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FULL BENCH—Appeals against decision of Commission—

2017 WAIRC 00689

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 2 OF 2017 GIVEN ON 17 FEBRUARY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
FULL BENCH

CITATION	:	2017 WAIRC 00689
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
HEARD	:	FRIDAY, 16 JUNE 2017
DELIVERED	:	FRIDAY, 28 JULY 2017
FILE NO.	:	FBA 4 OF 2017
BETWEEN	:	SANDRA TYE Appellant AND CARE SERVICES ADMINISTRATION PTY LTD Respondent

ON APPEAL FROM:		
Jurisdiction	:	**Western Australian Industrial Relations Commission**
Coram	:	**Chief Commissioner P E Scott**
Citation	:	**[2017] WAIRC 00082; (2017) 97 WAIG 311**
File No.	:	**B 2 of 2017**

CatchWords	:	Industrial Law (WA) - Appeal against decision of Commission - Claim of contractual benefits for payment of outstanding salary for the remainder of a fixed term contract - Application summarily dismissed at first instance pursuant to s 27(1)(a) of the *Industrial Relations Act 1979* (WA) - Principles to be applied when considering to dismiss on grounds a claim has no question to be tried considered - Requirements of procedural fairness considered - Whether statutory 'right' created a contractual right considered - No error demonstrated
Legislation	:	*Industrial Relations Act 1979* (WA) s 23(1), s 26(1)(a), s 27(1)(a), s 27(1)(a)(ii), s 27(1)(a)(iv), s 29(1)(b), s 29(1)(b)(ii), s 49, