondent's application for the same reasons I gave in *The Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch* (2017) 97 WAIG 354 and *The Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch* (2017) 97 WAIG 361.

29 I note also that at the hearing I allowed the respondent to amend its Notice of Answer. The transcript will show the amendment allowed but I do not consider I need to make any order in relation to the matter given that the respondent was under no obligation to provide a Notice of Answer and I am not proposing to make the declarations the respondent sought for the reasons I have given above.

30 Finally, I have referred to problems that may be caused by the inelegant drafting of non-professional drafters. I attach a schedule showing each defined term and its appearances in the agreement with and without capitalisation (without fully guaranteeing its accuracy). It may be that the parties will find the schedule useful in the future. The schedule in my view supports a finding that there was simply insufficient regard given to consistency in drafting rather than any meaningful distinction between capitalisation and non-capitalisation of defined terms.

31 If either party wishes me to act under section 46(2) *Industrial Relations Act 1979* they should inform my chambers.

Schedule

1.5.1 – Act	
As per definition	1.4.2, 4.1.9, 9.2
1.5.2 – Afternoon Shift	
As per definition	No reference
afternoon shift	2.11.24, 5.1.1(a)
1.5.3 – AM/PM Preference System	
As per definition	3.2.3(c)
1.5.4 – Award	
As per definition	1.3.3
1.5.5 – Base Rate of Pay	
As per definition	3.3.5(b)(i), 3.4.3, 4.1.1, 5.4, 6.1.3(a), 6.2.3, 6.7.3, 9.1.4
Base rate of pay	1.5.20
base rates of pay	4.1.9, 5.5
base rate	1.5.16, 1.5.28, 2.11.24, 4.1.7, 4.1.8, 5.1.1(a)(b)(c), 6.11.8

1.5.6 – Credit day	
As per definition	6.6.18(d)
Credit Day	2.8.2, 3.1.2(b), 6.6.16, 6.6.18(a),6.9.6, 6.16.3(b)
Credits days	6.5.1(c), 6.5.3, 6.5.4, 6.6.5(b), 6.6.17, 6.6.18(a)(b)
1.5.7 – Day shift	
As per definition	No reference
Day Shift	6.7.1, 6.7.2, 6.7.3
day shift	6.7.2(a), 6.7.3
1.5.8 – Day **(not fully searched, examples only)**	
Day	6.7.1, 6.7.2, 6.7.3
day	2.8.1, 2.8.2, 2.9.1(a)(b), 3.1.4(a)(b) – Numerous other examples
1.5.9 – Early morning shift	
As per definition	No reference
early morning shift	5.1.1(c)
1.5.10 – Emergency	
As per definition	3.3.1(b), 3.4.2(a)(i), 6.3.1, 6.17.2, 6.17.5
1.5.11 – Employer **(not fully searched, examples only)**	
As per definition	1.5.15, 1.5.21, 1.5.29, 2.1.2, 2.1.3, 2.1.4, 9.1.1
employer	8.1.4, 8.1.5, 8.1.8
1.5.12 – Full Time Employee	
As per definition	2.4, 2.5, 3.1.5, 3.3.3(b)(i), 3.6.1, 6.2.2, 6.12.5(a)(i), 6.13.3(a)(i), 6.14.4(a)(i), 6.18.4(b)
1.5.13 – Guide Roster	
As per definition	3.2.1, 3.2.3, 3.2.3(a)(b), 3.2.4, 3.2.4(a), 3.2.4(b), 3.2.4(b)(ii), 3.2.4(c), 3.2.4(d), 3.2.5(c), 3.2.5(c)(i)(ii)
1.5.14 – Head of Branch	
As per definition	2.1.1
1.5.15 – Home Depot	
As per definition	No reference
home depot	1.5.15, 2.6.1, 3.2.6(e)(i), 5.2.1, 5.2.1(a), 5.2.1(b)(i)(ii), 5.2.2
1.5.16 – Hour's pay	Reference to term defined at sub-clause 0?
As per definition	No reference
hours' pay	3.3.5(b)(i), 3.4.3
1.5.17 – Night shift	
As per definition	No reference
night shift	5.1.1(b)
1.5.18 – Operational Roster	
As per definition	1.5.20, 3.2.1, 3.2.4(ii), 3.2.5, 3.2.5(a)(b), 3.2.5(c)(ii), 3.2.5(d), 3.2.5(e)(i), 3.2.5(f), 3.2.5(g), 3.2.6, 3.2.6(a), 3.2.6(d), 3.2.6(e), 3.2.6(e)(i)(ii), 3.2.6(h), 3.2.6(k), 3.2.7(b), 6.6.18(c)
1.5.19 – Ordinary Hours	
As per definition	No reference
ordinary hours	3.1.1
1.5.20 – Ordinary time earnings	
As per definition	No reference
ordinary time earnings	2.7.4
1.5.21 – Parties	
As per definition	1.6.1, 1.6.2
parties (may not be a reference to defined term)	2.11.26(d), 5.8.2, 6.12.12(a)(ii), 6.12.12(b)(ii), 6.12.12(e)(i)
parties	1.4.3, 6.11.8, 8.1.6, 8.1.9, 8.2.1, 9.2
1.5.22 – Part Time Employee	
As per definition	2.5, 3.1.5, 3.3.3(b)(ii), 3.6.2, 6.13.3(a)(ii), 6.14.4(a)(ii), 6.18.4(b), 6.16.9,
Part time employees	6.2.2
1.5.23 – Rostering Committee	
As per definition	3.2.2, 3.2.4(b)(i),3.2.4(d)(iv)
1.5.24 – Rostered Day Off	
rostered day off	3.1.3, 3.1.4, 3.1.4(a), 3.2.3(a), 3.2.5(c)(i), 3.3.3(f), 6.1.3, 6.11.2
1.5.25 – Shed Duties	
As per definition	5.4

1.5.26 – Shift employee	
As per definition	6.7.2(a)
shift employee	2.11.24, 3.3.4, 6.7.3, 6.7.4(b)
Shift Employee	6.7.1, 6.7.2, 6.7.3, 6.7.5
1.5.27 – Special Event	
As per definition	3.1.7
1.5.28 – Standard Hours	
As per definition	3.1.2(a), 3.1.7, 3.2.5(e)(i), 3.3.2, 3.3.3(b)(i)(ii), 3.3.3(f), 3.3.4(a), 3.6.2, 5.3.1, 5.3.2, 6.2.2
1.5.29 – Transperth Train Operations	
As per definition	1.3.1, 2.11.1(d), 3.2.6(h)(viii), 3.3.1(e)(iii)
1.5.30 – Union (not fully searched, examples only)	
As per definition	1.3.2, 1.5.21, 2.1.2, 9.1.1
union representative	8.1.2, 8.1.3, 8.1.4, 8.1.5, 8.1.7
union	8.1.8, 9.1.1(b)
1.5.31 – WAIRC	
As per definition	2.10.2, 2.11.23, 4.2.13, 8.1.5, 8.1.8

PUBLIC SERVICE ARBITRATOR—Matters dealt with—

2017 WAIRC 00341

DISPUTE RE ANNUAL LEAVE ENTITLEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CHANTAL AILIE HEWITSON

APPLICANT

-v-

ROYAL PERTH HOSPITAL

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER T EMMANUEL

DATE FRIDAY, 16 JUNE 2017

FILE NO P 4 OF 2016

CITATION NO. 2017 WAIRC 00341

Result Application dismissed

Order

WHEREAS this is an application for an order from the Public Service Arbitrator under the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 22 May 2017, the applicant informed the Commission by email that she would like her matter to be closed;

AND WHEREAS on 24 May 2017, the Registry emailed the applicant with information about how to file a *Form 14 – Notice of withdrawal or discontinuance*;

AND WHEREAS the applicant has not contacted the Commission and has not filed a *Form 14 – Notice of withdrawal or discontinuance*;

NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT this application be, and by this order is, dismissed.

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

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2017 WAIRC 00270

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00270
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 15 FEBRUARY 2017
DELIVERED	**:**	MONDAY, 15 MAY 2017
FILE NO.	**:**	APPL 41 OF 2016
BETWEEN	**:**	NIGEL BEVERLY Appellant AND THE COMMISSIONER OF POLICE Respondent

CatchWords	**:**	Industrial law (WA) – Removal of Police Officer – Loss of Confidence by Commissioner of Police – Appeal against removal – Whether removal harsh, oppressive or unfair – Conduct unbecoming of a Police Officer – Police Officer convicted of criminal offence – False or misleading testimony in court – Commissioner of Police able to rely on conduct not the subject of a conviction
Legislation	**:**	*Industrial Relations Act 1979* s 29(1)(b)(i) *Police Act 1892* s 8, s 33K, s 33L(1), s 33L(2), s 33L(3)(a), s 33L(3)(b), s 33L(4), s 33L(5)(a), s 33P, s 33P(1), s 33Q(1), s 33Q(1)(a), s 33Q(2), s 33Q(4), s 33Q(4)(b), s 33Q(4)(b)(i) *Industrial Relations Commission Regulations 2005* reg 92
Result	**:**	Appeal dismissed
Representation:		
Counsel:		
Appellant	**:**	Mr D Renton
Respondent	**:**	Mr N John

Reasons for Decision

1 This is our unanimous decision.

2 Mr Nigel Beverly was removed as a police officer after he gave evidence in the Perth Magistrates Court. The evidence Mr Beverly gave was in his own defence against a charge of aggravated assault occasioning bodily harm (AOBH) against his estranged wife, Tanya. He was convicted of the charge.

3 The Commissioner of Police lost confidence in Mr Beverly's suitability to continue as a member of WA Police, having regard to Mr Beverly's conduct, honesty and integrity. The reason for the loss of confidence is set out in the Commissioner's letter to him dated 27 May 2016 that:

> … on 1 September 2015, you acted in a manner unbecoming of a police officer by wilfully or negligently providing false or misleading testimony in the Perth Magistrates Court.

Respondent's reg 92 Bundle, document 6 –
Notice of Removal Recommendation 27 May 2016

4 Mr Beverly now appeals against that decision in accordance with s 33P of the *Police Act 1892* (the *Police Act*), on the general ground that the decision to take removal action was harsh, oppressive or unfair.

Grounds of appeal

5 The grounds of appeal, filed on 4 July 2016, are that:

> The reasons why the Respondent's decision to remove the Appellant dated 7 June 2016 ("the Removal") is harsh, oppressive or unfair are –
>
> 1. The finding that the Appellant on 1 September 2015 acted in a manner unbecoming of a police officer by willfully[sic] or negligently providing false or misleading testimony in the Perth Magistrates Court 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. it was not reasonable for the Respondent to rely on the observations regarding credibility made by the Magistrate as they were:

1.1.1. either erroneous or not entirely supported by the evidence; and

1.1.2. not the subject of a conviction for contempt nor were they the subject of a charge of perjury;

1.2. it was not reasonable for the Respondent to rely on the observations regarding credibility made by the Magistrate in circumstances when the Respondent's internal managerial process did not raise any issue about the Appellant's honesty or integrity during the internal investigations into the Appellant's conduct concerning his wife;

1.3. the finding did not distinguish whether the alleged conduct was willful[sic] or negligent;

1.4. the Removal was based on a single incident; and

1.5. the Removal was disproportionate to the gravity of the alleged conduct.

2. 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 33L(4) of the *Police Act 1892* and in any event, denied the Appellant a fair go all round.

Form 31, Attachment A

Chronology

6 Nigel Beverly and Tanya Beverly married in 2012. Tanya Beverly is also a police officer. They have two children. On 29 March 2014, in Sorrento, there was an altercation between them (the Sorrento incident), following a social function where they had both consumed alcohol. The altercation was the subject of an internal investigation. They were each found to have acted unprofessionally and to have failed to fully cooperate with the investigation. Each was disciplined. It was said that during this incident Nigel Beverly punched Tanya Beverly.

7 In December 2014, Mr Beverly moved out of the family home in Carine. However, they shared parenting responsibilities.

8 On 21 February 2015, there was an incident at the home in Carine (the Carine incident) and police attended.

9 On 25 February 2015, an Interim Violence Restraining Order (VRO) was issued restraining Mr Beverly from contacting Mrs Beverly. He breached that order by contacting her via email. He was subsequently charged with this offence, pleaded guilty and received a fine and a spent conviction.

10 On 24 February 2015, Mr Beverly was charged with the criminal offence of aggravated AOBH relating to the Carine incident. He pleaded not guilty.

11 On 26 February 2015, as part of an internal investigation, Mr Beverly was interviewed in a Managerial Interview regarding the alleged assault and the breach of the VRO. At the completion of the internal investigation, Mr Beverly received an Assistant Commissioner's Warning Notice for assaulting Ms Beverly and for the breach of the VRO.

12 On 31 August and 1 September 2015, the charge of aggravated AOBH was heard in the Perth Magistrates Court. Mr Beverly chose to give evidence in his trial.

13 On 11 September 2015, Magistrate Mignacca-Randazzo issued Reasons for Decision and a judgment finding Mr Beverly guilty of the charge. In those Reasons, the learned Magistrate made findings against the truthfulness and credibility of Mr Beverly's evidence.

14 On 23 September 2015, Mr Beverly made his plea of mitigation and a fine of $10,000 was imposed on him. Mr Beverly did not appeal against his conviction.

15 In light of the findings against Mr Beverly's truthfulness and credibility made by the Magistrate, an investigation was undertaken by Detective Senior Sergeant Bell in consideration of a recommendation that the Commissioner apply the Loss of Confidence (LOC) process and require Mr Beverly to show cause why he should not be removed.

16 In his report dated 18 November 2015 (Respondent's reg 92 Bundle, document 1.3), Detective Senior Sergeant Bell sets out the background information which generally is set out above. He quotes from the Magistrate's findings against Mr Beverly as follows (footnotes omitted):

- "*The accused has not been forthcoming that Ms Beverly had been[sic] had a black eye on 31 March 2014.*" (Sorrento Incident)
- "*The accused has not told me the truth that he did not punch Ms Beverly that accounts for the "black eye". In this respect the accused has not been a witness of the truth and not trust worthy.*" (Sorrento Incident)
- "*I do not believe the accused. In this part of the accused's evidence the accused has not been truthful. The accused was not prepared to admit that Ms Beverly was seen on the bathroom floor crying and bleeding…*" (Carine Incident)
- "*As I have firmly concluded that I do not believe a significant part of the evidence given by the accused I also make clear that I do not even believe that his account might be true. I have lost all confidence in the accused as a historian of the truth. My disbelief and want of confidence is reinforced by the fact that the accused was also shown not to be truthful about causing Ms Beverly a black eye in the "Sorrento incident". My belief in the accused's credibility is not even restored by taking account that as serving police officer he would be a person otherwise of good character.*"

- "*I believe and find as fact beyond reasonable doubt that the accused repeatedly and deliberately punched Ms Beverly 4 times to the nose with his left fist wrapped in a towel. The accused's actions were willed. That series of strikes are proved by the prosecution beyond reasonable doubt…*"
- "*I also believe beyond reasonable doubt that the accused punched Ms Beverly to the face after she got up from the bath room floor and pushed the accused. The accused's punch was not in response to a harmful act but a lawful reaction by Ms Beverly. In any event the further punch was an unreasonable response to the push and was unlawful.*"

Respondent's reg 92 Bundle,
document 1.3, pages 7 – 8

17 Detective Senior Sergeant Bell also examined and compared Mr Beverly's answers in his managerial interviews regarding the Sorrento and Carine incidents with his evidence in court. He made a finding that by repeating a false assertion relating to the Sorrento incident, in the trial, and raising previously unmentioned matters, Mr Beverly has displayed dishonesty.

18 Mr Bell noted at page 10:

> It is clear from [Magistrate] Randazzo's findings that Beverly has, during his evidence given under oath, lied about several matters. Again Beverly repeated false assertions previously given in internal interviews, this time under oath in court. Those false assertions are:
>
> - Tanya punched him during the Sorrento incident; (New assertion)
> - He did not punch Tanya during the Sorrento incident;
> - He did not know Tanya had a black eye following the Sorrento incident;
> - He did not punch Tanya four times to the face during the Carine incident;
> - He did not see any injuries or blood during the Carine incident; and
> - He did not punch Tanya a fifth time during the Carine incident.
>
> Beverly has displayed dishonesty, bringing his and the WA Police's credibility into disrepute. The issue is sustained.

Respondent's reg 92 Bundle,
document 1.3, page 10

19 Detective Senior Sergeant Bell recommended the Commissioner initiate the LOC process. The recommendation took into account the Magistrate's findings, the investigation of the Sorrento and Carine incidents, a psychological assessment, and Mr Beverly's refusal 'to accept he has done anything inappropriate. He minimises and abrogates his responsibility at all opportunities' (page 13).

20 On 18 January 2016, Superintendent Beer forwarded the recommendation to Assistant Commissioner Anticich, and it was approved.

21 Inspector Green then prepared a Summary of Investigation, gathering together all materials said to be relevant. In this SOI, Inspector Green analyses the circumstances of the assault on 21 February 2015 in the Carine incident and says (footnotes omitted):

> 51. Whilst it is in no way the intent of the SOI to question the findings of [Magistrate] Randazzo or to dispute his interpretation of the evidence, it is nonetheless important to appreciate the opinion of Randazzo in respect of his views concerning witnesses are merely his views, albeit such views carry significant weight.
>
> 52. It is noted that in his judgement Randazzo raised concerns over the honesty of Beverly, and, he made the comment over a number of specific aspects of his testimony including the following:
>
> '*I do not believe the accused. In this part of the accused's evidence the accused has not been truthful. The accused was not prepared to admit that Ms Beverly was seen on the bathroom floor crying and bleeding by Ms Gantner when she was first called to come and get the children and certainly before any chain being broken or before he gave her <u>any</u> push with his hands.*'
>
> 53. However, in respect of the above evidence attributed to Beverly it should be noted that this is not testimony provided by Beverly, either in direct evidence or put to him and denied by him during his testimony.
>
> 54. From viewing the transcript of the trial it is noted the closest comments which could be attributed to Beverly in respect of this aspect of the evidence occurred on 1 September 2015 in discussions between Randazzo (His Honour) and the Defence Counsel (Dobson), in the following conversation:
>
> **His Honour:** '*But I repeat the question I asked: am I right in saying that on his version of events, there's not an occasion when he has seen Ms Gantner go to the bathroom with Ms Beverly on the floor of the bath with a towel?*
>
> **Dobson:** '*I don't think he said that he said that. No. No, your Honour.*'
>
> **His Honour:** '*Am I right in saying that at least part of Ms Gantner's evidence was clearly to that effect?*'
>
> **Dobson:** '*Yes, your Honour. Although you might think I am having 50 cents each way here, Ms Gantner also has that at the end, which on the complainant's evidence never happened.*'

55. It would appear that at least in respect of Randazzo's view that Beverly has lied about seeing Tanya on the bathroom floor, bleeding and holding a towel to her nose in fairness to Beverly and with respect may not be accurate. Whilst the evidence of Gantner was readily accepted it is noted that there was not a lot of rigour in determining exactly when Gantner arrived in the bathroom relative to when Beverly left the bathroom.

56. Also from analysing the transcript it is noted that this evidence has not been led by Beverly, nor has this version of events been put to him (Beverly) to comment on or deny. However, this does not diminish the fact that Randazzo has found Beverly guilty of the offence and that he has been untruthful or at least misleading for parts of his testimony albeit not to the extent expressed by Randazzo.

57. The aspects of Beverly's testimony which raise the most concern centre around the black eye received by Tanya in the Sorrento incident, and, the bloody nose received by Tanya in the Carine incident, neither of which were not reasonably explained by Beverly when he provided testimony concerning these matters.

58. In respect of these matters, on balance it is accepted that Beverly has been untruthful or at least misleading when stating that he had not struck Tanya to the face during the 2014 Sorrento incident and again during the 2015 Carine incident for which he was convicted.

59. In respect of these matters the available evidence suggests that the conduct of Beverly in being either untruthful or misleading was unbecoming and below what it should have rightly been expected of a police officer.

Respondent's reg 92 Bundle,
document 1, [51] – [59]

22 Inspector Green also looked at Mr Beverly's 'Behavioural History' from the records of the respondent, which included both positive and negative comments and records of incidents.

23 The SOI also took into account the Internal Investigations of the Sorrento and Carine incidents.

24 It also examined the medical evidence, which included a psychological assessment of Mr Beverly and his work performance and recommendations by senior officers.

25 In his conclusions, Inspector Green says:

88. It is noted that the Psychological Assessment of Beverly articulates that Beverly does not pose a threat to others is positive as is his separation from Tanya which is likely to diminish the propensity of future incidents against her. It is also noted that this LOC is primarily focused on the issue of Beverly providing untruthful or misleading evidence before Randazzo rather than the matter of the assault upon Tanya which has been finalised through the courts and during previous investigations.

89. It is noted that Randazzo formed the view that Beverly has been untruthful in the evidence he provided, and whilst the view of Randazzo should be considered as persuasive it is at the end of the day merely his view. From analysing the transcript of evidence actually led it could equally be determined that the view of Randazzo at least in respect to some of his criticisms of Beverly were not well founded or supported.

90. That being said the available evidence suggests that Beverly has not been completely truthful and has been misleading with respect to the testimony has[sic] provided before Randazzo specifically in respect of the black eye and bloody nose of Tanya. In respect of these matters his conduct in providing misleading evidence has the potential to undermine any good work undertaken and achieved by him previously and into the future.

91. It is appreciated that Beverly is an experienced and effective police officer but for an officer to remain effective requires the maintenance trust from the community which in no small part is achieved from officers demonstrating honesty, integrity and appropriate conduct. To be criticised for being untruthful when giving evidence before a Magistrate has the potential to seriously undermine the capacity of Beverly to perform his role as a police officer.

92. On a positive note it is recognised that Beverly is highly regarded by senior police for his work ethic, his capacity to apprehend criminals, and, his leadership of others to improve their capacities in what are increasingly challenging times for police.

93. If the Commissioner accepts the evidence in these issues then it is open to him to conclude that Beverly has breached the trust placed in him to adhere to the expected conduct of a police officer whilst off-duty.

Recommendation

94. The conduct of Beverly in respect of this issue is well below what could and should be expected of him as a member of the WA Police. I contend that there is evidence and doubt concerning Beverly's conduct which may raise concerns over his ability to remain a member of the WA Police.

95. Based on the available evidence it is open for the Commissioner to lose confidence in Beverly, although given the good work history of Beverly, the positive appraisal of his supervisors, and assessment that he does not pose a risk to others it is also open for Commissioner to consider alternative remedies should he deem that appropriate.

Respondent's reg 92 Bundle,
document 1, [88] – [95]

26 On 5 April 2016, the Commissioner issued the Notice of Intention to Remove (NOITR). The sole basis as set out in the NOITR was that:

> My loss of confidence in your suitability to continue as a member of WA Police is based on the matters set out in the Summary of Investigation prepared by the Review Officer and in particular, the allegation that you:
>
> - On 1 September 2015, you acted in a manner unbecoming of a police officer by wilfully or negligently providing false or misleading testimony in the Perth Magistrates Court.
>
> Respondent's reg 92 Bundle, document 2

27 On 1 May 2016, Mr Beverly responded. He argued against the Magistrate's findings against him by setting out the details of the Sorrento and Carine incidents from his perspective and the evidence at trial. He asserted that all his evidence was given with complete honesty and as thoroughly as he could. He said that while he:

> completely accept[ed] that the finding, and the comments, are a conclusion following the trial process of a learned Magistrate, it is not a finding of fact that needs to be accepted by you for the purpose of determining my honesty and integrity. As I mentioned above, sometimes the court process produces results that do not reflect the truth of events, for various reasons, and this is one such example.
>
> Respondent's reg 92 Bundle, document 3, page 11

28 Mr Beverly maintained that he did not punch Mrs Beverly on either occasion and that he gave truthful and full evidence before the court. He 'adamantly' denied that he had not given truthful evidence or that he wilfully misled the court.

29 He then said that he had let his family down and damaged his reputation and that of the WA Police Service, that in effect, the incidents were not a true reflection of his character.

30 Mr Beverly said his performance in court was hindered by the emotional, stressful and personal nature of the proceedings, but he repeated his assertion that he was 'completely honest' in his evidence to the court.

31 Inspector Green provided an Analysis of Response on 13 May 2016. In it, he examined Mr Beverly's response and the letters of support from senior officers. In his conclusions, Inspector Green noted that if the Commissioner accepts the evidence in respect of the issue, it is open for him to conclude that the response had not provided any plausible explanation, mitigation or justification for the questionable conduct exhibited by Mr Beverly. He said:

> 37. Similarly, should the Commissioner determine he accepts the evidence outweighs the officer's account of events in relation to each of these issues, it is open for him to conclude that Beverly has acted in a manner that is in clear contravention of the *WA Police Code of Conduct* and that his conduct represents a significant risk to WA Police which brings into question Beverly's suitability in continuing as a member of WA Police.
>
> 38. In the alternative if the Commissioner determines a remedy, other than progressing with an LOC, would reinforce with Beverly the expectations he has of him then this would also respectfully be open to him.
>
> …
>
> 40. I contend there is sufficient evidence and doubt concerning Beverly's conduct, honesty and integrity for the Commissioner to lose confidence in his ability to remain a member of the WA Police.
>
> Respondent's reg 92 Bundle, document 4, [37] – [38], [40]

32 By letter dated 27 May 2016, the Commissioner recommended Mr Beverly's removal to the Minister for Police, who approved it.

The process of an appeal

33 If the Commissioner does not have confidence in a member's suitability to continue as a member of the WA Police, the Commissioner may give the member a written notice setting out the grounds on which the Commissioner does not have confidence in the member's suitability to continue as a member (*Police Act* s 33L(1)). This is known as the Notice of Intention to Take Removal Action (NOITR).

34 The member is then given 21 days in which to make written submissions to the Commissioner in respect of those grounds (s 33L(2)).

35 The Commissioner then decides whether to take removal action (s 33L(3)(a)), and if so, is to give the member written notice of that decision (s 33L(3)(b)), the Notice of Removal Action (NORA).

36 If the Commissioner decides to take removal action, the Notice referred to in subsection (3)(b) shall advise the member of the reasons for that decision (s 33L(5)(a)).

37 Removal action is the recommendation by the Commissioner to the Minister that the Minister approve the removal (s 33K). If approved by the Minister, the Commissioner gives the member the Notice of Removal (NOR).

38 Therefore, the Commissioner's reasons for taking removal action are those in the document referred to in s 33L(3)(b).

The test and the appeal process

39 An appeal to the WAIRC is on the basis that the decision of the Commissioner of Police to take removal action relating to the member was harsh, oppressive or unfair (s 33P(1)). In the case of an unfair dismissal of an employee, referred to the Commission under s 29(1)(b)(i) of the *Industrial Relations Act 1979*, this requires consideration of whether the employer's lawful right to dismiss an employee had been exercised so harshly or oppressively against him as to amount to an abuse of that right (Brinsden J in *The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia* (1985)

65 WAIG 385). In the case of a removal under s 8 of the *Police Act*, the same test applies, albeit that the member is not an employee. Also, the test for the purposes of the *Police Act* include that the Commissioner is required to take account of those matters set out in s 33Q(4) which are:

> 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.

(See also *McGrath v Commissioner of Police* [2005] WAIRC 01989; (2005) 85 WAIG 2006)

40 In *Polizzi v Commissioner of Police* [2014] WAIRC 00302; (2014) 94 WAIG 477 [144] the WAIRC expressed the test as including whether there is a logical and sound basis for the Commissioner finding as he did. If so, then even if an aspect of the Commissioner's reasons is invalid or mistaken, it does not necessarily mean that the whole of the decision ought to be overturned. It is the overall reasonableness or fairness of the decision, taking account of all of the circumstances, that is significant.

41 The appellant bears the burden of establishing that the decision to take removal action was harsh, oppressive or unfair (s 33Q(2)).

42 The WAIRC is firstly to consider the Commissioner's reasons for deciding to take removal action (s 33Q(1)). According to s 33L(1), the Commissioner loses confidence in a member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct.

43 The grounds of appeal are those which the WAIRC is to consider, and they mark out the scope of the issues to be determined (*Moran v The Commissioner of Police* [2015] WAIRC 00464; (2015) 95 WAIG 804 (per Beech CC [96] – [97], Mayman C agreeing; Kenner C [175])). In *Ferguson v The Commissioner of Police* [2017] WAIRC 00238 the WAIRC noted:

> 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.

44 Therefore, whilst s 33Q(1)(a) says the WAIRC is to consider the Commissioner of Police's reasons for deciding to take removal action, that is done as part of the process of considering the appeal, rather than the WAIRC examining the reasons with a view to identifying matters other than those that are set out in the grounds of appeal.

The Commissioner's reasons

45 The reasons are set out in the Commissioner's letter to Mr Beverly dated 27 May 2016 in accordance with s 33L(3)(b), the Notice of Removal (NORA). That Notice says that the Commissioner has lost confidence in Mr Beverly's suitability to remain as a member of WA Police, having regard to his conduct, honesty and integrity because 'on 1 September 2015, [he] acted in a manner unbecoming of a police officer by wilfully or negligently providing false or misleading testimony in the Perth Magistrates Court'.

46 It goes on to note:

> In the Response, you adamantly deny that you wilfully mislead[sic] the court in your testimony, regardless of the comments or finding of Magistrate Mignacca-Randazzo. You offer some strong letters of support from other officers, however you fail to provide any new material that would alter my decision.
>
> Much of the support we receive from the community as police officers is conditional upon officers conducting themselves appropriately at all times, including being truthful when providing testimony before the courts. Unfortunately the available evidence suggests that you have not been truthful in the testimony you provided to Magistrate Mignacca-Randazzo and it is likely that this will present significant challenges to your credibility if you were to present testimony as a police officer before the courts in the future. Your conduct has exposed the WA Police to risk and embarrassment, and potentially compromises the agency's integrity and reputation within the community.
>
> Respondent's reg 92 Bundle, document 6

47 Therefore, the Commissioner's reason is that he had lost confidence in Mr Beverly's suitability to remain as a member of WA Police, having regard to his conduct, honesty and integrity because on 1 September 2015 he had acted in a manner unbecoming of a police officer by wilfully or negligently providing false or misleading testimony in the Perth Magistrates Court.

Ground 1

48 The overarching assertion in grounds 1.1 and 1.2 is that the Commissioner relied on the Magistrate's observations and ought not to have done so. It then goes on to challenge particular aspects of the reasonableness of that reliance. However, we would dismiss grounds 1.1 and 1.2 because the Commissioner did not rely on the Magistrate's observations.

49 The Commissioner's reasons are not that the learned Magistrate made unfavourable comments about Mr Beverly's honesty, but rather, in apparent reliance on an assessment by both Detective Senior Sergeant Bell and Inspector Green, Mr Beverly had been dishonest and repeated false assertions under oath in court. Ultimately the Commissioner found that he had 'wilfully or negligently provid[ed] false or misleading testimony.'

50 Detective Senior Sergeant Bell's report examined records of the investigations into the Sorrento and Carine incidents, the VRO incident and the trial in the Perth Magistrates Court. It analysed the differences between the findings of the investigating officers and the findings of fact by the Magistrate. It compared Mr Beverly's answers given in managerial interviews and those given in court. It concluded in respect of the Sorrento incident that '[b]y repeating [the false assertion that he had not struck Tanya in the face] during trial, and raising previously unmentioned matters regarding Tanya's punch, Beverly has displayed dishonesty' (Respondent's reg 92 Bundle, document 1.3, page 9).

51 It also examined the conflicting statements relating to the Carine incident. While the report acknowledged the difficulty in interpreting conflicting evidence, and of the benefits of testing witnesses and the accused under cross-examination and under oath, it also referred to the Magistrate's findings and said that it is clear from those findings that Mr Beverly lied under oath about several matters, and repeated false assertions previously given in internal interviews. It identified six such assertions.

52 This report made its own findings of fact rather than relying on the observations made by the Magistrate.

53 In the SOI, Inspector Green examined the findings made by the learned Magistrate and compared them with the evidence before the court. He examined the Magistrate's findings by reference to the transcript and expressed reservations about, and expressly rejected, some of the Magistrate's findings. He drew his own conclusions about whether each of the Magistrate's findings was supported by the evidence. He drew distinctions between which facts the Magistrate found and those he accepted as being supported by the evidence and those which were not.

54 In particular, Inspector Green did not conclude that Mr Beverly was dishonest or gave misleading evidence in respect of each of the factual findings made by the Magistrate. Rather, he drew his own conclusions, including that 'some of the Magistrate's criticisms of Mr Beverly were not well founded or supported' (Respondent's reg 92 Bundle, document 1, page 21). He went on to say that Mr Beverly had been dishonest in respect of specific matters.

55 Therefore, in accepting the recommendation in the SOI, the Commissioner did not say that he had lost confidence in Mr Beverly because the Magistrate had made adverse comments about his credibility. Rather he lost confidence because he found that Mr Beverly had in fact acted in a manner unbecoming of a police officer 'by wilfully or negligently providing false or misleading testimony', that is, as a matter of fact, not because of the Magistrate's observations.

56 In spite of finding that the general premise of all of grounds 1.1 and 1.2 is erroneous, we will deal with the sub-grounds as if they were not based on that overarching premise.

Ground 1.1.1

57 This ground alleges that the Magistrate's observations about credibility were either erroneous or not entirely supported by the evidence.

58 Mr Beverly says that it was not open to the Commissioner to rely on a judicial officer's comments where they are not properly based in evidence. Rather, the Commissioner must be independently satisfied of those matters. Mr Beverly then examines the Magistrate's observations and findings, and draws his own conclusion about his own and Mrs Beverly's evidence.

59 He also says that the Commissioner does not provide reasons for how he came to the conclusion he did or identify the particular evidence given by him.

60 While the Commissioner's NOITR and the NORA do not expressly identify the particular aspect or aspects of false or misleading testimony said to have been given by Mr Beverly, the supporting documents on which the Commissioner's decision is based give clear guidance. Firstly, the Commissioner appears to have accepted the recommendation of Inspector Green set out in the SOI. That document analyses the evidence before the Magistrate and concludes that a couple of the Magistrate's findings may be erroneous. However, having identified those particular aspects, Inspector Green's comments provide a clear inference that the remainder of the Magistrate's findings and comments were correct. He concludes that:

> 57. The aspects of Beverly's testimony which raise the most concern centre around the black eye received by Tanya in the Sorrento incident, and, the bloody nose received by Tanya in the Carine incident, neither of which were not reasonably explained by Beverly when he provided testimony concerning these matters.
>
> 58. In respect of these matters, on balance it is accepted that Beverly has been untruthful or at least misleading when stating that he had not struck Tanya to the face during the 2014 Sorrento incident and again during the 2015 Carine incident for which he was convicted.
>
> Respondent's reg 92 Bundle, document 1, [57] – [58]

61 In particular, issues of what Mr Beverly saw in relation to Mrs Beverly being on the floor in the bathroom, and of having seen the black eye may be open to question. What was not open to question was the finding that Mr Beverly punched Mrs Beverly a number of times.

62 It is clear that a number of the Magistrate's findings were accepted. Those findings were contrary to Mr Beverly's testimony (as well as to his other statements) and this supported a conclusion that he had given false or misleading testimony. Therefore, to the extent that the Magistrate's findings were considered and accepted by the Commissioner, it was open to him to do so (see *AM v Commissioner of Police* [2009] WAIRC 01285; (2009) 90 WAIG 276 at [45] – [46]).

63 Therefore, in respect of ground 1.1.1, whether some of the Magistrate's findings were erroneous about particular matters does not overcome the fact that a number of those findings regarding the punches were found by the Review Officer to be sustained, having taken account of the entirety of the material in the respondent's possession.

Ground 1.1.2

64 Mr Beverly complains that it was not reasonable for the respondent to rely on the observations regarding credibility made by the Magistrate as they were not subject to a conviction for contempt nor were they subject of a charge of perjury.

65 Firstly, we note that Mr Beverly did not appeal against his conviction.

66 Secondly, in his report, Detective Senior Sergeant Bell considered the prospects of Mr Beverly being charged with perjury for giving false evidence. He noted that it is not the practice of WA Police to routinely conduct perjury investigations unless a magistrate makes a referral to the Police; that lying may be taken into account by the Magistrate in sentencing for the substantive offence; and the public interest would not be served by an investigation and trial of that matter as Mr Beverly had already been convicted of the original offence. He also noted that Mr Beverly had acknowledged in sentencing that he was likely to be dismissed from WA Police, and he used it as a mitigating factor.

67 It is not necessary for Mr Beverly to have been convicted of contempt or been charged with perjury for the Commissioner of Police to be able to draw the conclusion that he has in respect of Mr Beverly's testimony before the Perth Magistrates Court.

68 In *Ferguson v The Commissioner of Police* [2017] WAIRC 00238 at [63] – [65] the WAIRC dealt with the issue of the Commissioner being able to rely on matters not the subject of a conviction, saying:

> 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.

69 In the same way as the Commissioner is entitled to rely upon conduct which might, but has not, actually been the subject of criminal charges, or has been the subject of criminal charges which were not proven in a court of law, and thus beyond reasonable doubt, the Commissioner is not required to act or to draw his own conclusions regarding a member's truthfulness in court based only on a conviction for contempt or a charge of perjury.

70 Therefore, this ground fails.

Ground 1.2

71 In this ground, Mr Beverly says that the Commissioner should not have relied on the observations of credibility by the Magistrate when the Commissioner's own internal managerial processes did not raise any issues about Mr Beverly's honesty or integrity during the internal investigations into Mr Beverly's conduct concerning his wife. However, this is contrary to the material that was actually considered by Detective Senior Sergeant Bell. He referred to the investigations into the Sorrento incident in which the credibility of both Mr Beverly and Mrs Beverly was questioned. Senior Sergeant Wynne's report (Respondent's reg 92 Bundle, document 1.11, pages 7 – 8) also noted at page 13 that Mr Beverly's 'sanatised[sic] version' raised concerns about his integrity. Inspector Green also referred to this in the SOI at page 17.

72 This ground is not sustained.

Ground 1.3

73 This ground says that it is not reasonable for the Commissioner to make the finding that he did when the finding did not distinguish between whether the alleged conduct was wilful or negligent. It is said that this leaves open the possibility that the manner in which testimony was given might not necessarily give rise to loss of confidence.

74 To have any possible effect on a removal decision, it would need to be demonstrated that negligently giving evidence on a matter such as punching someone a number of times, is a significantly lesser evil than doing so wilfully.

75 The use of terms 'wilfully or negligently' is disjunctive. However, they are used as a phrase to cover a broad range of attitudes, from intentional or deliberate through to failing to take proper care. The use of the phrase in this case also suggests that, whether wilful or negligent, the evil was worthy of a loss of confidence.

76 This ground seems to us to be very pedantic, and not of much assistance to Mr Beverly. We think it is fair to say, having examined the reports by Detective Senior Sergeant Bell and Inspector Green, that there is not much room for a conclusion that Mr Beverly gave his testimony negligently, because he repeated the same assertions a number of times at various stages of the internal investigations and in court, as well as in his response to the NOITR. That leaves the conclusion as being that his conduct was wilful.

77 Further, it is difficult to contemplate that a person would be negligent in giving testimony about whether they punched another person, the only person present with them, a number of times.

Ground 1.4

78 The basis of this ground is that it was unreasonable to rely on a single incident of giving evidence before the Magistrates Court. However, as set out in the Commissioner's NORA of 27 May 2016:

> much of the support we receive from the community as police officers is conditional upon officers conducting themselves appropriately at all times, including being truthful when providing testimony before the courts … and it is likely that this will present significant challenges to your credibility if you were to present testimony as a police officer before the courts in the future. Your conduct has exposed the WA Police to risk and embarrassment, and potentially compromises the agency's integrity and reputation within the community.

79 We think this is the nub of the issue, that for all time, the truthfulness of Mr Beverly's testimony and thus his credibility as a witness in court may be undermined. It is a very significant matter that a police officer should wilfully or negligently give false testimony when the conduct of police officers is scrutinised and the truthfulness of their evidence in court is an essential part of their role.

80 Also, s 33Q(4)(b)(i) notes the importance of 'maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force'.

Ground 1.5 – that the removal was disproportionate to the gravity of the alleged conduct

81 Mr Beverly accepts in his submissions at [85] that 'a police officer who deliberately gives false or misleading testimony would undoubtedly do irreparable harm to both himself and the WA Police more broadly.'

82 Even taking account of the personal nature of the incident, Mr Beverly was still a member of WA Police and his relationship to upholding the law goes with him into court every time he gives evidence. It is to be remembered that his removal was due to the Commissioner's loss of confidence in him. Giving false testimony in court strikes at the heart of the confidence the community holds in members of the Police Force and in the confidence the Commissioner holds in his officers.

83 In our view, the gravity of the conduct was very significant in the context of Mr Beverly being a police officer. It strikes at the heart of his role. In the circumstances, removal was not disproportionate.

Ground 2

84 This ground relates to the weight that the Commissioner gave to Mr Beverly's written submissions.

85 The authorities make it clear that the weight to be given to decisions of this nature is a matter for the decision maker, and only in cases where it is glaringly unreasonable would an appeal body overturn the weight that has been attributed in such a decision.

86 In *Lourey v Legal Profession Complaints Committee* [2012] WASCA 112, Murphy JA (Pullin JA agreed) dealt with the issue of weight in these circumstances. Although these proceedings are not by way of judicial review, the principles are not dissimilar:

> 30 In proceedings for judicial review (and hence in an appeal of the kind under consideration), generally the weight to be given to a relevant consideration is for the decision-maker to determine; however, a failure to give adequate weight to a matter of great importance, or the giving of excessive weight to a matter of no real importance, may signify that the discretionary decision is 'manifestly unreasonable' in the sense that it is so unreasonable that no reasonable person could ever have come to it: ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** (41) per Mason J, citing ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 KB 223, 230. In this respect, there is an analogy between judicial review of administrative action and appellate review of a judicial discretion: ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** (42). An appellate court will not interfere with an exercise of judicial discretion on the basis of a failure to give adequate weight to relevant considerations unless it can be shown that the failure really amounts to a failure to exercise the discretion actually entrusted to the court: ***Gronow v Gronow*** [1979] HCA 63; (1979) 144 CLR 513, 534 - 535; ***Mallett v Mallett*** [1984] HCA 21; (1984) 156 CLR 605, 614; ***Lovell v Lovell*** [1950] HCA 52; (1950) 81

CLR 513, 519; ***Monteleone v The Owners of the Old Soap Factory*** [2007] WASCA 79 [36]; ***Dodds v Kennedy*** [2011] WASCA 32 [4]. The analogy serves to illustrate that 'a court should proceed with caution ... lest it exceed its supervisory role by reviewing the decision on its merits': ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** (42). See also [102] below.

31 A discretionary decision will be so unreasonable that no reasonable person could have come to it if there is 'something overwhelming' such that the conclusion is one to which no reasonable body could have come: ***Minister for Immigration and Multicultural Affairs v Eshetu*** [1999] HCA 21; (1999) 197 CLR 611 [44]. Also, a decision that no reasonable person could have come to is so unreasonable if 'it might almost be described as being done in bad faith' or if it is 'so absurd that no sensible person could ever dream that it lay within the powers of the [Tribunal]': ***Wednesbury*** (229), cited with approval in ***Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*** [2003] HCA 56; (2003) 216 CLR 212 [30].

87 In this case, the Commissioner has examined the conduct, he has come to conclusions based on an analysis of all of the material before him that Mr Beverly has given false testimony in the Perth Magistrates Court. He says in the NORA of 27 May 2016 that he has taken account of Mr Beverly's years of service and the letters of support and his personal circumstances, but he has not changed his view.

88 We are not satisfied that the weight attributed by the Commissioner to Mr Beverly's case is manifestly unreasonable such that no reasonable person could have ever come to the decision he did, nor is there something overwhelming such that the conclusion is one that no reasonable body could have come to. That is a high threshold to meet in such a case and is not demonstrated in this case where Mr Beverly has conducted himself in such a way that his credibility is severely undermined and would be an issue for performance of his duties for the future. This is in spite of his having many years of worthy service and having received letters of support from other officers.

Section 33Q(4) considerations

89 It is true that Mr Beverly's interests are significant. The decision to remove brings his career of 20 years as a police officer to an end; it affects his livelihood, his reputation and his family arrangements.

90 Those interests are to be weighed with the public interest of the maintenance of public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force. It is of great importance that the public confidence be maintained. The Commissioner of Police has a particular role in ensuring that public confidence is maintained and his relationship with members of the Force is of a special nature because of the requirement for public confidence in members of the Force, and because of the powers and responsibilities of those police officers. Confidence in a member means, amongst other things, being able to rely on the member to give truthful testimony in court, and not having any case before a court undermined by tarnished testimony.

91 In those circumstances, we find that the interests of the appellant do not override the public interest as it is identified in s 33Q(4)(b).

92 We find that it has not been demonstrated that the removal was harsh, oppressive or unfair. Accordingly, the appeal is dismissed

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2017 WAIRC 00271

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NIGEL BEVERLY
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 15 MAY 2017
FILE NO/S	APPL 41 OF 2016
CITATION NO.	2017 WAIRC 00271

Result	Appeal dismissed
Representation	
Applicant	Mr D Renton of counsel
Respondent	Mr N John of counsel

Order

HAVING HEARD from Mr D Renton of counsel for the appellant and Mr N John of counsel on behalf of the respondent, the WAIRC, pursuant to the powers conferred by the *Industrial Relations Act 1979* and the *Police Act 1892*, hereby orders:

THAT this appeal be, and is hereby dismissed

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 00343

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00343
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 8 MAY 2017
DELIVERED	**:**	FRIDAY, 16 JUNE 2017
FILE NO.	**:**	U 191 OF 2016
BETWEEN	**:**	JOHN ALLEN
		Applicant
		AND
		DANNI'S ELITE SERVICES
		Respondent

CatchWords	**:**	Industrial law (WA) - Termination of employment - Alleged harsh, oppressive and unfair dismissal - Applicant employed on casual basis - Principles applied - Continuing employment relationship between applicant and respondent - Applicant dismissed - Respondent's business performing poorly - Held dismissal not harsh, oppressive or unfair - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr R Bell, as agent

Cases referred to in reasons:

Swan Yacht Club (Inc) v Leanne Bramwell (1998) 78 WAIG 579

Ryde-Eastwood Leagues Club Ltd v Taylor (1994) 56 IR 385

Metropolitan (Perth) Passenger Transport Trust v Erhard Gersdorf (1981) 61 WAIG 611

Reasons for Decision

1 The applicant has established that he was dismissed from his employment with the respondent but has not satisfied me to the required standard that the dismissal was unfair. Accordingly, the application is dismissed.

2 When unemployed Ms Danni Campbell, the "Danni" in "Danni's Elite Services" (and the person who legally employed the applicant) took advantage of a Federal Government programme which taught people how to set up and run a small business.

3 Having completed the one-year programme Ms Campbell established "Danni's Elite Services" which was a business providing, in the main, cleaning and garden maintenance services. She was assisted by Mr Richard Bell her ex-partner with whom she was on good terms. He provided her with equipment and played a hands on role in the day to day running of the business.

4 In around April 2016, not long after the business had been established, Mr Bell agreed to do his friend, the applicant's father, a favour.

5 The applicant's father explained to Mr Bell that his son, the applicant, was unemployed and spent much of his time at home smoking marijuana. He told Mr Bell that if the applicant was employed he would smoke less because he did not smoke while he was working.

6 Mr Bell agreed to approach Ms Campbell about employing the applicant on a casual basis in the business.

7 Despite some hesitation, because of Ms Campbell's knowledge of the applicant's habit, Ms Campbell agreed to employ the applicant.

8 Accordingly, in April 2016 the applicant commenced casual employment with Ms Campbell's business.

9 The applicant's payslips became Exhibit 1 in these proceedings and they show that he worked between eight and forty hours per week during his employment. He would be told at the end of each day if he was required for work the next day.

10 Although it was accepted by the applicant that he was a casual employee the evidence established to my satisfaction that, all things being equal, the applicant had a reasonably founded expectation of being given work in the business from day to day, if such work was available.

11 Accordingly, I find there was a continuing employment relationship between the applicant and Ms Campbell and that it was a relationship capable of coming to an end by the employer dismissing the employee as that term is used in the *Industrial Relations Act 1979*.

12 I find that the applicant was, in fact and at law, dismissed from his employment in the sense that he was sent away or removed from it. (See *Swan Yacht Club (Inc) v Leanne Bramwell* (1998) 78 WAIG 579; *Ryde-Eastwood Leagues Club Ltd v Taylor* (1994) 56 IR 385; *Metropolitan (Perth) Passenger Transport Trust v Erhard Gersdorf* (1981) 61 WAIG 611.)

13 I find that the dismissal occurred when Mr Bell sent the following text to the applicant on 15 November 2016 (which is part of Exhibit 2).

> "Sorry mate you were casual and Danni doesn't need your services anymore at the moment but will call you if her work picks up".

14 This represented a sudden change to the applicant's relationship with the respondent which can only be described as a dismissal.

15 However, I am not satisfied, on the balance of probabilities, that the dismissal was unfair for the following reasons.

16 The facts established before me were that during the course of his employment the applicant was unhappy with certain matters and communicated this to Mr Bell, who he primarily dealt with as the employer's representative. The main issue was that the applicant considered that he should be paid for travel to and from jobs, rather than only for time at jobs, or that, at the very least, the time spent travelling should be reflected in his working hours. The applicant sought this because if it occurred he would achieve the number of hours in work to end the need to have ongoing contact with his "employment case worker" (a body contracted by the Federal Government to assist the unemployed in getting back to work).

17 The matter raised by the applicant was not dealt with to his satisfaction.

18 On the weekend of 12-13 November 2016 the applicant worked out how much the respondent owed him if he was entitled to payments when travelling between jobs.

19 On 14 November 2016, when he commenced work, which he typically did by arriving at Mr Bell's house, he initiated a conversation about the matter with Mr Bell.

20 Both the applicant and Mr Bell gave evidence about the conversation. The accounts were not dramatically different and the material details of the exchange can be described as follows.

21 The applicant told Mr Bell that the business owed him $10,000 and made it clear that he would be pursuing it. Mr Bell firmly rejected the claim. The applicant may or may not have said anything further, it is immaterial to decide, and then Mr Bell told the applicant to leave. The applicant left.

22 The applicant gave evidence that Mr Bell said "Get out. Don't come back". Mr Bell's version did not include the words, or words to effect of, "don't come back." Mr Bell was not pressed in cross-examination about the use of the words, although I do not place great reliance on that given the applicant represented himself.

23 The applicant says Mr Bell dismissed him in the exchange. Mr Bell denies this and says that he did not have the authority to dismiss the applicant or any other employee of the respondent.

24 In support of his contention the applicant relies not only the words he says Mr Bell used on 14 November 2016 but also on texts between himself and Mr Bell on 14 and 15 November 2016 which are part of Exhibit 2.

25 The applicant noted that he texted Mr Bell at 10:20 am on 14 November 2016, after the verbal exchange, writing that he would "drop by" the next day "to pick up my final pay" and that Mr Bell did not query the reference to "final pay". The applicant says this supports his contention that Mr Bell had dismissed him a couple of hours before. He says if Mr Bell had not dismissed him he would surely have queried why the applicant was seeking his "final pay".

26 The applicant also notes that he raised the issue of him being wrongfully dismissed in a text to Mr Bell at 9:08 am on 15 November 2016 and it was only after that text, at 10:48 am on the same day, that he received the text I have reproduced at [13] above.

27 The applicant says that it is clear that he was dismissed on 14 November 2016, by Mr Bell, and that the text at 10:48 am on 15 November 2016 came all too late and was, essentially, an attempt by Ms Campbell to regularise his unfair dismissal by Mr Bell which had occurred the previous day.

28 The problem with the applicant's argument is that Mr Bell was not his employer and there is no evidence that he was authorised by Ms Campbell to hire and fire her employees.

29 The evidence that Mr Bell had to contact Ms Campbell and get her agreement before the applicant was offered employment was not challenged.

30 In relation to the dismissal, Ms Campbell said this in her evidence in chief:

> *"Now, getting back to this - the dismissal of John - - -?---Yes.*
>
> *- - - on the day that I sent him the text that - the - the- this text that I was supposed to be gloating about, can you tell me what happened that day?---Um, it was no longer viable for me to have anyone employed for me. I couldn't afford it. And, I mean, I'd lost that much, um, as far as my, ah, clients were concerned that, as I said before, I didn't have enough to keep everyone afloat, mm, let alone me. And so I got you to send him a text saying, due to the drop of the work, that we didn't have any more available, and just telling him if it picks up in the future, we'll give him a call, you know, and just give him a smiley face, say, you know, like no hard feelings, just, you know- - -"*
>
> (ts 49)

31 Ms Campbell was not cross-examined on the issue. That is, her evidence that it was she who dismissed the applicant, and for the reason that the business did not have work for the applicant, was not challenged in cross-examination.

32 In Mr Bell's evidence in chief he gave this evidence:

> *"Now tell me - - -?---Yeah.*
>
> *- - - whether you had a role in the decision to offer no further work to Mr Allen?---No. Danni discussed it with me and I - and I did say to her, "Look, you know, you're probably better off without him".*
>
> *So this is a conversation you had with Ms Campbell?---Yeah. I just - - -*
>
> *So when did that conversation take place?---Ah, two days after John got all stroppy.*
>
> *Okay?---And I said to - "Well, that's up to you, Danni, but" - and she went away and thought about it and then she said to me - she rang me up and says, "Look, can you send him a text? Just tell him that, um, due to the business being the way it is" - and it was, it was just about - just about dead, "That I can't really offer him any more work at the moment, but if it picks up and we can get some of the clients back we'll give him a ring". So I - I didn't word the text exactly like that. I just sent him a - you know, "At the moment Danni hasn't got any more hours to offer you, but the business picks up we'll give you a ring"."*
>
> (ts 58)

33 Under cross-examination, although in answer to questions from me, Mr Bell said that when the applicant made reference to picking up his final payslip in the text on 14 November 2016, he said he was hoping this indicated that the applicant no longer wanted to work for the business but denied he had dismissed him on that day.

34 In relation to the first text on 15 November 2016 Mr Bell gave evidence, under cross-examination, that he did not think too hard about its contents before he responded. However, it was not put to him that having received the first text that he then either sent his response, or contacted Ms Campbell about a response, in an attempt to address a suggestion that he had, in fact, dismissed the applicant the day before.

35 I find that the language used by Mr Bell on 14 November 2016, even if it was as the applicant says, was not sufficient to amount to a dismissal. I find that, in any event, it could not have amounted to a dismissal because Ms Campbell was the applicant's employer and there is no evidence that she had delegated any power in relation to hiring and firing to Mr Bell.

36 I also cannot find, on the evidence before me, that Ms Campbell authorised the sending of the text on 15 November 2016 with the intention of overtaking or regularising a purported termination of the applicant's employment by Mr Bell on 14 November 2016.

37 Although the timing may suggest that the events of 14 November 2016 relating to Mr Bell and the applicant and the dismissal were connected, in terms of the reason for the applicant's dismissal the evidence that the reason given in the text on 15 November 2016 was the reason for the applicant's dismissal was not undermined in these proceedings.

38 I am reinforced in my view by the following evidence:

(1) Ms Campbell's evidence, which I accept without reservation, that the business was not going well from about the middle of 2016 and was losing clients; and

(2) The evidence from Ms Campbell, Mr Bell and Ms Campbell's brother, Mr Lavars, that despite their best efforts working basically as volunteers in the business in its later months of operation, the business folded up in January 2016, just a couple of months after the applicant's dismissal.

39 The applicant has not satisfied me, despite his suspicions, that he was, in fact and at law, dismissed on 14 November 2016 by Mr Bell because he raised an issue with Mr Bell about entitlements under his contract of employment. Nor has the applicant satisfied me, given that I have found Ms Campbell dismissed him on 15 November 2016 (although it was communicated by Mr Bell), that Ms Campbell dismissed him because of what had happened on 14 November 2016 and because he had raised an issue about his entitlements with Mr Bell.

40 I am satisfied that Ms Campbell dismissed the applicant for operational reasons related to the performance and financial viability of her business.

41 I do not find that Ms Campbell abused her right to dismiss the applicant in all of the circumstances. He had only been employed for around six months and only on a casual basis. I find that given the state her business was in, basically going to the wall, it was a reasonable response to let the applicant go from that casual employment. It is a shame that given the real effort she had evidently put in to learning about how to set up a business and in getting the business off the ground that she could not make it take flight. But she did nothing wrong in dismissing the applicant.

42 I add that, even if I had found that the applicant was in effect dismissed by Mr Bell on 14 November 2016 because he raised an issue about an entitlement, or that he was dismissed on 15 November 2016 by Ms Campbell for that reason, and I had found that the dismissal was unfair, I would have been unlikely to have made an award of damages because it is clear from the evidence that the business was performing poorly and that the applicant would, in any event, have been dismissed for this reason very soon after 15 November 2016.

2017 WAIRC 00342

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN ALLEN
	APPLICANT
	-v-
	DANNI'S ELITE SERVICES
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 16 JUNE 2017
FILE NO/S	U 191 OF 2016
CITATION NO.	2017 WAIRC 00342

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr R Bell as agent

Order

HAVING heard the applicant on his own behalf and Mr R Bell, as agent, for the respondent;

AND HAVING given reasons for decision in which I determined to dismiss the claim;

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

THE application be dismissed.

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

2017 WAIRC 00274

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00274
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 4 MAY 2017
DELIVERED	**:**	TUESDAY, 16 MAY 2017
FILE NO.	**:**	B 13 OF 2017
BETWEEN	**:**	WILLIAM GEOFFREY CARTER
		Applicant
		AND
		MT PLEASANT BOWLING CLUB INC
		Respondent

Catchwords	:	*Industrial Law (WA) - Contractual benefits claim - Whether the terms of the contract provided for payments to be made in respect of overtime - Principles applied - No direction given by employer for the employee to work the hours claimed - Employee was paid a higher hourly rate in lieu of other benefits - Contract did not contain an express or implied term entitling the employee to payment for work performed outside of ordinary hours of work - Extra hours of work were donations - Application dismissed*
Legislation	:	*Industrial Relations Act 1979* (WA) *Registered and Licensed Clubs Award 2010*
Result	:	*Application dismissed*
Representation:		
Counsel:		
Applicant	:	In person
Respondent	:	Ms I Lewin-Jones

Case(s) referred to in reasons:

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 16 ALR 363

Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704

Brett Arthur King v Griffin Coal Mining Company Pty Ltd [2017] WAIRC 00102

Thomas George Hartwig v Interstate Enterprises Pty Ltd t/as ATS Recruitment Services [2016] WAIRC 00741

Tracey Louise Fergusson v The Salvation Army (Western Australia) Property Trust as the Trustee for the Salvation Army (WA) Social Work trading as Salvo's Stores [2014] WAIRC 01042

Case(s) also cited:

Reasons for Decision

The application

1 The applicant Mr Carter was employed by the respondent the Mt Pleasant Bowling Club as Bar and Functions Manager under a written contract of employment dated 10 September 2016 and signed by Mr Carter on 18 September 2016. It was common ground that Mr Carter commenced employment with the Club on 17 September 2016. Mr Carter was initially employed on a permanent part-time basis working 30 hours per week and was paid at the rate of $27.66 per hour.

2 In the position of Bar and Functions Manager Mr Carter's duties included bar and function operations; staffing and training; stock and purchasing; maintenance and coordination; repairs; after hours security call outs; maintaining tills and daily banking; and cleaning and coordination of cleaning staff. The letter of engagement for Mr Carter provided at cl 4 – Ordinary hours of work as follows:

> **4. Ordinary hours of work**
>
> 4.1 Your ordinary hours of work will be 30 hours per week, plus any reasonable additional hours that are necessary to fulfill (sic) your duties or as otherwise required by the employer.
>
> 4.2 Your ordinary hours of work may be averaged over a one-week period.

3 Furthermore, by cl 5 – Remuneration, it was provided:

> **5. Remuneration**
>
> 5.1 You will be paid weekly at the rate of $830 per week (ie that equates to an hourly rate of $27.6666 and an actual annual salary of $43,160 plus superannuation), which includes a 20% exemption rate in lieu of the provisions set out in Part 2 of this letter of engagement.
>
> 5.2 The employer will also make superannuation payments on your behalf in accordance with the *Superannuation Guarantee (Administration) Act 1992*. The current superannuation rate is 9.5%.
>
> 5.3 Your remuneration will be reviewed annually and may be increased at the employer's discretion.

4 It was also common ground that annexed to Mr Carter's contract of employment, tendered as exhibit A1, were two annexures. The first was a position description for the job of Bar and Functions Manager. The second annexure and referred to in schedule A of the written contract of employment, was an extract of the *Registered and Licensed Clubs Award 2010* in relation to "Management Exemption Rates". It was common ground that this was intended, as specified in cl 5.1 of the contract, to recognise the payment of a higher base hourly rate of pay, of 20%, in lieu of other benefits and entitlements. Those benefits and entitlements included overtime and penalty rates.

5 Mr Carter maintained that he regularly worked approximately 70 hours per week. He was paid for 30 hours per week initially and by a variation to his contract of employment agreed to in December 2016 and effective from 2 January 2017, Mr Carter's hours of work increased to 40 hours per week, at the same hourly rate. In his particulars of claim at par 20, Mr Carter referred to these additional hours beyond 30 and 40 per week as a "donation". He further said that after his unfair dismissal (the subject

of a separate claim before the Commission), he now wishes to claim up to an extra 40 hours per week that he says he worked over and above the hours specified in his contract of employment. Mr Carter claims the sum of $12,900 in this regard.

6 The Club denied Mr Carter's claim in its entirety. It maintained that the terms of the contract, properly construed, did not provide for overtime or any other payment for additional hours. The Club maintained that the effect of cl 5 of the contract was clear and that Mr Carter was paid a salary "loading" to compensate him for all hours of work. This clause was based on the terms of the Award, which carries a 20% salary loading payable to club managers, in lieu of a number of provisions of the Award, one of which is overtime for additional hours of work. The Club therefore maintained that there was no express term of Mr Carter's contract of employment which provided for overtime payments or any payments for additional hours. The Club also contended that there was no basis in law to imply such a term either.

7 Furthermore, the Club contended that Mr Carter by his own admission, said that any extra hours that he worked were performed voluntarily and were not done so at the direction of the Club.

The evidence

8 To the extent that there were many matters in contention beyond the proper interpretation of Mr Carter's contract of employment, the evidence of Mr Carter and the Club was as follows.

9 Mr Carter testified that he applied for the position with the Club and was interviewed. He was offered the appointment on a permanent part-time basis working 30 hours per week. His rate of pay was $27.66 per hour. He agreed that the document tendered as exhibit A1 was his letter of engagement, together with the attached position description and additional annexure in relation to the management exemption rate. Mr Carter agreed that his rate of pay included a 20% additional loading, but maintained that this did not apply to the excessive number of hours that he worked.

10 Mr Carter referred to him working between six and six and a half days per week and attending sometimes between nine and ten hours per day. A lot of the work done initially was preparing to open the venue. Mr Carter was aware from the Club Committee that the Club was not in a good financial position. He therefore understood that the Club would not be able to pay him for any additional hours of work, but maintained that there was some tacit arrangement that if he continued with the Club and became a full time employee, he would be able to recoup the additional hours through time off arrangements. Mr Carter did not dispute his initial description in his particulars of claim, that the extra hours worked were "donations".

11 After being employed for three months, Mr Carter referred to a meeting with the Committee members, where his hours of work were increased to 40, effectively a full time position, at the same hourly rate of pay. Mr Carter testified that he continued working as he had done from the beginning of his employment. Mr Carter did accept that in early October 2016, he had a conversation with Ms Lewin-Jones the then Vice-President of the Club, in the Club's car park. Mr Carter accepted that Ms Lewin-Jones told him that the Club did not want him to work the additional hours that he had been performing up to that time.

12 For reasons unrelated to the present claim, Mr Carter's employment was terminated by the Club some weeks later.

13 The Club adduced evidence through Ms Lewin-Jones and Ms Melkus. Ms Lewin-Jones is now the President. At the time of Mr Carter's employment, she was the Vice-President. Ms Lewin-Jones testified that it was always understood, as set out in Mr Carter's contract of employment, that he would be required to work some additional hours as part of his duties as the Bar and Functions Manager. However, there was never any direction to or expectation of Mr Carter to work the hours that he has claimed. On the contrary, as just mentioned, Ms Lewin-Jones said she spoke with Mr Carter and told him not to work the hours that he maintained he had been working. In particular, Ms Lewin-Jones' evidence was that she was concerned that working excessive hours had the effect of reducing the working hours for other longstanding paid employees.

14 As to the working arrangements generally, Ms Lewin-Jones said that as the Club is staffed mainly by volunteers, it was up to Mr Carter to regulate his working hours. There was very little supervision as to what he did and when.

15 The direction to not work excessive hours was affirmed by Ms Melkus, the Treasurer of the Club. Ms Melkus is also on the Club Committee. She said that in the last weeks of Mr Carter's employment, he did take some time off work.

Consideration

16 The relevant principles in relation to a claim such as the present are well settled. In *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704 Sharkey P said as follows at par 34:

> 34 The limitations (and/or conditions precedent to the exercise of jurisdiction and/or power) include the following—
>
> (a) The claim must relate to an "industrial matter", as defined in s.7 of the Act.
>
> (b) The claim must be made by an "employee", as defined in s.7 of the Act.
>
> (c) The benefit claimed must be a contractual benefit, i.e. the claimant must be entitled to the claim under his/her contract of service.
>
> (d) The subject contract must be a contract of service.
>
> (e) The benefit must not arise under an award or order of the Commission.
>
> (f) The benefit must have been denied by the employer.
>
> (See also the discussion of the nature of s.29(1)(b)(ii) claims in *Ahern v AFTPI* 79 WAIG 1867 (FB).)

17 Therefore, the primary task is to determine whether the issue of payment for time worked beyond Mr Carter's contracted ordinary hours of work was a "benefit" under Mr Carter's contract of employment. On its proper construction I am not persuaded that the claim made by Mr Carter is supported by the terms of his former contract of employment. The interpretation

of a contract is to be approached objectively in accordance with the ordinary and natural meaning of the words used in it, in the view of a reasonable person in the position of the parties.

18 By cl 4 – Ordinary hours of work, Mr Carter's ordinary hours of work were to be 30 hours per week plus "reasonable additional hours" or hours as directed. It is common ground and I am satisfied on the evidence in any event, that there was no direction given by the Club for Mr Carter to work the hours he claimed. Even if no such direction or a requirement was made, the additional hours must be "reasonable" and must be "necessary to fulfil duties".

19 By cl 5 – Remuneration it is clear that the language of the contract seeks to provide for a "loaded" hourly rate of pay to compensate for certain other matters "set out in Part 2 of this letter of engagement". It seemed clear enough on the evidence, and certainly in accordance with Mr Carter's understanding, that this was intended to refer to the second annexure dealing with the management exemption rates. That is, Mr Carter was paid a higher hourly rate, in lieu of other benefits. This was common ground between the parties.

20 The other term of the contract to note for the purposes of determining this matter, is cl 3 – Terms and conditions of employment. This provided as follows:

> **3. Terms and conditions of employment**
>
> 3.1 Unless more generous provisions are provided in this letter or in the attached Schedule, the terms and conditions of your employment will be those set out in the *Registered and Licensed Clubs Award 2010* and applicable legislation. This includes, but is not limited to, the National Employment Standards in the *Fair Work Act 2009*.
>
> 3.2 The additional terms and conditions set out in the attached Schedule will also apply to your employment.

21 It seems reasonably clear from this clause, that the terms of the Award applied to Mr Carter's employment, subject to any other provisions of a more generous nature, as set out in the written contract of employment.

22 In my opinion, the only reasonable construction of the contract of employment, when read as a whole, is that the remuneration paid to Mr Carter, as specified in cl 5, was intended to compensate him for additional hours of work. It is important to note, that the terms of the contract itself, do not provide for or make any mention of overtime or payments to be made in respect of overtime for additional hours of work. Furthermore, from the language of cl 3, it is also reasonably clear in my view, that it was not the intention of the parties to the contract, objectively considered from the language used, to incorporate the terms of the Award into the written contract of employment. This is so, as it is clear from cl 3.1, that the reference to the Award is for information purposes.

23 Additionally, the introductory words to cl 3.1 they being "unless more generous provisions are provided in this letter or in the attached Schedule …" made clear that the relevance of the Letter of Engagement is for the purposes of specifying those matters which might apply other than those terms as set out in the Award. The words "as per" in the initial paragraph of the Letter of Engagement construed in accordance with the contract as a whole, were for the purposes of identification of the relevant award to apply, and are not words of incorporation: *Thomas George Hartwig v Interstate Enterprise Pty Ltd t/as ATS Recruitment Services* [2016] WAIRC 00741; (2016) 96 WAIG 1359 per Kenner SC at par 18; *Brett Arthur King v Griffin Coal Mining Company Pty Ltd* [2017] WAIRC 00102 (as yet unreported) per Kenner SC at pars 58 to 61; *Tracey Louise Fergusson v The Salvation Army (Western Australia) Property Trust as the Trustee for the Salvation Army (WA) Social Work Trading As Salvo's Stores* [2014] WAIRC 01042; (2015) 95 WAIG 348.

24 Given my conclusion that the contract between Mr Carter and the Club did not contain an express term entitling him to payment for work performed outside of ordinary hours of work, the next issue is whether a term to that effect could be implied into the contract. The test for the implication of a term into a contract in fact was set out in the decision of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at 376 where it was said:

> Their Lordships do not consider it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be established: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

25 Plainly in this case, the test for implication is not satisfied because to imply a term in the contract for payment for hours worked outside of ordinary hours of work, would be inconsistent with the express terms of the contract which I have set out earlier in these reasons.

26 Finally, and in any event, even if it could be contended, which in my view it cannot be, that the relevant benefit claimed by Mr Carter would be that as specified within the terms of the Award itself, then that is not a matter which can be pursued before this Commission. It would involve the enforcement of an award, which would need to proceed before the Industrial Magistrate's Court or an eligible federal court: *Fergusson* per Kenner C at pars 16-17.

27 Irrespective of these conclusions, Mr Carter himself admitted in his evidence and indeed in his particulars of claim, noted above, that the additional hours of work he performed were not directed by the Club but were "donations".

28 For all of the foregoing reasons, I am not persuaded that Mr Carter has established that he has been denied a contractual benefit by the Club. Therefore, the application must be dismissed.

2017 WAIRC 00275

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WILLIAM GEOFFREY CARTER
	APPLICANT
	-v-
	MT PLEASANT BOWLING CLUB INC
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 16 MAY 2017
FILE NO/S	B 13 OF 2017
CITATION NO.	2017 WAIRC 00275

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Ms I Lewin-Jones

Order

HAVING heard the applicant on his own behalf and Ms I Lewin-Jones 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.

2016 WAIRC 00746

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR BRUCE CRIPPS
	APPLICANT
	-v-
	TALGA RESOURCES LTD ACN 138 405 419 ABN 32 138 405 419 AUSTRALIAN PUBLIC COMPANY, LIMITED BY SHARES FORMER NAME: TALGA GOLD LIMITED
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 8 SEPTEMBER 2016
FILE NO.	B 120 OF 2016
CITATION NO.	2016 WAIRC 00746

Result	Direction issued
Representation	
Applicant	Mr D Cripps of counsel
Respondent	Mr T Smetana of counsel

Direction

HAVING heard Mr D Cripps of counsel on behalf of the applicant and Mr T Smetana 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 Commission's jurisdiction to hear and determine the herein application be heard as a preliminary issue.

(2) THAT the respondent file and serve any affidavits, an outline of submissions and any list of authorities upon which it intends to rely by no later than 22 September 2016.

(3) THAT the applicant file and serve any affidavits, an outline of submissions and any list of authorities upon which he intends to rely by no later than 6 October 2016.

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

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

2016 WAIRC 00916

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00916
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 8 SEPTEMBER 2016, THURSDAY, 20 OCTOBER 2016
DELIVERED	**:**	WEDNESDAY, 7 DECEMBER 2016
FILE NO.	**:**	B 120 OF 2016
BETWEEN	**:**	MR BRUCE CRIPPS Applicant AND TALGA RESOURCES LTD ACN 138 405 419 ABN 32 138 405 419 AUSTRALIAN PUBLIC COMPANY, LIMITED BY SHARES FORMER NAME: TALGA GOLD LIMITED Respondent

Catchwords	**:**	*Industrial Law (WA) - Contractual benefits claim - Whether application is beyond the jurisdiction of the Commission - Whether employment had a sufficient connection with the State of Western Australia - Whether employer has been properly identified - Whether application is otherwise vexatious and frivolous - Principles applied - Jurisdiction found - Employment did have a real connection with Western Australia - Employee has properly named employer for the purpose of these proceedings - Application not vexatious or frivolous - Declarations and order issued*
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 27(1)(a), 29(1)(b)
Result	**:**	Jurisdiction found and declaration and order issued
Representation:		
Counsel:		
Applicant	**:**	Ms H Millar of counsel
Respondent	**:**	Mr T Smetana of counsel
Solicitors:		
Respondent	**:**	HLS Legal

Case(s) referred to in reasons:

Kim Anthony Fitzpatrick v Baulderstone Clough Joint Venture (1999) 79 WAIG 2310

MKZ Transport Pty Ltd v Perth Freightlines Pty Ltd (2011) 91 WAIG 426

Ray Douglas Parker v Mark Anthony Tranfield (2001) 81 WAIG 2505

The Owners of Johnston Court Strata Plan No. 5493 v Anna Dumanic (1990) 70 WAIG 1285

Case(s) also cited:

Moore and Others v Inglis (1976) 9 ALR 509

Reasons for Decision

Brief background

1 The applicant Mr Cripps was employed as Country Manager Sweden for the respondent Talga Resources Ltd ("Talga Resources") from October 2012 to about mid November 2014. Talga Resources is engaged in the business of mineral exploration. At all material times, apart from the first two weeks of his employment, Mr Cripps was located in and performed all of his work in Sweden. He was based in the town of Lulea which is in the far north of the country, close to the Arctic Circle.

2 As the Country Manager Sweden, Mr Cripps was responsible for a range of duties. These included managing exploration projects and operations; the coordination of drilling programmes; sampling and data management; engaging and managing consultants, contractors and field assistants as needed; budgeting; logistics and dealing with regulatory and other matters.

3 From about mid November 2012, Mr Cripps was responsible for his own accommodation costs. Up to that time, Talga Resources provided relocation costs and assistance to Mr Cripps. Talga Resources understood that Mr Cripps purchased a house in Sweden in about October 2014. There was no requirement on Mr Cripps and Talga Resources was not aware of Mr Cripps' return to Western Australia over the period of his employment.

4 In about June 2013, as a result of some financial problems and the then uncertain future of Talga Resources' business prospects, Mr Cripps' working hours were reduced from five to three days per week. Whether this was an agreed change in Mr Cripps' employment arrangements, and the consequences that flowed from this, was contentious. In short, Mr Cripps denies that this occurred with his agreement. He maintained that it was to be a temporary change and amounted to a deferral of his salary and entitlements, pending a recapitalisation of the business to fund its ongoing operations.

5 In about mid November 2014 Mr Cripps' employment was terminated on the grounds of redundancy. Mr Cripps claims loss of salary in the sum of approximately $88,000, for the period where his working days were reduced from five to three days per week.

6 Talga Resources contended that Mr Cripps' claim is beyond the jurisdiction of the Commission on the basis that Mr Cripps' employment did not have a sufficient connection with this State. This issue is somewhat complicated by a further matter raised by Talga Resources, that being the proper identification of Mr Cripps' employer. Talga Resources maintained that Mr Cripps was initially employed by it. It was common ground that Talga Resources was formerly known as Talga Gold Ltd ("Talga Gold"), which changed its name to Talga Resources. However, Talga Resources contended that following Mr Cripps' initial period of employment as Country Manager Sweden, from about January 2013, he became employed by Talga Mining Pty Ltd Filial Sweden ("Talga Sweden"), the Swedish branch of Talga Mining Pty Ltd ("Talga Mining").

7 Given the issues raised by Talga Resources and the need for the Commission to be satisfied it has jurisdiction to hear and determine Mr Cripps' claim, the Commission listed the matter of jurisdiction to be determined as a preliminary issue. Directions were made for the filing and service of affidavits and outlines of submissions. Regrettably and surprisingly, on the day of the hearing, counsel for Mr Cripps informed the Commission that she had not been made aware of these directions and therefore the Commission only has before it, evidence from Talga Resources by way of an affidavit of its Managing Director, Mr Thompson. Fortunately, there did not appear to be much dispute as to the primary facts.

8 Furthermore, even if the Commission found against the company on the threshold issue of jurisdiction, Talga Resources further maintained that because Mr Cripps has in the past, and may still be seeking to take action against it or related entities in both Sweden and Australia, the Commission should conclude that these proceedings are vexatious and that they should be dismissed under s 27(1)(a) of the Act.

Consideration

Proper identification of employer

9 Essential to the institution of proceedings before the Commission, especially under s 29(1)(b) of the Act, is the proper identification of the employer by a claimant. The onus falls on the employee in this respect. Whilst an amendment to proceedings may be made to overcome the misdescription of a respondent, this generally does not extend to the substitution of an entirely new party: *The Owners of Johnston Court Strata Plan No. 5493 v Anna Dumanic* (1990) 70 WAIG 1285.

10 In this matter there is no dispute that the Employment Agreement initially entered into was between Mr Cripps and Talga Gold, which then changed its name to Talga Resources. The terms of the Agreement specified that Mr Cripps would be Country Manager Sweden for the company. The Agreement, by cl 2.5, specified that the employment of Mr Cripps was to be for an "initial fixed term of 12 months". By item 6 of Schedule 1 of the Agreement, the notice of termination of employment to be given by the employer was six months.

11 By cl 6.1 of the Agreement, Talga Resources was to pay Mr Cripps the remuneration package as set out in item 5 of Schedule 1. This amount was expressed in Swedish currency as SEK 750,000 per annum. By this clause, and also by cl 6.4, Talga Resources was to be responsible for paying compulsory employer social security contributions under Swedish law. By cl 7.1, provision was made for Mr Cripps to have a motor vehicle for use in the field and he was required to hold a current Swedish drivers licence approved by the Swedish authorities. Leave entitlements for Mr Cripps as specified in cl 9, were to be as prescribed by "applicable legislation". There was no suggestion in the Agreement that this meant other than applicable Swedish legislation.

12 Post-employment restraints were dealt with in cl 13 of the Agreement. The "restraint area" as defined in this clause included the whole of Sweden and Australia, alternatively each country individually. The relevant "business or activity" included a number of named companies including Swedish companies engaged in the global graphite and Swedish iron ore industry sectors. Thus, at least for the purposes of the Agreement, the relevant "industry" in relation to which Mr Cripps was employed, was not necessarily confined to the Swedish graphite industry. By cl 14 of the Agreement it was provided that Mr Cripps' overall remuneration package was expressed to be "considered on an overall basis as an annualised salary" and in compensation for entitlements arising under a number of named Swedish statutes dealing with employment entitlements. Again, there was no suggestion in the Agreement when read as a whole, or indeed on the evidence, that these statutes were intended to be other than Swedish.

13 By cl 17.1, there was a governing law clause, which provided that the contract was to be construed in accordance with the laws of Western Australia. The parties agreed to submit themselves to the exclusive jurisdiction of the courts of Western Australia "in respect of all matters arising out of or relating to this Agreement, its performance or subject matter". However, there was a qualification. It was further provided that "Should it [sic] deemed by a competent court, tribunal or authority, however, that (a) and / or (b) do not apply, and that the law of Sweden applies in respect of part of this Agreement, than [sic] the law of Sweden shall prevail over the law of Western Australia". I will return to this provision below because it was a major plank of Mr Cripps' contention that his employment had a sufficient connection with this State.

14 By Schedule 2 to the Agreement, under the heading "Executive duties", at par xii, it was provided that Mr Cripps "will perform various statutory functions with respect to Swedish authorities as required. These may include, but not [sic] limited to, the roles of Swedish Managing Director and / or Authorised Representative. Should that occur the Company agrees to take out Directors and Officers Insurance or equivalent to cover any potential liability and also resolve for Talga Gold Limited to indemnify the Executive against any such liabilities that may arise." It is of some importance to note that by this provision, and also pars iii, iv, vii and x of the Agreement, that Mr Cripps agreed to hold other positions within the group of companies and to perform such functions and powers as directed on behalf of any group company "as if they were duties performed on behalf of Talga Resources". Furthermore, by these provisions, Talga Resources undertook to arrange for directors' and officers' liability cover for Mr Cripps to indemnify him against any liabilities arising from the performance of these duties.

15 For the purposes of these provisions of the Agreement, "Group Company" was not separately defined. I see no reason to not give these words their ordinary understanding as provided for in Australian company law (see generally RP Austin and IM Ramsey *Fords Principles of Corporations Law* 14th ed pars [4.270] to [4.340]).

16 As referred to in the affidavit of Mr Thompson, Talga Resources is an Australian public company. Talga Mining is an Australia Pty Ltd company limited by shares and is a wholly owned subsidiary of Talga Resources. As noted above, Talga Sweden is the Swedish branch of Talga Mining. Mr Thompson is the Managing Director of both Talga Resources and Talga Sweden and is a director of Talga Mining. Mr Cripps was also a director of Talga Sweden and acted as its Deputy Managing Director in Sweden.

17 From the start of his employment with Talga Resources in October 2012 to about December 2012, Mr Cripps was paid his salary and entitlements by Talga Resources. The salary was paid in Australian currency from the Talga Resources' Australian bank account as Mr Cripps had not by that time, established a bank account in Sweden. From January 2013 the salary payment arrangement changed. From this time, Mr Cripps was paid by Talga Mining in Swedish currency from the Talga Mining Swedish bank account into Mr Cripps' Swedish bank account. Appropriate tax deductions were made and remitted to the Swedish tax department. Pay slips, reflecting these payment arrangements, were annexure MT-4 to Mr Thompson's affidavit.

18 As noted earlier, as a result of some financial problems and uncertainty about the future of the Swedish operations, on 1 June 2013 Mr Thompson, in his capacity as Managing Director of Talga Resources, wrote to Mr Cripps to confirm discussions between himself and Mr Cripps, that Mr Cripps' working days would be reduced from five to three per week. Mr Thompson's letter to Mr Cripps, attached to the notice of application, was on the Talga Resources letterhead. The letter, formal parts omitted, provided as follows:

> As per our discussions, I confirm that your employment arrangement has been changed such that your standard working week will be reduced from five days per week to three days per week effective from 1 June 2013. Your relevant entitlements will be reduced proportionately. All other terms and conditions contained within your employment agreement remain unchanged.
>
> Bruce I would like to take this opportunity to thank you for all your hard work to date, and also for your support during this difficult time. It is appreciated and highly regarded for the future.

19 There were further developments. By letter of 14 November 2014, Mr Thompson wrote again to Mr Cripps. In this letter, on the letterhead of which appears the names of all three entities, Talga Resources, Talga Mining and Talga Sweden, Mr Thompson informed Mr Cripps of the termination of his employment on the grounds of redundancy. A copy of this letter was annexure MT-5 to Mr Thompson's affidavit. The evidence of Mr Thompson in relation to this letter was to the effect that reference was made to all three entities on the letterhead because of the then uncertainty as to who was Mr Cripps' employer. It was said to be an attempt to make the position clear, as Mr Thompson put it. The letter from Mr Thompson, formal parts omitted, was in the following terms:

> **TERMINATION OF EMPLOYMENT**
>
> Further to your discussion with myself and Lisa Wynne earlier today, your employment with Talga Mining Pty Ltd Filial Sweden and or Talga Resources Limited (jointly and severally **Talga**) is hereby terminated by reason of redundancy effective 17 November 2014, since your position will not remain.
>
> As discussed during the consultation meeting, Talga is restructuring, and it has considered but has not been able to identify any suitable alternative employment opportunities for you within the organisation.
>
> In accordance with your employment contract, you are entitled to 6 months' payment in lieu of notice and therefore from the date of this letter you are released from your work duties. We attach a calculation of all gross termination payments that Talga will make as "Attachment A" to this letter.
>
> You will also be paid all accrued entitlements up to the date of your termination, including accrued but untaken annual leave and any unpaid salary.

20 Not long after this, on 2 December 2014, what appears to be a Swedish Union wrote a letter on behalf of Mr Cripps to Mr Thompson. The letter, as annexure MT-6 to Mr Thompson's affidavit, was addressed to both Talga Resources and Talga Sweden at the West Perth business address. It claimed that the termination of Mr Cripps' employment was unlawful and "in violation of the Employment Agreement" under Swedish law. In accordance with the uncontradicted testimony of Mr Thompson, as there were no further written contracts of employment entered into between Mr Cripps and Talga Resources, or any other company in the group for that matter, the assumption must be that the reference to the "Employment Agreement" referred to in the letter of 2 December 2014, was the Agreement. It was not clear on the evidence, but it does not seem that the issues raised in the letter were taken any further by the Union.

21 On 4 December 2014, Mr Cripps signed an unfair dismissal application under s 394 of the *Fair Work Act 2009* (Cth). In the claim document, Mr Cripps cited his Perth address and named the respondent to the claim as all three corporate entities and cited the Talga Resources office address in West Perth. At par 3.2.7 Mr Cripps stated:

> 3.2 Why was the dismissal unfair?
>
> 7. I was the Country Manager and Deputy Managing Director (by title) of the branch in Sweden (the branch name being Talga Mining Pty Ltd Filial Sweden). The company states in their termination document that role will be done by no one; however they are actively seeking a person to fill that role. Here is an extract from a public document released the day of my termination:
>
> *TMPL is currently in the process of recruiting inter alia a deputy managing director resident within the EEA to the Branch, but such deputy director will not have been appointed at the time of this application.*

22 The description of Mr Cripps as "Deputy Managing Director (by title)" of the Swedish branch is broadly consistent with Mr Thompson's evidence that it was a requirement of Swedish law to have at least one director of a Swedish company resident in Sweden.

23 Later, in early March 2016, Mr Cripps instructed a Swedish lawyer to write to Talga Sweden claiming a breach of the Agreement and to seek compensation. Whilst both the Swedish letter and English translation were annexure MT-9 to Mr Thompson's affidavit, there was some faint suggestion made by Talga Resources that a formal claim may have been made by Mr Cripps. However, Mr Thompson's evidence was that he had not been made aware of whether there had been proceedings commenced or discontinued in Sweden, arising from this particular correspondence.

24 There are considerable difficulties confronting the Commission in determining this leg of Talga Resources' contention. Not the least of which is the state of the evidence in that I can only proceed on the basis of evidence lead through Mr Thompson and the documents annexed to his affidavit. I can also have some regard to some of the documents annexed to Mr Cripps' particulars of claim.

25 It seems that Talga Resources itself, was in considerable doubt as to the proper identity of Mr Cripps' employer. Whilst in his affidavit Mr Thompson asserted the belief that Mr Cripps was employed by Talga Sweden, at least after the initial period of employment, the letter of termination of Mr Cripps' employment of 14 November 2014 is less than clear on this issue and somewhat seeks to hedge the company's bets. As Mr Thompson said in his evidence, the letter to Mr Cripps named all three companies in an attempt to "cover the bases" and to be clearer as to the issue of the identity of the employer. I do not think that Mr Thompson's letter had the latter effect.

26 At the end of the day it is a question of law, from all of the surrounding circumstances, as to whether there was any change to the employment arrangements originally entered into between Mr Cripps and Talga Gold which became Talga Resources. The Commission can only proceed on the basis of the evidence before it. The Commission does not have the benefit of evidence of, for example, any tax returns to Swedish authorities lodged by Talga Sweden in relation to any employees it may have employed in Sweden. The fact that from January 2013 Mr Cripps was paid by Talga Mining and tax deductions were made and remitted to the Swedish tax department, is of some significance. However, given the Talga Resources group structure, is not of itself decisive.

27 Of considerable significance on this issue, is the terms of the Agreement. It was a comprehensive contract setting out the terms of the employment relationship between Mr Cripps and Talga Resources, in relation to his employment as the Country Manager Sweden. It is important to note that this is not a case where the employee concerned was employed in Australia in an Australian position and then was subsequently sent to another location abroad. The object of the Agreement was Mr Cripps' employment overseas in Sweden as the Country Manager there. Therefore, the fact that Mr Cripps spent his whole time and attention in that regard, working in Sweden in relation to projects and tenements owned and operated by Talga Sweden, is not inconsistent with his ongoing employment by Talga Resources. That is what the express terms of the Agreement contemplated.

28 The correspondence to Mr Cripps, apart from the final letter of termination of employment, was from Talga Resources in Perth, signed by Mr Thompson as the Managing Director. Of significance too, is that the Agreement itself contemplated the payment to Mr Cripps of a salary in Swedish currency and appropriate payments in relation to social security obligations. The Agreement also referred to statutory entitlements of Mr Cripps while working in Sweden, to various leave and other local conditions of employment. I also attach very considerable weight to the terms of the Agreement as I have referred above, in Schedule 2. In particular, in par xii in relation to "Executive duties". As mentioned, this provision contemplated Mr Cripps assuming the position of Director of the Swedish branch, which in fact he did, and the performance of any other statutory obligations for Swedish authorities. This was all to be done in accordance with Mr Cripps' obligations as an employee of Talga Resources under the terms of Agreement.

29 Therefore, the fact that Mr Cripps was Deputy Managing Director of Talga Sweden, and performed whatever statutory obligations were imposed on him by Swedish law in connection with this appointment, does not of itself, lend support to the proposition that Mr Cripps was no longer an employee of Talga Resources and thereby became an employee of Talga Sweden.

30 As to steps taken by Mr Cripps to challenge the termination of his employment and the naming of Talga Sweden as part of these processes, I am not persuaded that this should be accorded much weight. It was reasonably clear from Mr Thompson's evidence that the reason that Mr Cripps' letter of termination of employment cited all three corporate entities was because of Mr Thompson's and Talga Resources' uncertainty as to the proper identity of Mr Cripps' employer. As noted above, Mr Thompson wanted to "cover the bases" in an attempt to capture the correct entity. Likewise, in my view, Mr Cripps did the same thing in relation to his Fair Work Commission application. He also cited both Talga Mining and Talga Sweden in the correspondence sent to the company on his behalf by his Swedish representatives.

31 Given all of the foregoing, but in particular the terms of the Agreement, in my view Mr Cripps' employer throughout his employment was Talga Resources. Therefore, he has properly named his employer for the purpose of these proceedings.

Sufficient connection with the State

32 It is well settled that the State Parliament may make legislation for the "peace, order and good government of Western Australia" and in this respect, its legislation may have extra territorial effect: *Ray Douglas Parker v Mark Anthony Tranfield* (2001) 81 WAIG 2505 per McKechnie J at par 12. In *Parker*, the matter in issue was whether the respondent, Mr Tranfield, who worked as an oil rig surveyor exclusively overseas, fell within the Commission's unfair dismissal jurisdiction. His employer, Mr Parker, was engaged in the industry of marine surveying and his business was based in Bunbury. It was the case however, that the work was able to be performed anywhere around the world. Mr Tranfield was employed in Western Australia and was paid from Mr Parker's business operations in this State. Mr Tranfield resided in the State in between overseas work and the contract of employment was terminated in Western Australia.

33 At first instance, the Commission held that the absence of any work done in this State by Mr Tranfield, meant that there was not a sufficient connection with the jurisdiction. The matter went on appeal to the Full Bench, which upheld the appeal and found the factors to which I have referred above, in relation to Mr Parker's business, along with Mr Tranfield being employed in the State, residing in the State and his employment being terminated in the State, were sufficient to establish a connection with Western Australia. The employer appealed to the Industrial Appeal Court.

34 In considering the relevant principles in relation to extra-territorial application of legislation, McKechnie J at pars 12-20 said as follows:

> Legal principles
>
> 12 It is not disputed that the Western Australian Parliament may make laws for the peace, order and good government of Western Australia and that pursuant to this power its laws may have extra-territorial effect.
>
> 13 In ***R v Foster; Ex parte Eastern and Australian Steamship Co Ltd*** (1959) 103 CLR 256 the High Court held that the Commonwealth Conciliation and Arbitration Commission had jurisdiction to make a binding award in respect of a log of claims served on a shipping company whose ships, registered in London, traded between South Australia and Japan. Dixon CJ was of the view that there was sufficient connection with Australia because the disputants were, for the most part, connected by residence, or the likes, with Australia and the demands were made with respect to employment for which masters, officers, and engineers were engaged in Australia.
>
> 14 Taylor J at 289 took the view that it was necessary for there to be a substantial connection with Australia.
>
> 15 Windeyer J, although in dissent on the overall decision, on this point expressed the position as follows at 311—
>
> > "*Prima facie* Commonwealth statutes ought not to be so construed as authorising any subordinate law-making body to deal with matters which have no real and substantial connexion with Australia or to make any rules except such as can be directly or indirectly enforced by the authority of Australian courts."
>
> 16 Later decisions of the High Court appear to have moved from the requirement of a "real and substantial connexion" to a less substantial connection.
>
> 17 In ***Pearce v Florenca*** (1975-76) 135 CLR 507 the High Court considered the validity of the Western Australian *Fisheries Act*.
>
> 18 After discussing the rule requiring a relevant connection between the personal circumstances on which the legislation operates and the State, Gibbs J said—
>
> > "For that reason it is obviously in the public interest that the test should be liberally applied, and that legislation should be held valid if there is any real connexion—even a remote or general connexion— between the subject matter of the legislation and the State. And it has been established by a series of well-known decisions, which are collected in *Cobb & Co Ltd v Kropp* [1967] 1 AC 141, at pp 154-156, that within their limits the legislatures of the States have powers 'as plenary and as ample' as those of the Imperial Legislature itself. It would seem anomalous and unfitting that the enactments of such a legislature should be held invalid on narrow or technical grounds."
>
> This test was followed by the ***High Court in the Union Steamship Co of Australia Pty Ltd v King*** (1988) 166 CLR 1 by the Court at 14.
>
> 19 The cases are not precisely analogous in that the appellant does not dispute that the *Industrial Relations Act 1979* might have extra-territorial effect in a proper case. Instead it is contended that the particular facts have no sufficient connection with the State. However, I consider the principles expressed in ***Pearce v Florenca*** and confirmed in ***Union Steamship v King*** are generally applicable to resolve factual questions about the extra-territorial effect of the *Industrial Relations Act* in particular circumstances.
>
> 20 As a result it may be that the nexus between the factual circumstances and Western Australia may not be so substantial as the Commission considered necessary to ground jurisdiction. A real, even though a remote, or general connection with Western Australia is sufficient.

35 Hasluck J also dealt with the issue at pars 61-68 in the following terms:

> 61 In ***Union Steamship Co of Australia Pty Ltd v King*** (1988) 166 CLR 1, the High Court recognised that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself; that is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony.
>
> 62 When it came to legislation having an extra-territorial operation, it was thought initially that colonial legislatures were incompetent to enact such legislation. However, as the High Court noted in the ***Union Steamship*** case at 12, it was eventually accepted beyond any question that colonial legislatures had powers to make laws which operate extra-territorially, and this view applied with equal force to the parliaments of the Australian States, including the State of Western Australia.
>
> 63 The High Court went on to say, however, that the 19th century decisions did not deny that the words "peace, order and good government" might be a source of territorial limitation. As each State parliament in the Australian federation has power to enact laws for its State, it is appropriate to maintain the need for some territorial limitation in conformity with the terms of the grant, notwithstanding the recent constitutional rearrangements for Australia effected

by the *Australia Act 1986* (Cth) whereby State parliaments have power to enact laws having an extra-territorial operation.

64 The High Court said further at 14—

> "The new dispensation is, of course, subject to the provisions of the Constitution (see s 5(a) of each Act) and cannot affect territorial limitations of State legislative powers *inter se* which are expressed or implied in the Constitution. That being so, the new dispensation may do no more than recognize what has already been achieved in the course of judicial decisions. Be that as it may, it is sufficient for present purposes to express our agreement with the comments of Gibbs J in *Pearce* where his Honour stated that the requirement for a relevant connexion between the circumstances on which the legislation operates and the State should be liberally applied and that even a remote and general connexion between the subject matter of the legislation and the State will suffice."

65 This approach is reflected in the reasoning of various members of the High Court in an earlier case, namely, ***R v Foster; Ex parte Eastern and Australian Steamship Co Ltd*** (1959) 103 CLR 256. Dixon CJ said this at 275—

> "It does not follow from the adoption of the Statute of Westminster that Commonwealth legislation should be construed as if there were no territorial considerations affecting its interpretation. Indeed it may be fairly said that when the consequence of invalidity is removed from extra-territorial legislation it becomes more important to give effect to the presumption governing the interpretation of English legislation. That is a presumption which assumes that the legislature is expressing itself only with respect to things which internationally considered are subject to its own sovereign powers."

66 In the same case, Windeyer J said this at 311—

> "It is, however, one thing to say that the Commonwealth Parliament has a constitutional power to make a law having a wide extra-territorial operation. It is quite another thing to say that it has confided the exercise of such a power to a subordinate law-making authority. The Parliament might, as a matter of law, exercise its powers in defiance of international comity and heedless of whether or not its laws could be enforced. It does not follow that it has authorised its industrial tribunals to do so. *Prima facie* Commonwealth statutes ought not to be so construed as authorizing any subordinate law-making body to deal with matters which have no real and substantial connexion with Australia or to make any rules except such as can be directly or indirectly enforced by the authority of Australian courts."

67 One of the clearest statements that legislation is presumed not to have extra-territorial effect appears in ***Jumbunna Coal Mine NL v Victorian Coal Miners' Association*** (1908) 6 CLR 309 at 363. O'Connor J said—

> "In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most Statutes, if their general words were to be taken literally in their widest sense, would apply to the whole world, but they are always read as being *prima facie* restricted in their operation within territorial limits. Under the same general presumption every Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law."

68 Nonetheless, it is now apparent from the reasoning of the High Court in the ***Union Steamship*** case, that it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person of rights and obligations. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers.

36 In applying these principles to the facts of the case the Court (Kennedy J agreeing) came to the conclusion that a number of features of the relationship between Mr Tranfield and Mr Parker pointed to a real and substantial connection with Western Australia. The location and physical activities of the employee Mr Tranfield were not to be seen as conclusive. In that case the industry of the employer, Mr Parker, contained sufficient features so as to constitute a real connection with the State, along with the other matters referred to. Thus, the relevant connection with the State may be remote, but it must be real. Contrary to the submissions of Mr Cripps, this is not a matter involving fairness or individual rights, it is a question of fact in each case.

37 At the time the Agreement was signed between Mr Cripps and Talga Gold as it then was, Mr Thompson testified that he was not sure where both he and Mr Cripps were at the time of signing. However, there is no doubt that the head office of both Talga Resources and Talga Mining is based in West Perth in this State. As noted above, the work to be performed by Mr Cripps was intended to be and was performed by him solely in Sweden. The work was to be performed by Mr Cripps on behalf of Talga Resources, an Australian public company headquartered in Western Australia. As the Country Manager Sweden, Mr Cripps was required to project manage the work required to be performed. The detailed list of Mr Cripps' duties as Country Manager were set out in Schedule 2 – Duties in the Agreement. In short, it was to oversee the Swedish operations of the company. The reference to the industries in which the Talga group of companies were involved was set out in the affidavit of Mr Thompson. At pars 17-26 of his affidavit, Mr Thompson said:

> 17. Both Talga Resources (formerly Talga Gold) and Talga Mining have their head office in Western Australia.
>
> 18. However, Talga Sweden's head office was and remains in Sweden.
>
> 19. I perform most of my managerial duties from the office in Western Australia, but occasionally travelled to Sweden to visit Talga's sites and on those occasions met with Mr Cripps.
>
> 20. Talga Resources formed Talga Sweden in 2011 and pegged mineral titles in Sweden prospecting for graphite.

21. In 2012, Talga Resources acquired a Canadian company with a branch in Sweden that owned multiple mineral titles over graphite, iron and cobalt deposits.

22. In 2012, several of these projects were drilled and have been the subject of ongoing mineral exploration to date.

23. During this time the mineral titles were transferred from the Canadian company to Talga Sweden.

24. At October 2012, Talga Sweden had five graphite projects in Norrbotten County, north Sweden which consisted of multiple graphite prospects and several iron ore projects with multiple iron prospects.

25. Europe is one of the world's minor graphite markets with approximately 10% of global demand, but Europe currently imports around 95% of its graphite needs.

26. Talga Sweden carried on the business of mineral exploration in Sweden, and this was the industry in which Mr Cripps was employed.

38 It was common ground that Mr Cripps did not perform any work for any of the Talga companies in Western Australia. Whilst employed in Sweden, Mr Cripps was based in Lulea. Given the responsibilities of the position as Country Manager Sweden, it was also not contested that Mr Cripps had no need to and seemingly did not return to Western Australia in the course of his employment. As noted, at the commencement of his employment, in accordance with the Agreement, in late October 2012, Mr Cripps relocated to Lulea and Talga Resources paid Mr Cripps' relocation expenses, including his temporary accommodation costs. In about mid November 2012, Mr Cripps was paid the balance of his relocation costs in the lump sum of approximately $16,500.

39 According to Mr Thompson, once these payments were made to Mr Cripps, Mr Cripps was responsible for all of his living arrangements and costs in Sweden. Also, according to Mr Thompson, Talga Resources was not responsible for relocating Mr Cripps back to Western Australia or for any associated costs. In any event, Mr Thompson said that he understood that Mr Cripps had intended to stay in Sweden for family reasons. As to the payment arrangements, I refer to my earlier discussion of these matters in relation to the issue of the proper identity of the employer.

40 According to the evidence of Mr Thompson, both he and Mr Cripps were the only two senior managers of Talga Sweden. Also Mr Thompson said he understood that Mr Cripps was employed in Sweden from January 2013 by Talga Sweden. Mr Thompson appeared to base this understanding on a requirement of Swedish law to the effect that at least one director of a Swedish company must be a resident of that country, and that it was necessary in order for Mr Cripps to work in Sweden on a permanent basis. This was not contested by Mr Cripps.

41 The circumstances surrounding the termination of the employment of Mr Cripps was also outlined in Mr Thompson's evidence, some of which I have already referred to above. It appears the letter of termination of employment was prepared by an officer of Talga Resources, on Mr Thompson's instructions. This was done from Talga Resources' West Perth office.

42 Another factor of note is the choice of law clause, which I have referred to above. The parties have by their bargain, specified that the laws of Western Australia would apply to the Agreement and matters arising out of it, unless a competent court or tribunal finds to the contrary. In relation to choice of law provisions in contracts generally, in *MKZ Transport Pty Ltd v Perth Freightlines Pty Ltd* (2011) 91 WAIG 426, which was a decision of the Road Freight Industry Tribunal of Western Australia, and concerned an owner-driver contract specifying Victoria as the jurisdiction chosen by the parties in relation to contractual disputes, at pars 35- 41 I said:

> 35 As a matter of principle, it seems to me where parties have, as a part of their bargain, agreed to submit exclusively to the jurisdiction of courts and tribunals of a particular State, then absent any compelling reason to the contrary, parties should be held to their bargain (See generally R Garnett *The Enforcement of Jurisdiction Clauses in Australia* 1998 UNSW Law Journal Vol 21(1)).
>
> 36 That is, applying the relevant principles of private international law, where parties to a commercial agreement have by the terms of their agreement, set out a procedure for dispute resolution and to which jurisdiction they should submit in resolving disputes under a contract, then that provision should be given great weight.
>
> 37 This principle should be no less important in intra-national contracts as opposed to international contracts, where the parties have agreed to submit disputes arising under a contract to a foreign court. In the case of non-exclusive jurisdiction clauses, the courts appear to have taken a less stringent view.
>
> 38 Cases upholding exclusive jurisdiction clauses within Australian courts appear to have been decided despite situations where the balance of convenience may point to trial in another forum.
>
> 39 For example, in *Rick Manietta Pty Ltd v National Mutual Life Association of Australasia Ltd* (unreported Supreme Court Victoria per McDonald J 8 September 1995), in a case where the parties entered into a contract containing an exclusive choice of forum clause, the court was not persuaded to transfer the proceedings outside of the jurisdiction stipulated, despite the majority of evidence lying in another jurisdiction.
>
> 40 Similar results were achieved in *Bond Brewing Holdings Ltd v National Australia Bank Ltd* (unreported Supreme Court Western Australia per Wallwork J 16 February 1990) and *National Dairies WA Ltd v Wesfarmers Ltd* (unreported Federal Court of Australia per Tamberlin J 22 July 1996).
>
> 41 In *Air Attention WA Pty Ltd v Seeley International Pty Ltd* (unreported Supreme Court Western Australia per Walsh J 3 September 1996) a proceeding commenced in Western Australia was transferred to South Australia by reason of the operation of an exclusive jurisdiction clause in a contract. In dealing with this issue, Walsh J said at pp 6-7:
>
> > "One has to interpret the clause in light of what it says before and I emphasise that the jurisdiction clause which states:

> "And the parties hereby submit to the jurisdiction of the courts of that State and any courts having jurisdiction to hear appeals there from."

follows specifically from the words which appear before it:

> "this agreement shall be construed and governed by the laws applicable in the State of South Australia."

It therefore in my opinion, inevitably leads to the conclusion that it is an exclusive clause and I so find accordingly. In the alternative, if I am wrong in the conclusion that I have reached, I would in any event have come to the position that even if it is not an exclusive jurisdiction clause, nonetheless full weight should be given to it because that clause evidences the basic intent of the contracting parties that their obligations were to be determined in accordance with the laws of the State of South Australia. Even if the clause be construed, as I say it should not, to be not exclusive, nonetheless, in my view, that in itself would be sufficient reason to transfer the proceedings in any event to South Australia …

It is appropriate therefore when considering the merits of the application, as I have already emphasised, to take into account, amongst other things, principles extracted from private international law. To that extent the jurisdictional clause in the agreement is, in my view, a determinative feature of the application before me. Notwithstanding all the considerations which should be properly taken into account, and I do not overlook them, the question at the end of the day is, what do the interests of justice in this case dictate?

Due weight, of course, as I have said, must be given to the fact that the litigation was initiated in Western Australia and that was the plaintiff's choice. Nonetheless, the plaintiffs had, when they reached the agreement, laid down as part of their contractual bargain that the agreement was to be construed and governed by the laws applicable in the State of South Australia and the parties submit to the jurisdiction of the courts in that State."

43 Whilst as Talga Resources rightly submitted, the terms of a governing law clause may not always be conclusive, it is to be given considerable weight, unless in this case, the Commission reaches the view that countervailing factors strongly point to Swedish law as the governing jurisdiction. This is particularly so in the case where the choice of law clause is said to be exclusive. In this case, despite the endeavours of Talga Resources to persuade me to the contrary, I do not consider that there is no connection with the State. The Agreement entered into between the parties was one between a Perth based group of companies and Mr Cripps. At the time of the formation of the Agreement, both parties were resident in the State. Talga Resources and its group companies, apart from Talga Sweden, remain based in this State. Mr Cripps appears to have retained a residence in the State, being the same residence cited in both the Agreement and in his application to the Fair Work Commission.

44 It was the case of course, that Mr Cripps intended to and did work for Talga Resources in its Swedish operations. As I have already mentioned above, this was the object of the Agreement entered into between the parties. Whilst I accept that the work performed under the Agreement, apart from the first couple of weeks, was solely in Sweden in relation to the Swedish mineral resources operations of the group, and Mr Cripps was paid in Swedish currency in Sweden, at all times his employer under the Agreement was resident in this State. The Agreement contemplated all other things being equal, that the Western Australian jurisdiction would exclusively apply to the Agreement and any disputes between the parties to the Agreement. Mr Cripps' involvement in Talga Sweden, as a director and as its nominated Deputy Managing Director, was expressly contemplated by the Agreement and formed part of his duties as a senior employee of Talga Resources. It is to be recalled that the Industrial Appeal Court concluded in *Parker*, that the relevant connection between a party and this State to confer jurisdiction may be remote. But it has to be real. In this case, based on all of the evidence before the Commission, I consider that the employment of Mr Cripps by Talga Resources did have a real connection with Western Australia, in the sense that that principle was outlined in *Parker*.

Vexatious and frivolous

45 In circumstances where a party brings a multiplicity of proceedings involving the same parties for essentially the same relief, a court or tribunal may make orders to prevent an abuse of process. In the case of the Commission, such matters may be dealt with by the use of the powers under s 27(1)(a) of the Act.

46 The use of s 27(1)(a) for these purposes, was the subject of consideration in *Kim Anthony Fitzpatrick v Baulderstone Clough Joint Venture* (1999) 79 WAIG 2310. In this case Fielding SC dismissed an unfair dismissal claim on an application by the employer under s 27(1)(a), on the basis that the employee had an identical claim before the Australian Industrial Relations Commission in circumstances where there was no apparent doubt as to that tribunal's jurisdiction to deal with the matter before it. On appeal by the employee, the Full Bench dismissed the appeal.

47 As to the general principles applicable, Sharkey P said at 2311:

> The general principle is that a court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being prevented for an unjust end (see Moore and Others v Inglis (1976) 50 ALJR 589 at 591 per Mason J (HC)). His Honour cited with approval the reasons for judgment of Sir Gorell Barnes P in Logan v Bank of Scotland (No 2) [1906] 1 KB 141 at 150, and also Slough Estates Ltd v Slough Borough Council [1968] ChD 299 at 314-315 per Ungoed-Thomas J) (see also AEEFEU and Others v SCM Chemicals Ltd 75 WAIG 2507 at 2508 per Sharkey P and Henry v Henry (1996) 70 ALJR 480 at 484 per Brennan CJ and at 488 per Dawson, Gaudron, McHugh and Gummow JJ and the cases cited therein).
>
> Where two actions are brought by a person against the same person in different courts governed by the same procedure, it is, prima facie, vexatious to bring those two actions where one will lie (see Moore and Others v Inglis (HC) (op cit) and Logan v Bank of Scotland (op cit), as well as AEEFEU and Others v SCM Chemicals Ltd (op cit)).

The onus lies upon the party who brings a second action to show that it is not brought vexatiously. I apply those principles.

48 In a similar vein, I observed at 2312:

> Principles
>
> It is a general principle that in circumstances where a party has commenced proceedings in different jurisdictions that are governed by essentially the same procedure, and the same relief is available, that the second set of proceedings will prima facie be regarded as vexatious. In *Moore and Another v Inglis* (1976) 50 ALJR 59 the High Court considered this issue in the context of proceedings brought by a party in both the Supreme Court of the Australian Capital Territory and in the High Court. Mason J observed as follows at 591—
>
> *"The principal issue is whether, in the light of all the circumstances which I have outlined, the commencement by the plaintiff of the proceedings in this Court should be held to be vexatious and oppressive or to be an abuse of the process of the Court within the meaning of O.63, r 2. In McHenry v Lewis (1982), 22 Ch D 397, at p408 Bowen L J referred to "the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end". After quoting this passage, Sir Gorell Barnes P in Logan v Bank of Scotland (No 2), (1906) 1 KB 141, at p150 went on to say: "For instance, in this country, where two actions are brought by the same person against the same person in different Courts governed by the same procedure, and where the judgements are followed by the same remedies, it is prima facie vexatious to bring two actions where one will lie..."*
>
> The onus lies on the party who has commenced the second proceedings, to establish that those proceedings were not vexatiously commenced. It is the commencement of the second proceedings that, in my view, in applying the authorities referred to above, creates the abuse of process. In these circumstances, in my opinion, it is not the case that the Commission should countenance the commencement and maintenance of concurrent proceedings in both the AIRC and the Commission for unfair dismissal, unless good reason exists why this should be so. An example of where good reason may exist, is in the case where there is a real and serious prospect of a jurisdictional difficulty in the first set of proceedings. In that event, a party would have a sound defence to any application to stay or dismiss proceedings on the basis of an abuse of process, in that the party would be doing no more than preserving it's right to bring the action in a tribunal of competent jurisdiction.

49 It seems to me the same principle applies irrespective as to whether the second or further proceedings have been commenced in this State or elsewhere.

50 Talga Resources made further submissions in the alternative that if the Commission found that Mr Cripps' claim had a sufficient connection with Western Australia, the Commission should nonetheless, dismiss Mr Cripps' application because it is vexatious and frivolous. This submission was based on the fact that Mr Cripps has brought claims previously against Talga Resources and this was said to be the third one. Thus, it was submitted that the Commission should exercise its powers under s 27(1)(a) of the Act and dismiss the application.

51 For the following reasons, which I can relatively shortly state, I am not persuaded by Talga Resources' submissions in this respect. Firstly, it was not clear on the evidence that Mr Cripps did in fact commence proceedings in Sweden in respect of what he now claims in these proceedings. The first letter from a Union in Sweden seemed to be a general demand. It did not appear to go any further. The second correspondence or claim, from Mr Cripps' then Swedish lawyer, was also somewhat unclear as to its status. It had the appearance of a letter of demand, with the document, or at least the English translation of it, not appearing to refer to the institution of a formal claim or proceeding before a court or tribunal. It did not appear from Mr Thompson's evidence that the subject matter of either claim or demand, had been progressed. The Fair Work Commission claim was for different relief to that sought in this matter. In any event, those proceedings were discontinued.

52 In all of these circumstances, I cannot be satisfied that the situation contemplated in *Fitzpatrick* has application in this case.

Conclusion

53 For all the foregoing reasons Mr Cripps' substantive application will now be listed for hearing. Declarations and an order now issue.

2016 WAIRC 00920

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR BRUCE CRIPPS
	APPLICANT
	-v-
	TALGA RESOURCES LTD ACN 138 405 419 ABN 32 138 405 419 AUSTRALIAN PUBLIC COMPANY, LIMITED BY SHARES FORMER NAME: TALGA GOLD LIMITED
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 9 DECEMBER 2016
FILE NO/S	B 120 OF 2016
CITATION NO.	2016 WAIRC 00920

Result	Declaration and order issued
Representation	
Applicant	Ms H Millar of counsel
Respondent	Mr T Smetana of counsel

Declarations and Order

HAVING heard Ms H Millar of counsel on behalf of the applicant and Mr T Smetana of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

(1) DECLARES that at all material times the employer of Mr Cripps was Talga Resources Ltd.

(2) DECLARES that Mr Cripps' claim the subject of the herein application has a sufficient connection with the State of Western Australia to be within the Commission's jurisdiction.

(3) ORDERS that the application by Talga Resources Ltd under s 27(1)(a) of the Act be and is hereby dismissed.

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

2017 WAIRC 00320

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR BRUCE CRIPPS
	APPLICANT
	-v-
	TALGA RESOURCES LTD ACN 138 405 419 ABN 32 138 405 419 AUSTRALIAN PUBLIC COMPANY, LIMITED BY SHARES FORMER NAME: TALGA GOLD LIMITED
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 8 JUNE 2017
FILE NO/S	B 120 OF 2016
CITATION NO.	2017 WAIRC 00320

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Mr T Smetana of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

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

2017 WAIRC 00257

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR RICKY DOUGLAS DOW
	APPLICANT
	-v-
	COLIN COOK (GOLDSTAR TRANSPORT)
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 10 MAY 2017
FILE NO/S	U 42 OF 2017
CITATION NO.	2017 WAIRC 00257

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr C Cooke

Order

HAVING heard the applicant on his own behalf and Mr C Cooke 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 discontinued.

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

2017 WAIRC 00272

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00272
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 13 APRIL 2017
DELIVERED	**:**	TUESDAY, 16 MAY 2017
FILE NO.	**:**	U 209 OF 2016
BETWEEN	**:**	RICKY KING
		Applicant
		AND
		GOURMET BEEF PTY LTD
		Respondent

CatchWords	**:**	Unfair dismissal application - Respondent a trading corporation - Western Australian Industrial Relations Commission does not have jurisdiction - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979*
		Fair Work Act 2009 (Cth)
Result	**:**	Application dismissed for want of jurisdiction
Representation:		
Applicant	**:**	Mrs J King, as agent
Respondent	**:**	Ms M Ibrahim, as agent

Reasons for Decision

1 Ricky King has brought an application asserting that he was employed, and unfairly dismissed, by "Brian McDonald and Russel Taylor, The Beef Shop".

2 Mr McDonald and Mr Taylor both deny that they employed Mr King. They assert that he was employed by an entity named "Gourmet Beef Pty Ltd" which is the trustee of the Three Blind Mice Unit Trust.

3 Mr McDonald and Mr Taylor made an oral application, supported by various documents, to amend the name of the respondent to be the entity which they say employed Mr King.

4 They made a further application that, if the application to amend the name of the respondent is successful, the matter be dismissed because Gourmet Beef Pty Ltd is a trading corporation and the Western Australian Industrial Relations Commission does not have jurisdiction to hear and determine unfair dismissal claims against trading corporations, such entities being national system employers under the *Fair Work Act 2009* (Cth).

5 I am satisfied on the basis of the documentation provided to me that there is an entity named Gourmet Beef Pty Ltd (see Certificate of Registration of a Company dated 28 August 2015). I am also satisfied that Mr King was employed by it. The entity purchased the business "The Beef Shop" in which Mr King was employed (see "Agreement for Sale of Business The Beef Shop"). The entity also paid Mr King his wages (see three bank account payment details showing payments from Gourmet Beef Pty Ltd to Mr King dated 4 February 2016, 2 June 2016 and 10 November 2016).

6 Mr King did not attempt to convince me that Gourmet Beef Pty Ltd was not a trading corporation. Even if all Gourmet Beef Pty Ltd did was act as trustee for a trust it would still be a trading corporation given that in that role it owns and operates the business "The Beef Shop". I find it is a trading corporation.

7 The error Mr King made in naming Mr McDonald and Mr Taylor as his employers is easy enough to understand. He dealt with these persons in relation to his employment. He never received a written contract of employment. The documentation he received in relation to his employment (such as his Payment Summaries provided for taxation purposes) nominated "The Beef Shop" as the payer of his wages. He had no idea that a company had been created, seemingly for the purchase of the business, and that that company operated the business, and employed him, in its role as the trustee for a unit trust established and known as the Three Blind Mice Unit Trust pursuant to a resolution of the company directors.

8 If Mr King's excusable misunderstanding has caused delay in him bringing his claim in the correct forum then to the extent delay is relevant it seems to me, for what it is worth, that the delay is equally excusable.

9 However, his claim before the Western Australian Industrial Relations Commission must be dismissed for want of jurisdiction.

2017 WAIRC 00273

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICKY KING
	APPLICANT
	-v-
	GOURMET BEEF PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 16 MAY 2017
FILE NO	U 209 OF 2016
CITATION NO.	2017 WAIRC 00273

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mrs J King as agent
Respondent	Ms M Ibrahim as agent

Order

HAVING heard Mrs J King, as agent, on behalf of the applicant and Ms M Ibrahim, as agent, on behalf of the respondent;

AND HAVING given reasons for decision in which I determined to amend the name of the respondent and dismiss the claim for want of jurisdiction;

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

1. That the name of the respondent in U 209 of 2016 be changed to "Gourmet Beef Pty Ltd".
2. That the application be dismissed for want of jurisdiction.

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

2017 WAIRC 00028

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYNETTE LINDECKER
	APPLICANT
	-v-
	MINGENEW PRIMARY SCHOOL
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 17 JANUARY 2017
FILE NO/S	U 150 OF 2016
CITATION NO.	2017 WAIRC 00028

Result	Order made
Representation	
Applicant	In person
Respondent	Ms N Sanders and with her Ms S Bhar

Order

HAVING heard the applicant on her own behalf and Ms N Sanders and with her Ms S Bhar for the respondent on 17 January 2017 and by consent;

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

1. That the name of the respondent in U 150 of 2016 be changed to "Director General, Department of Education".

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

2017 WAIRC 00345

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00345
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 27 APRIL 2017
DELIVERED	**:**	FRIDAY, 16 JUNE 2017
FILE NO.	**:**	U 150 OF 2016
BETWEEN	**:**	LYNETTE LINDECKER
		Applicant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
		Respondent

CatchWords	**:**	Industrial law (WA) - Termination of employment for substandard performance - Alleged harsh, oppressive and unfair dismissal - Applicant claims performance was at all times of a satisfactory standard - Applicant alleges substandard performance claim a fabrication and that review of performance incompetent - Allegations of fabrication and incompetency rejected - Found performance of applicant was substandard at the relevant time - Proper process and investigation undertaken - No denial of natural justice - Respondent's concerns about substandard performance reasonably held and demonstrated - Held dismissal not harsh, oppressive or unfair - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr J Carroll, of counsel, and with him Ms N Sanders

Reasons for Decision

1 Mrs Lynette Lindecker was employed as a part-time Level 1 cleaner at Mingenew Primary School at the time of her dismissal in September 2016 for substandard performance and had been employed at the school for over 19 years.

2 Mrs Lindecker asserts that her performance was at all times of a satisfactory standard. She asserts that allegations of substandard performance were manufactured against her by the school's Principal, Ms Nadine Pulbrook, and Registrar, Ms Deirdre Poultney, out of spite and that the review of her performance by a Departmental employee from Perth, Mr James Plowman, cannot be relied upon because:

(1) he was senile;

(2) he was inappropriately influenced by the Principal and Registrar at Mingenew Primary School; and

(3) he took an approach of telling the Department what it wanted to hear to protect his employment.

3 I could, of course, reject Mrs Lindecker's assertions and still find that her dismissal was unfair if the evidence gave me a basis to do so. Having reviewed the evidence, I am confident that there is no issue not relied upon by Mrs Lindecker that raises a question as to the fairness of her dismissal. In particular, the process was sound in that the issue of substandard performance was squarely raised with Mrs Lindecker, an opportunity for improvement was given, with the consequence of a failure to improve explained to her, and an appropriate investigation was carried out, and Mrs Lindecker given an opportunity to comment on the outcome of the investigation, before the decision to dismiss her was taken.

4 I am, of course, not at this point making any conclusion about the standard of Mrs Lindecker's performance. I am merely stating that, in my view, the matter can be fairly decided by deciding the issues Mrs Lindecker has put before me, being that her performance was in truth of a satisfactory standard and that any allegation, and indeed evidence, to the contrary should not be relied upon for the reasons given above.

5 Counsel for the respondent submitted that I only need to determine Mrs Lindecker's allegations relating to Mr Plowman because the respondent ultimately relied upon his reports to dismiss Mrs Lindecker. While it is true that the respondent may not have dismissed Mrs Lindecker but for the reports of Mr Plowman, the approach suggested by counsel is an overly technical one. A common sense approach is that Mr Plowman would not have conducted his reviews had not Ms Pulbrook raised issues relating to Mrs Lindecker's performance with the respondent. It is not as if Mr Plowman was conducting a regular scheduled review or even a random spot check and issues came to light which the respondent acted upon. The respondent acted upon Mr Plowman's findings in light of all of the circumstances which included that Mr Plowman's findings indicated there was a continuing problem with Mrs Lindecker's performance or that previous performance issues raised had not been addressed and were not reasonably likely to be addressed.

6 I consider it necessary, and in any event desirable, to deal with all of Mrs Lindecker's contentions.

7 Mrs Lindecker says that the Registrar at Mingenew Primary School, Ms Deirdre Poultney, has disliked her for many years commencing when Ms Lindecker questioned with her the appropriateness of some of Ms Poultney's behaviour.

8 Mrs Lindecker says that on at least one occasion Ms Poultney's dislike of her boiled over when Ms Poultney swore at her. This was in 2015, soon after Ms Pulbrook commenced at Mingenew Primary School as the Acting Principal. While Ms Poultney admitted, and admitted in these proceedings, that conduct and its inappropriateness she denied in her evidence in chief that she had a "personal vendetta against Ms Lindecker". Ms Poultney was not cross examined.

9 In relation to Ms Pulbrook, Mrs Lindecker says that, when she became the Acting Principal at Mingenew Primary School in early 2015, Ms Pulbrook quickly became close, both professionally and socially, with Ms Poultney and Mrs Lindecker asserts that Ms Poultney poisoned Ms Pulbrook's mind against her.

10 Mrs Lindecker noted that Ms Pulbrook began to raise issues about her performance soon after she commenced as Acting Principal. Mrs Lindecker also said the issue of her performance was raised soon after Ms Poultney's inappropriate conduct toward her mentioned above and Mrs Lindecker's complaint to the District Office about it.

11 Ms Pulbrook in her evidence denied any conspiracy against Mrs Lindecker and said that the performance management of Mrs Lindecker resulted purely from her concerns about the standard of Mrs Lindecker's performance, that she conducted her part of the process fairly, and without inappropriate influence from Ms Poultney, and that she ultimately referred the matter to the Department which made the decision to dismiss Mrs Lindecker without material input from her.

12 I do not accept Mrs Lindecker's assertion that there was nothing much wrong with her performance and that Ms Pulbrook and Ms Poultney concocted a case against her.

13 I have had regard to the five "Cleaning Inspection Reports" covering the period 1 July 2015 to 15 September 2015 that formed part of Exhibit 1.

14 Those reports, on their face, indicate an ongoing problem with Mrs Lindecker completing her cleaning duties to a satisfactory standard. Although the reports show that on some occasions, in some areas, there was improvement, the overall impression they give is one of substandard performance.

15 In my view either the reports are either a complete fabrication or they show ongoing performance issues. I do not accept that the contents of the reports are in any way fabricated.

16 It is an extraordinary allegation and my assessment of Ms Pulbrook and Ms Poultney is that they would be highly unlikely to have conspired in this way over a period of months, and in such a detailed way, escalating the matter to a more senior level, when any fabrication, relating as it did to physical evidence, would have been easily uncovered.

17 Also Mrs Lindecker, in my view, is not the kind of person who would have quietly suffered the production of reports in relation to her that contained invented material. At the time of production of the first, and each subsequent report containing allegedly false material, Mrs Lindecker would have reacted in some way, probably by providing the report to the District Office alleging it was false.

18 I say this even though Mrs Lindecker gave evidence that in her view attempts to raise matters with the District Office had not produced satisfactory results for her in the past. I cannot accept that, even against that background, Mrs Lindecker would have suffered false written reports about her without taking some sort of action.

19 Instead it seems Mrs Lindecker tried, at least on some occasions, to address the issues contained therein so that the follow-up inspection conducted after each report went well for her.

20 Ultimately, I find that Mrs Lindecker's attempt to address the very real issues raised by the reports were not successful and the matter was escalated to the Departmental level for that reason.

21 I can see why Mrs Lindecker may have come to the conclusion that Ms Pulbrook and Ms Poultney "had it in for her".

22 There was clearly bad blood between Mrs Lindecker and Ms Poultney. The hearing was told that Ms Poultney had sworn at Mrs Lindecker and that she had ceased being Mrs Lindecker's line manager due to conflict and immediately following that incident.

23 In relation to Ms Pulbrook the problems with Mrs Lindecker's performance were raised, and actioned, soon after she commenced as the Acting Principal and at a time when Mrs Lindecker had been at Mingenew Primary School for many years without her performance being called into question. This would have caused Mrs Lindecker to wonder about Ms Pulbrook's motivation.

24 Unbeknown to Mrs Lindecker, which would have added to her confusion, this was actually because Ms Pulbrook "had received comment on occasion from outside the Department [from] community members and …. a nurse who had … stated that the school was not of a satisfactory … standard" (ts 132). Ms Pulbrook never raised with Mrs Lindecker her motivations and so, as I say, Mrs Lindecker was left to speculate on them.

25 Also it is clear that Ms Pulbrook took a strictly formal approach to Mrs Lindecker and this formal approach clearly upset Mrs Lindecker. At least in part, I find this was because Mrs Lindecker's performance was not up to scratch and she did not like being challenged in relation to it. Also, however, it is clear to me that Ms Pulbrook and Mrs Lindecker were very different people and Ms Pulbrook's manner annoyed Mrs Lindecker.

26 Mrs Lindecker complained to me that Ms Pulbrook gave her feedback and raised issues with her by reading documentation to her and not allowing her to contribute. I think there is some truth in that complaint. Ms Pulbrook, it seemed to me, preferred form over substance in her dealings with Mrs Lindecker. Perhaps because of their different personalities or Ms Pulbrook's knowledge of the difficulties others had encountered in engaging with Mrs Lindecker it is clear that no attempt at establishing rapport was made by Ms Pulbrook, despite her being new to the role of Acting Principal. She preferred to manage Mrs Lindecker in a way that favoured style over substance and Mrs Lindecker may have found this off putting.

27 That aspect of Ms Pulbrook's approach was experienced in these proceedings.

28 Ms Poultney in her evidence had freely, and to her credit, admitted that she had behaved unprofessionally toward Mrs Lindecker on one occasion and said that, because of that incident, "it was felt that it would be best if [Ms Pulbrook] took over the line management [of Ms Lindecker]." (ts 94).

29 In her evidence in chief, Ms Pulbrook was asked why she became Mrs Lindecker's line manager instead of Ms Poultney. I reproduce the relevant passage:

> "Can you explain why you were - became Line Manager for Ms Lindecker?---Ah, it was in the best interests of the school for me to, ah, oversee the line management of the cleaning staff.
>
> Yes.
>
> Is there any particular incident, I suppose, which led to you being the Line Manager?---I - ah, in consultation with the Department, I felt that it was my role to - to be the Line Manager."
>
> (ts 101)

30 Ms Pulbrook not having responded to these two questions on the issue, I then took the matter up with Ms Pulbrook as follows:

> "You've been asked twice why did you become the Line Manager and you said it was in the best interest of the school, then you were asked whether there was a particular incident and you avoided that question. Can you tell me why you became the Line Manager of Ms Lindecker, please?--- Because there was a conflict of interest between - or a conflict between, ah, Ms Lindecker and Mrs Poultney.
>
> Yes. What was the conflict?---… They - they tended to not get on and I think - I - I'm very much in a - the capacity of building teams and I felt that if two people are not getting on then I needed to step in and, um, rectify the situation and if, … someone - then they both can just report to me and I can rectify things or sort things out or clarify things as a third person that it was impartial.
>
> Okay. Give me some examples of conflict, please?---… They tended to disagree, …, over, … maybe sentences that they had said to each other, … conversations that they may - that they interpreted things differently. … I felt there was a lot of, … anxiety between the two of them. …, they didn't seem to listen to each other as I would have liked them to."
>
> (ts 102)

31 There may be elements of truth in Ms Pulbrook's evidence but the failure to refer to the incident that Ms Poultney said led to the change in line management indicated that Ms Pulbrook was more comfortable in mouthing generalities than getting to the substance of an issue.

32 Difficulties with Ms Pulbrook's approach also became clear in Ms Pulbrook's evidence under cross-examination. It appeared clear to me that Ms Pulbrook had decided to take a "formulaic" approach to Mrs Lindecker's questioning rather than listening to the questions and trying to deal with them in a substantial way.

33 In answer to the first three questions asked by Mrs Lindecker, Ms Pulbrook answered: "I would disagree with that statement", "I would disagree with that, Ms Lindecker" and "I would disagree with you, Ms Lindecker." (ts 130).

34 Those answers may have been all well and good except that they were not responsive to the questions asked. Some allowances might be made for the process being an unfamiliar one for Ms Pulbrook but my impression of Ms Pulbrook was that she was not nervous. My impression was that Ms Pulbrook did not like engaging with Mrs Lindecker and that this extended to her thinking she could neutralise her questions by blandly stating in relation to each that she "did not agree" with them. This informs my view of how Ms Pulbrook was likely to have dealt with Mrs Lindecker during her employment.

35 I was also concerned by Ms Pulbrook's refusal to entertain the prospect that she had used the term "deeper process" in her evidence when describing the escalation of the process relating to Mrs Lindecker from performance development to performance management.

36 Ms Pulbrook did use that term, as is shown at (ts 103), but when Mrs Lindecker referred to it when she was cross-examining Ms Pulbrook, and I took up the point to encourage Ms Pulbrook to respond to the question asked of her, Ms Pulbrook denied that she had used the word "deeper" and said she would not use such a word to describe the escalation.

37 That Ms Pulbrook was firm that she had not used the word, even after I had said she had, and did not allow for the possibility that she may have done so, showed me not only was Ms Pulbrook not a nervous witness but also gave me some insight into what Mrs Lindecker may have faced in getting any point of view across to Ms Pulbrook that disagreed with her own.

38 Finally, I admit to concern about Ms Pulbrook's evidence that the Cleaning Inspection Reports only contained details in relation to matters needing attention and that they were never intended to give a complete picture of Mrs Lindecker's performance. Ms Pulbrook gave evidence that filling out the reports comprehensively, that is showing both the areas where Mrs Lindecker's performance was satisfactory and those where her performance was unsatisfactory, "would be just too overwhelming" (ts 113).

39 I would have thought it would be more overwhelming to receive reports focussing on negative matters but even if Ms Pulbrook considered there were good reasons for the approach taken, and even if these were explained to Mrs Lindecker, it would have been dispiriting at the least to receive a series of reports relating to your performance which concentrated solely on unsatisfactory aspects without noting satisfactory ones.

40 For the above reasons, I find that Mrs Lindecker has not brought and pursued her claim based on allegations of bias against Ms Pulbrook and Ms Poultney knowing them to be unfounded and fanciful.

41 I do not think that Ms Pulbrook took the action she did with a heavy heart and I think certain matters would have led Mrs Lindecker to think Ms Pulbrook had it in for her. However, I think, ultimately, that Mrs Lindecker has taken the personality differences and her objection to Ms Pulbrook's approach, in general and in relation to particular matters, too far in suggesting that they have led Ms Pulbrook and Ms Poultney to fabricate evidence against her.

42 Mrs Lindecker's reliance on these matters cannot deflect attention from her performance and in relation to that I reject that Ms Pulbrook and, to the extent she was involved, Ms Poultney fabricated evidence against her.

43 That is, by the time the Department became involved in this matter I consider that the evidence establishes that there were real question marks against Mrs Lindecker's performance, that those concerns had been brought to her attention and that, despite being given an opportunity to do so, she had not adequately addressed them.

44 Resolution of this matter then becomes a simple thing.

45 On two occasions Mr Plowman inspected Mrs Lindecker's work at Mingenew Primary School. On both occasions Mrs Lindecker had notice of this occurring sufficiently well in advance. Being a person well qualified to express such a view, and not being a person previously involved with Mrs Lindecker or anyone at Mingenew Primary School in any way, and taking into account the area Mrs Lindecker had to clean, the location of Mingenew Primary School and the age of its buildings, Mr Plowman came to the view that Mrs Lindecker's work was well below standard.

46 He said in evidence variously:

> "I just did not feel that the effort had been put into the cleaning."
>
> (ts 148)
>
> "[The presence of cobwebs] just had not been rectified."
>
> (ts 148)
>
> "[Between the first and second inspection] there was a slight improvement, but I didn't think it was … improved enough."
>
> (ts 152)
>
> "It just seemed like no effort was put into vacuuming or … the ledges were dusty and things that should have been picked up during the spring clean I don't believe were done."
>
> (ts 152)
>
> "…there could have been a huge improvement [if more effort had been made by Ms Lindecker]."
>
> (ts 153)
>
> "I had a very close look at the toilet bowls and everything else, but I just could not see that any effort had been made to clean them."
>
> (ts 155)

47 Mr Plowman had also reported to the Department, in his report dated 12 February 2016, which was part of Exhibit 1, that:

> "if the cleaning standards are not improved immediately there could be an adverse health effect to the students and staff."
>
> (ts 151)

48 Mrs Lindecker made no inroads into Mr Plowman's evidence at all. In relation to each of her allegations against him I find as follows:

(1) That Mr Plowman was senile – I do not proceed on the basis Mrs Lindecker was attempting a medical diagnosis. She was trying to convey to me that Mr Plowman was not "switched on", to use a colloquial term. She relied for this upon

Mr Plowman attending on the wrong day on one occasion and some other matters. There is nothing in the allegation. Having observed Mr Plowman give his evidence, it is clear he is very much "switched on";

(2) That Mr Plowman was inappropriately influenced by Ms Pulbrook and Ms Poultney – There is no evidence to support the allegation. Mr Plowman denied it and I accept his denial and reject the allegation; and

(3) That Mr Plowman told the Department what he thought it wanted to hear to preserve his employment – This was a preposterous allegation made without any foundation at all. I reject it out of hand. That Mr Plowman actually retired by choice just a few months after completing the second review of Mrs Lindecker's work to enjoy a well-earned retirement would make the allegation comical if it were not so serious and so recklessly made.

49 That Mrs Lindecker did not take up the opportunity presented by Mr Plowman's involvement to improve her performance and impress him is telling. Mrs Lindecker seemed to honestly believe that there was nothing wrong with her work because she had not had complaints about it before 2015 and because she was convinced Ms Pulbrook and Ms Poultney were motivated by malice rather than real concern. In this belief she was wrong. Her work was substandard by 2015, whatever it may have been in the past. Ms Pulbrook had real and well-founded concerns about Mrs Lindecker's work regardless of whether she and Mrs Lindecker had a poor relationship and whatever Mrs Lindecker's view may have been of her. Mr Plowman's conclusions were based on the honest and reasonable assessments of an experienced and credible person.

50 The respondent was entitled to act in the way it did on the information it had before it. I note that Mrs Lindecker was given the opportunity to comment before any decision was made. The decision to dismiss her was not harsh, oppressive or unfair and her application will be dismissed for the reasons given above.

2017 WAIRC 00344

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYNETTE LINDECKER
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 16 JUNE 2017
FILE NO/S	U 150 OF 2016
CITATION NO.	2017 WAIRC 00344

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr J Carroll, of counsel, and with him Ms N Sanders

Order

HAVING heard the applicant on her own behalf and Mr J Carroll, of counsel, and with him Ms N Sanders for the respondent;

AND HAVING given reasons for decision in which I determined to dismiss the claim;

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

THE application be dismissed.

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

2017 WAIRC 00288

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR NAYORI LOJORE
	APPLICANT
	-v-
	MRS SUI JOHANSEN ST BARTHOLOMEW HOUSE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 23 MAY 2017
FILE NO/S	U 59 OF 2017
CITATION NO.	2017 WAIRC 00288

Result Parties' names amended

Order

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

WHEREAS in the forms filed by the applicant and correspondence between the applicant and the Commission it was apparent that the applicant had incorrectly identified herself; and

WHEREAS in the respondent's *Form 5 – Notice of answer* filed on 9 May 2017, the respondent informed the Commission of the respondent's proper name; and

WHEREAS on 23 May 2017, the Commission convened a conference for the purpose of conciliation and scheduling; and

WHEREAS at the conference, the parties agreed that their respective names should be amended to reflect their true identity; and

WHEREAS the Commission is of the opinion that it is appropriate to issue an order amending the parties' names.

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

1. THAT the applicant's name be deleted and replaced by:

   "Nayore Lojore"

2. THAT the respondent's name be deleted and replaced by:

   "St Bartholomew's House Inc"

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

2017 WAIRC 00322

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES NAYORE LOJORE

APPLICANT

-v-

ST BARTHOLOMEW'S HOUSE INC

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT
DATE FRIDAY, 9 JUNE 2017
FILE NO/S U 59 OF 2017
CITATION NO. 2017 WAIRC 00322

Result Application dismissed

Order

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

WHEREAS on 23 May 2017, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS the conference adjourned to enable the applicant to seek advice regarding the respondent's jurisdictional objection; and

WHEREAS on 7 June 2017, the applicant advised the Commission that she wished to withdraw her application.

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

THAT this application be, and is hereby dismissed.

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

2017 WAIRC 00291

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DENNIS MULLALLY
	APPLICANT
	-v-
	PIGDON PORTABLES
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 25 MAY 2017
FILE NO/S	B 49 OF 2017
CITATION NO.	2017 WAIRC 00291

Result	Application discontinued
Representation	
Applicant	In person
Respondent	Ms N Silby of counsel

Order

HAVING heard the applicant on his own behalf and Ms N Silby 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 discontinued.

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

2017 WAIRC 00324

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00324
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 31 MAY 2017
DELIVERED	**:**	TUESDAY, 13 JUNE 2017
FILE NO.	**:**	B 213 OF 2016
BETWEEN	**:**	ALBERT SCHOLTEN
		Claimant
		AND
		MVP ACCOUNTANTS & ADVISORS PTY LTD
		Respondent

CatchWords	**:**	Claim for payment of hours worked outside of "normal work hours" - Claimant a salaried professional - No contractual term for payment for overtime hours or payment for time off in lieu hours - Claim dismissed
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Claim dismissed
Representation:		
Claimant	**:**	In person
Respondent	**:**	Ms Z Weir, as agent, and with her Mr K Smith

Reasons for Decision

(Given extemporaneously at the conclusion of proceedings,

taken from the transcript as edited by the Commission)

1 The claim for payment of a sum equivalent to the "time off in lieu" the claimant says he accumulated during his employment with the respondent is dismissed. In my view the claim is a try on.

2 Mr Scholten was a certified practising accountant and was employed in a professional role by the respondent.

3 It is unclear what world Mr Scholten seeks to have us enter but in the real world there is rough and smooth in the life of a person employed as a professional.

4 The smooth is very smooth. Firstly, you receive a good income. Mr Scholten started on $100,000 in 2008 and his income rose to around $115,000 by the time of his resignation. A professional person also enjoys the privilege of being treated as a professional person, meaning that you may largely come and go as you please, so long as you meet your billable hours. This is the situation Mr Scholten found himself in in his employment with the respondent.

5 The rough, of course, is that to achieve your billable hours sometimes you have to work outside of the normal span of hours, sometimes you have to work extra hours and sometimes you have to work on a Saturday, things like that. It is just an expected part of the duties of a professional person and there was nothing unusual about the situation Mr Scholten found himself in.

6 That normal situation is all captured by Mr Scholten's individual employment agreement, which became exhibit 1 in these proceedings. Exhibit 1 gives a span of hours of 9:00am to 5:30pm, effectively office hours. Exhibit 1 makes it clear, at clause 5.4, to the extent it needed to be made clear to a professional person, that the hours of work are flexible and the employee may be required to make themselves available for work outside of normal work hours.

7 The reference to "normal work hours" in clause 5.4 ties up with the reference in clause 5.2 to 9:00am to 5:30pm, those being for Mr Scholten the normal work hours in the sense of span of hours or office hours. The "normal work hours" referred to in clause 5.4 were not intended, in my view, to represent a number of hours that Mr Scholten had to work.

8 To the extent there is any ambiguity in the contract the conduct of the parties over the years makes it plain that there was no expectation for Mr Scholten to work 7.5 hours or 8 hours or any number of hours per day so long as Mr Scholten achieved his billables. Mr Scholten came and went largely as he pleased. If Mr Scholten had been amazingly efficient and achieved his billable targets in less than 7.5 hours or 8 hours presumably the respondent would have had no problem with that.

9 Clause 5.5 of Exhibit 1 makes it clear that the employer is not required to make extra payment when an employee is required to work outside of normal work hours.

10 Of course, it is always the case than an employer and employee, regardless of the status of that employee, may come to some separate arrangement where an employee is paid overtime or allowed time off in lieu where the employee works hours outside of, or additional to, normal work hours.

11 In relation to time off in lieu it would appear that the respondent's HR Policy made provision for it. However, for overtime to be payable or a time off in lieu scheme to be triggered there needs to be specific agreement between employer and employee. Mr Scholten made it clear in his evidence under cross examination that there was no such agreement in relation to either payment for overtime or the accumulation of time off in lieu, let alone payment for unused time off in lieu.

12 Mr Scholten raised the subject matter of his claim with the respondent for the first time in December 2014 and the respondent made it clear, either expressly or by implication, that it rejected Mr Scholten's claim for time off in lieu. Mr Scholten then did not raise the issue again for a couple of years and only then a year after his employment had finished. I don't know what was going on with Mr Scholten at the point in time at which he raised the matter but it just adds to my feeling that this is all very much a try on on Mr Scholten's part. The claim is dismissed.

2017 WAIRC 00327

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALBERT SCHOLTEN
	CLAIMANT
	-v-
	MVP ACCOUNTANTS & ADVISORS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 13 JUNE 2017
FILE NO	B 213 OF 2016
CITATION NO.	2017 WAIRC 00327

Result	Claim dismissed
Representation	
Claimant	In person
Respondent	Ms Z Weir, as agent, and with her Mr K Smith

Order

HAVING heard the claimant on his own behalf and Ms Z Weir, as agent, and with her Mr K Smith for the respondent; and

WHEREAS I gave oral reasons for decision at the conclusion of proceedings on 31 May 2017 dismissing the claim; and

WHEREAS I have provided written reasons for decision on 13 June 2017;

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

The claim be dismissed.

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

2017 WAIRC 00315

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00315
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	TUESDAY, 6 JUNE 2017
DELIVERED	**:**	WEDNESDAY, 7 JUNE 2017
FILE NO.	**:**	B 24 OF 2017, B 25 OF 2017
BETWEEN	**:**	YI ZHANG; RONG ZHANG Applicants AND ENJOY GOING (AUSTRALIA) PTY LTD Respondent

CatchWords	**:**	Industrial Law (WA) - contractual benefits claims - whether the respondent was duly served with notice of the proceedings - applications to be listed for hearing and determination
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 27(1)(d)
		Industrial Relations Commission Regulations 2005 (WA) reg 24(2)(b)
Result	**:**	*Applications to be listed for hearing and determination*
Representation:		
Applicants	**:**	Ms Y Zhang and Ms R Zhang
Respondent	**:**	No appearance

Reasons for Decision

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

1 Ms Yi Zhang and Ms Rong Zhang claim that their employer, Enjoy Going (Australia) Pty Ltd (**Enjoy Going**), has denied them contractual benefits. The applicants ask the Commission to hear their claims together.

2 The applicants filed a statutory declaration of service declaring that they posted the *Form 3 – Notice of claim* for each application to Enjoy Going at 161B Leake Street Belmont.

3 Enjoy Going has not filed answers to the claims nor responded to the Commission's correspondence. The applicants have asked the Commission to list their matters for hearing.

4 The Commission has the power to proceed to hear and determine the matter in the absence of any party who has been duly served with notice of the proceedings: s 27(1)(d) *Industrial Relations Act 1979* (WA).

5 Service on a corporation may be effected by leaving it at, or sending it by pre-paid post to, its principal place of business or principal office in the State or the registered office of the corporation: reg 24(2)(b) *Industrial Relations Commission Regulations 2005* (WA) (**Regulations**).

6 In the circumstances, I must be satisfied that Enjoy Going's principal place of business, principal office in Western Australia or registered office is at 161B Leake Street Belmont before I can proceed to hear and determine these applications.

7 The applicants gave evidence that 161B Leake Street Belmont is the address of Enjoy Going's registered office. They tendered an ASIC company extract for Enjoy Going dated 22 May 2017. It shows that the registered office address is 161B L**ae**ke Street Belmont and the principal place of business is Level 1, 100 Havelock Street West Perth.

8 Ms Rong Zhang gave evidence that Enjoy Going bought the property at 161B Leake Street Belmont. She lived and worked at that address for about a year and a half after she started working for Enjoy Going in 2014.

9 Ms Yi Zhang and Ms Rong Zhang gave evidence that Level 1, 100 Havelock Street West Perth is no longer Enjoy Going's principal place of business. They say Enjoy Going no longer operates.

10 Both applicants gave evidence that the street name of Enjoy Going's registered office in the ASIC company extract is misspelled. It should be Leake Street, not Laeke Street. The applicants correctly point out that there is no Laeke Street in Belmont.

11 I accept Ms Yi Zhang's and Ms Rong Zhang's evidence. I find that Enjoy Going's registered office address is 161B Leake Street Belmont, which is the address Ms Yi Zhang used to serve Enjoy Going with the notices of claim in both applications.

12 I am therefore satisfied that Enjoy Going has been duly served in accordance with the Regulations.

13 I will order that applications B 24 of 2017 and B 25 of 2017 proceed to hearing and determination.

2017 WAIRC 00316

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YI ZHANG
	APPLICANT
	-v-
	ENJOY GOING (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 7 JUNE 2017
FILE NO/S	B 24 OF 2017
CITATION NO.	2017 WAIRC 00316

Result	Application to be listed for hearing and determination
Representation	
Applicant	Ms Y Zhang
Respondent	No appearance

Order

HAVING heard Ms Y Zhang on her 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* (WA), orders –

THAT application B 24 of 2017 proceed to hearing and determination.

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

2017 WAIRC 00317

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RONG ZHANG
	APPLICANT
	-v-
	ENJOY GOING (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 7 JUNE 2017
FILE NO/S	B 25 OF 2017
CITATION NO.	2017 WAIRC 00317

Result	Application to be listed for hearing and determination
Representation	
Applicant	Ms R Zhang
Respondent	No appearance

Order

HAVING heard Ms R Zhang on her 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* (WA), orders –

THAT application B 25 of 2017 proceed to hearing and determination.

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

2017 WAIRC 00318

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YI ZHANG
	APPLICANT
	-v-
	ENJOY GOING (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 7 JUNE 2017
FILE NO.	B 24 OF 2017
CITATION NO.	2017 WAIRC 00318

Result	Direction issued

Direction

HAVING heard Ms Y Zhang on her 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* (WA), directs –

1. THAT the applicant file and serve outlines of evidence and written submissions by 20 June 2017.
2. THAT this matter be listed for hearing after 4 July 2017.

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

2017 WAIRC 00319

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RONG ZHANG
	APPLICANT
	-v-
	ENJOY GOING (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 7 JUNE 2017
FILE NO.	B 25 OF 2017
CITATION NO.	2017 WAIRC 00319

Result	Direction issued

Direction

HAVING heard Ms R Zhang on her 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* (WA), directs –

1. THAT the applicant file and serve outlines of evidence and written submissions by 20 June 2017.
2. THAT this matter be listed for hearing after 4 July 2017.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Kylee Fraser	Bay of Isles Community Outreach Inc	B 58/2016	Commissioner D J Matthews	Discontinued
Matthew Angelo Zolezzi	Melbourne Solar Company Pty Ltd trading as Supercharged Solar	B 64/2016	Commissioner T Emmanuel	Discontinued
Matthew Hughes	Momentum Wealth	B 149/2016	Commissioner D J Matthews	Discontinued
Mr Mark Edwin Jones	Mr St John Hammond, Director Timberglen Pty Ltd	B 188/2016	Commissioner D J Matthews	Discontinued
Mr Michael Grey	The Trustee for the West Coast Meat Solutions Unit Trust (ABN 89 491 797 508)	U 66/2016	Commissioner T Emmanuel	Discontinued
Mrs Simone Shalders	Ms Lorna MacGregor, Lifeline WA	U 153/2016	Commissioner D J Matthews	Discontinued
Ms Louise Helena Laraia	Mr Rhett Francis Marron, trading as Marron Real Estate West	U 39/2017	Senior Commissioner S J Kenner	Discontinued
Robert Beeton	Shire of Meekatharra	U 180/2016	Commissioner D J Matthews	Discontinued
Robert Moss	Sandstone Shire Council	U 23/2017	Commissioner D J Matthews	Discontinued
Simon Andrew Wakefield	Michael Borlase Clough Projects Pty Ltd	B 72/2016	Commissioner T Emmanuel	Discontinued
Sokeina Marine	The Lacey Brown Family Trust T/A Mogumber Park	U 47/2016	Commissioner D J Matthews	Discontinued

CONFERENCES—Matters arising out of—

2017 WAIRC 00340

DISPUTE RE ALLEGED PROTRACTED DELAYS IN THE PROCESS OF ASSESSING A MODE OF EMPLOYMENT CLAIM MADE BY UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

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

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER T EMMANUEL

DATE FRIDAY, 16 JUNE 2017

FILE NO PSAC 5 OF 2017

CITATION NO. 2017 WAIRC 00340

Result Application dismissed

Order

WHEREAS this is an application for a compulsory conference under s 44 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 7 April 2017, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*;

NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT this application be, and by this order is, dismissed.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Emmanuel C	PSAC 13/2016	N/A	Dispute re alleged unfair treatment of union members	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department for Child Protection and Family Support	Emmanuel C	PSAC 28/2014	13/02/2015	Dispute re alleged failure to implement a Workload Management Tool	Discontinued
The Public Transport Authority of Western Australia	Western Australian Municipal, Administrative, Clerical and Services Union of Employees, The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees	Matthews C	C 20/2016	20/10/2016	Dispute re initiation of bargaining for Public Transport Authority Salaried Officers Industrial Agreement 2014	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	The Director General, Department of Education	Matthews C	C 3/2017	24/01/2017	Dispute re respondent implementing changes to industrial instruments	Discontinued
Western Australian Municipal Administrative, Clerical and Services Union of Employees	CEO, John Gillespie The Federation of Western Australian Police & Community Youth Centres (Inc)	Matthews C	C 5/2017	N/A	Dispute re alleged unfair treatment of union worker	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00308

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 27 JULY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS ALFRED SMITH
	APPLICANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 2 JUNE 2017
FILE NO/S	APPL 70 OF 2016
CITATION NO.	2017 WAIRC 00308

Result	Programming orders issued
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms A Tempest (of counsel)
Respondent	Ms G Little (of counsel) and with her Mr S Kemp (of counsel)

Order

HAVING HEARD from Mr T Kucera of counsel and with him Ms A Tempest on behalf of the applicant and Ms G Little of counsel and with her Mr S Kemp of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the matter be listed for a hearing not before 31 August 2017.
2. THAT by 30 June 2017, the parties provide the Commission with their unavailable dates for hearing.
3. THAT by 31 July 2017, the applicant provide the respondent with a list of all documents in his possession, custody or power that relate to APPL 70 of 2016 for the period 1 July 2011 to 30 June 2016, including but not limited to:
    (a) relevant financial information to calculate the Applicant's 'ordinary pay';
    (b) bank statements of Equator Plumbing Pty Ltd;
    (c) bank statements of Thomas Alfred Smith;
    (d) financial reports of Equator Plumbing Pty Ltd;
    (e) PAYG payment summaries for Thomas Alfred Smith;
    (f) tax invoices issued by Equator Plumbing Pty Ltd;
    (g) timesheets issued by Equator Plumbing Pty Ltd;
    (h) payslips of Thomas Alfred Smith.
4. THAT the applicant provide the respondent with a copy of any document contained in the list of documents within 7 days of a request made by the respondent.
5. THAT no later than 28 days before the date of the hearing, the applicant file and serve:
    (a) any affidavits of evidence and materials that it intends to rely on;
    (b) an outline of submissions;
    (c) a list of authorities.
6. THAT no later than 14 days before the date of the hearing, the respondent file and serve:
    a) any affidavits of evidence and materials that it intends to rely on;
    b) an outline of submissions;
    c) a list of authorities;
7. THAT the examination in chief of the respective witnesses be on affidavit, subject to the parties agreement or any contrary order of the Commission.
8. THAT, with the exception of those documents exchanged in accordance with Order 4 above or annexed to any affidavit contemplated by Orders 5 and 6 above, each party must provide the other party with copies of each document to be produced and relied upon by that party at the hearing no later than 10 days before the date of the hearing.
9. THAT within 7 days before the date of the hearing, the parties file any statement of agreed facts.

10. THAT no later than 7 days before the date of the hearing, each party give notice of:
    (a) its intention to cross-examine any witness; and
    (b) any objections to affidavits of evidence.
11. THAT where a party does not intend to cross-examine a witness, the witness' affidavit of evidence will be admitted as evidence without the requirement for the witness to attend the hearing.
12. THAT the parties have liberty to apply on short notice.

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

2017 WAIRC 00269

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE MICHAEL FERGUSON
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 15 MAY 2017
FILE NO/S	APPL 109 OF 2015
CITATION NO.	2017 WAIRC 00269

Result	Order issued
Representation	(by written correspondence)
Appellant	Mr S Joyce, of counsel
Respondent	Mr N John, of counsel

Order

WHEREAS on 1 May 2017 the Western Australian Industrial Relations Commission (WAIRC) issued Reasons for Decision upholding this appeal (2017 [WAIRC] 00238); and

WHEREAS at [111] of the Reasons, the parties were to confer about remedy and advise the WAIRC within 14 days of any agreement on remedy or agreed directions for a hearing; and

WHEREAS on 12 May 2017 the appellant advised the WAIRC that the parties request an extension of 7 days in which to advise the WAIRC as to the above; and

WHEREAS the WAIRC is of the opinion that this extension of time to enable the parties to continue to confer is necessary for the expeditious and just hearing and determination of the matter.

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

1. THAT the appellant advise the WAIRC on the status of this matter by Monday, 22 May 2017.
2. THAT the parties have liberty to apply.

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

2017 WAIRC 00332

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE MICHAEL FERGUSON
	APPLICANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 14 JUNE 2017
FILE NO/S	APPL 109 OF 2015
CITATION NO.	2017 WAIRC 00332

Result Order issued

Order

WHEREAS this is an appeal pursuant to s 33P of the *Police Act 1892* against a decision of the Commissioner of Police to take removal action; and

WHEREAS on 1 May 2017, the WAIRC issued reasons for decision, upholding the appeal and leaving the issue of remedy to be agreed by the parties or determined at a later date; and

WHEREAS on 14 June 2017, the parties agreed on programming orders and the WAIRC is of the view that this will facilitate the hearing and determination of the issue of remedy,

NOW THEREFORE the WAIRC, pursuant to the powers conferred under the *Industrial Relations Act 1979* and the *Police Act 1892*, and by consent, hereby orders:

1. The Commissioner of Police shall, by 15 June 2017, file and serve submissions as to the admissibility, in the WAIRC's consideration of section 33U of the *Police Act 1892*, of the material the subject of the Commissioner of Police's application under section 33R of the *Police Act 1892* filed 17 October 2016 dealt with in the WAIRC's decision [2017] WAIRC 00238.
2. The appellant shall, by 19 June 2017, file and serve submissions in response.
3. The Commissioner of Police shall, by 26 June 2017, file and serve any other affidavit evidence as to the matters in section 33U(3) through (8) of the *Police Act 1892*.
4. The Appellant shall, by 30 June 2017, file and serve any affidavit evidence on which he seeks to rely in the WAIRC's consideration of section 33U of the *Police Act 1892*.
5. Each of the Appellant and the Commissioner of Police shall, by 6 July 2017, file and serve written submissions as to the WAIRC's consideration of section 33U of the *Police Act 1892*.
6. The matter be listed for hearing as to the WAIRC's consideration of section 33U of the *Police Act 1892* during the week of 10 July 2017.
7. There be liberty to apply.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

2017 WAIRC 00278

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PRASHANT KOTHARI
	APPLICANT
	-v-
	THIVAAGARA MURTHY AND KANAGA SOLAMUTHU
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 18 MAY 2017
FILE NO/S	B 62 OF 2017
CITATION NO.	2017 WAIRC 00278

Result All communication to be by email

Order

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

WHEREAS on 2 May 2017 the applicant filed an application for permission to serve his application by email; and

WHEREAS by email on 12 May 2017, the applicant informed the Registry that the reason for the request is to not disclose his residential address to the respondent; and

WHEREAS the Commission is of the opinion that granting the request will not prejudice either party or the process of the application;

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

1. THAT the parties serve one another by the email addresses provided by each party.
2. THAT the Commission send all notices and correspondence to the parties by email.

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

2017 WAIRC 00331

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 28 MARCH 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JONATHAN SHIELDS
	APPELLANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR D HILL - BOARD MEMBER
	MR M DAULBY - BOARD MEMBER
DATE	WEDNESDAY, 14 JUNE 2017
FILE NO.	PSAB 4 OF 2017
CITATION NO.	2017 WAIRC 00331

Result Direction issued

Representation

Appellant Mr C Fogliani (of counsel)

Respondent Mr D Anderson (of counsel)

Direction

HAVING heard Mr C Fogliani (of counsel) on behalf of the appellant and Mr D Anderson (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 7 July 2017.
2. THAT the appellant file and serve outlines of evidence by 21 July 2017.
3. THAT the respondent file and serve outlines of evidence by 11 August 2017.
4. THAT the appellant file and serve an outline of written submissions by 25 August 2017.
5. THAT the respondent file and serve an outline of written submissions by 8 September 2017.
6. THAT this matter be listed for a three-day hearing after 22 September 2017.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2017 WAIRC 00290

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 3 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR POH KOOI LOH
	APPELLANT
	-v-
	MS ELIZABETH MACLEOD CHIEF EXECUTIVE EAST METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR DR I JENKINS - BOARD MEMBER MR M WARNER - BOARD MEMBER
DATE	WEDNESDAY, 24 MAY 2017
FILE NO	PSAB 5 OF 2017
CITATION NO.	2017 WAIRC 00290

Result Order issued

Order

HAVING heard Mr T Smetana (of counsel) on behalf of the appellant and Ms J van den Herik (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) orders –

1. THAT the appellant file and serve an amended *Form 11 – Notice of appeal to Public Service Appeal Board* by 8 June 2017.
2. THAT the respondent file and serve an amended *Form 5 – Notice of answer* by 22 June 2017.
3. THAT parties file a statement of agreed facts and bundle of agreed documents by 6 July 2017
4. THAT the respondent's objection to the Board's jurisdiction will be dealt with on the papers.
5. THAT the respondent will file and serve its submissions about jurisdiction by 20 July 2017.
6. THAT the appellant will file and serve its submissions about jurisdiction by 3 August 2017.
7. THAT the respondent will file and serve its submissions in reply, if any, by 10 August 2017.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2017 WAIRC 00339

APPEAL AGAINST DISCIPLINARY PENALTY AND DECISION ON 9 SEPTEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JONATHAN SHIELDS
	APPELLANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MR D SHAW - BOARD MEMBER MR S GREGORY - BOARD MEMBER
DATE	FRIDAY, 16 JUNE 2017
FILE NO	PSAB 19 OF 2016
CITATION NO.	2017 WAIRC 00339

Result	Order issued
Representation (by correspondence)	
Appellant	Ms P Marcano (as agent)
Respondent	Mr M Golesworthy (as agent)

Order

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

THAT application PSAB 19 of 2016 be adjourned until application PSAB 4 of 2017 is resolved by determination or agreement.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2017 WAIRC 00293

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KARYN LISIGNOLI
	APPLICANT
	-v-
	WAYNE NANNUP - CHAIRPERSON NYOONGAR WELLBEING AND SPORTS ABORIGINAL CORPORATION; NYOONGAR WELLBEINGAND SPORTS ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 26 MAY 2017
FILE NO.	U 32 OF 2017, B 54 OF 2017
CITATION NO.	2017 WAIRC 00293

Result	Direction issued

Direction

HAVING heard from Mr P Mullally (as agent) on behalf of the applicant and Mr S Farrell (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), and by consent, directs –

1. THAT application B 54 of 2017 be heard before application U 32/2017.
2. THAT the parties file a statement of agreed facts and bundle of agreed documents by 15 June 2017.
3. THAT application B 54 of 2017 be adjourned until a decision in FBA 4 of 2017 issues.
4. THAT the parties have liberty to apply at short notice.

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

2017 WAIRC 00218

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS LOUISE HELENA LARAIA
	APPLICANT
	-v-
	MR RHETT FRANCIS MARRON, TRADING AS MARRON REAL ESTATE WEST
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 19 APRIL 2017
FILE NO/S	U 39 OF 2017
CITATION NO.	2017 WAIRC 00218

Result	Extension of time granted
Representation	
Applicant	No appearance required
Respondent	Mr R Marron

Order

HAVING heard Mr R Marron 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 28 April 2017.

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

2017 WAIRC 00328

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID DOUGLAS RIVETT
	APPLICANT
	-v-
	RICHMOND WELLBEING INC. ABN 36658041325
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 13 JUNE 2017
FILE NO/S	U 47 OF 2017, B 47 OF 2017
CITATION NO.	2017 WAIRC 00328

Result	Order issued
Representation	
Applicant	Mr D Hoffman (as agent) and Mr D Rivett
Respondent	Mr S Mare (as agent) and Ms Y Timson

Order

HAVING heard Mr D Hoffman (as agent) on behalf of the applicant and Mr S Mare (as agent) 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 applicant file further particulars for application B 47 of 2017 by 26 June 2017.
2. THAT the respondent file and serve outlines of evidence about jurisdiction by 26 June 2017.
3. THAT the respondent file and serve an outline of written submissions about jurisdiction by 10 July 2017.
4. THAT the applicant file and serve an outline of written submissions about jurisdiction by 24 July 2017.
5. THAT application U 47 of 2017 be listed for hearing the respondent's objection to jurisdiction after 7 August 2017.
6. THAT discovery be informal.
7. THAT the parties have liberty to apply at short notice.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Rockingham Montessori School (Enterprise Bargaining) Agreement 2015 AG 44/2016	05/24/2017	The Independent Education Union of Western Australia, Union of Employees, United Voice, Rockingham Montessori School	(Not applicable)	Commissioner D J Matthews	Agreement registered
Western Australian Fire Service Enterprise bargaining Agreement 2017 AG 9/2017	06/08/2017	Department of Fire and Emergency Services of Western Australia, United Firefighters Union of Australia West Australian Branch	(Not applicable)	Senior Commissioner S J Kenner	Agreement registered

EMPLOYMENT DISPUTE RESOLUTION ACT 2008—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008.

Application Number	Award, order or industrial agreement varied	Parties	Commissioner	Matter	Dates	Result
APPL 30/2016	N/A	N/A	Emmanuel C	Request for mediation	28/06/2016 26/08/2016	Concluded

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 2/2017	Donna Vicensoni	Director General, Department of Mines, Industry Regulation and Safety	Matthews C	Withdrawn	25/05/2017 10:23:58 AM
PSA 8/2015	Mr Mitchell Lee Penny	Director General Department of Housing	Emmanuel C	Discontinued	18/08/2016 12:00:28 PM
PSA 9/2015	Ms Louise Ann Bozich	Director General Department of Housing	Emmanuel C	Discontinued	18/08/2016 1:11:08 PM
PSA 10/2015	Mrs Naomi Moore	Director General Department of Housing	Emmanuel C	Discontinued	19/08/2016 1:18:01 PM

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2017 WAIRC 00286

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00286
CORAM : COMMISSIONER T EMMANUEL
HEARD : WRITTEN SUBMISSIONS: WEDNESDAY, 17 MAY 2017; FRIDAY, 19 MAY 2017
DELIVERED : MONDAY, 22 MAY 2017
FILE NO. : APPL 66 OF 2016
BETWEEN : MR LESLIE MAGYAR

Applicant

AND

DEPARTMENT OF EDUCATION

Respondent

CatchWords	:	Practice and procedure - Discovery, inspection and production of documents - Relevant principles - Application for costs - Order made
Legislation	:	*Industrial Relations Act 1979* (WA) s 27(1)(c), s 27(1)(o)
Result	:	*Application for the production of documents and costs dismissed*
Representation:		
Applicant	:	Mr N Marsh (of counsel)
Respondent	:	Ms R Hartley (of counsel)

Cases referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

Magyar v Department of Education [2017] WAIRC 00211; (2017) 97 WAIG 393

Reasons for Decision

1 Mr Magyar has referred to the Commission the Department of Education's finding that he committed a breach of discipline when he disobeyed a direction. The direction was not to alter his classroom without consulting his line manager, which the Department says Mr Magyar did when he established a standalone computer in his classroom. Mr Magyar also disagrees with the penalty imposed, which was a reprimand and a fine of one day's pay.

2 Mr Magyar's referral under the *Public Sector Management Act 1994* (WA) is listed for hearing next week.

3 Last month I dismissed Mr Magyar's four interlocutory applications for an order that the Department produce a large number of documents: ***Magyar v Department of Education*** [2017] WAIRC 00211; (2017) 97 WAIG 393(***Magyar***).

4 Mr Magyar has made a fifth application for orders that the Department provide a large number of documents, many of which are the same documents he has sought before. He also asks me to order that the Department pay his costs of this application.

5 As I state in ***Magyar***, discovery is not available as of right in this jurisdiction. The Commission will only order discovery under s 27(1)(o) of the *Industrial Relations Act 1979* (WA) if it is just to do so and necessary for the fair disposal of the case: ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd*** (1995) 75 WAIG 1801, 1805.

6 I must decide whether the documents Mr Magyar wants are necessary to resolve the matter in dispute. To do that, I must decide whether the documents are relevant to the four questions I expect I will answer when deciding Mr Magyar's referral:

1. Did the Department direct Mr Magyar not to alter his classroom without consulting his line manager?
2. If so, was that direction a lawful order?
3. If so, did Mr Magyar disobey the lawful order?
4. Should there have been a lesser penalty or no penalty?

7 I must also decide whether to order the Department to pay Mr Magyar's costs of this application.

What documents does Mr Magyar want?

8 Mr Magyar wants a large number of documents, which he describes in 18 categories, labelled A to R. Documents in 10 of the categories (A, B, C, K, L, M, N, O, Q and R) were also the subject of Mr Magyar's previous discovery applications, which I dismissed.

9 In summary, the documents relate to:

a. background matters set out in Ms Ward's outline of evidence; and
b. matters mentioned in paragraph 2.11 of the Standards and Integrity Directorate Investigation Report, which is part of the parties' bundle of agreed documents.

Are the documents necessary to resolve the matter in dispute?

10 Mr Magyar's submissions focus on describing the documents he seeks, rather than explaining why the documents are necessary to resolve the matter in dispute. He says he needs the documents:

a. because the Department has a policy of documenting 'all matters of this type' and therefore there should be documentary evidence of the allegations made by Ms Ward; and
b. to 'better understand the case that he is facing'.

11 I understand the Department's submission to be that the documents Mr Magyar wants, if they exist, relate to background information. They are not necessary to resolve the matter in dispute.

12 Mr Magyar says he needs the documents to better understand the case that he is facing. Leaving aside concerns I may have about Mr Magyar continuing to focus on allegations which were not the subject of findings made against him, I am satisfied that from the Department's notice of answer and its witnesses' outlines of evidence, the Department's case should be very clear to Mr Magyar. Mr Magyar does not need the documents to understand the Department's case. Further, the Department has confirmed that it will not seek to tender any documents other than the agreed documents already filed by the parties.

13 I am not persuaded that I should order the Department to produce the documents merely because those documents may exist.

14 The documents are not relevant to questions 1, 3 or 4.

15 It is not clear to me from Mr Magyar's notice of referral or submissions that he disputes that the direction was a lawful order. In any event, on the case Mr Magyar has presented, I am not persuaded that the documents Mr Magyar seeks are relevant to question 2 or necessary to resolve the matter in dispute.

16 I do not consider that the documents Mr Magyar seeks are necessary for the fair disposal of this case. It would not be just to order the Department to produce them.

Costs

17 Given that the Commission does not have the power to order legal costs: s 27(1)(c) *Industrial Relations Act 1979* (WA) and Mr Magyar does not explain what other costs he has incurred or why the Commission should order the Department to pay them, I will not make an order for costs.

18 Mr Magyar's application for the production of documents and costs is dismissed.

2017 WAIRC 00287

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	MONDAY, 22 MAY 2017
FILE NO/S	APPL 66 OF 2016
CITATION NO.	2017 WAIRC 00287

Result	Application for the production of documents and costs dismissed
Representation	
Applicant	Mr N Marsh (of counsel)
Respondent	Ms R Hartley (of counsel)

Order

HAVING heard Mr N Marsh (of counsel) on behalf of the applicant and Ms R Hartley (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), orders:

THAT the applicant's application for the production of documents and costs filed on 12 May 2017 be, and by this order is, dismissed.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2017 WAIRC 00304

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	IAN MOGGRIDGE PTY LTD
	APPLICANT
	-v-
	TOLL TRANSPORT PTY LTD T/AS TOLL IPEC
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 31 MAY 2017
FILE NO/S	RFT 30 OF 2015
CITATION NO.	2017 WAIRC 00304

Result Application dismissed

Order

WHEREAS this is an application referred pursuant to s 40 of the *Owner-Drivers (Contracts and Disputes) Act 2007*; and

WHEREAS on 27 January 2016, 17 February 2016 and 21 March 2017, the Tribunal convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conference on 17 February 2016, the respondent raised a jurisdiction objection of a similar nature to another application before the Tribunal, and the conference concluded on the basis that the application would be held over until that question was resolved; and

WHEREAS at the conference on 21 March 2017, the reached agreement in principle to settle the dispute; and

WHEREAS on 26 May 2017, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*; and

WHEREAS the Tribunal is of the opinion that further proceedings are not necessary or desirable in the public interest.

NOW THEREFORE, the Tribunal, pursuant to the powers conferred by the *Industrial Relations Act 1979* and the *Owner-Drivers (Contracts and Disputes) Act 2007*, hereby orders:

THAT the application be, and is hereby dismissed.

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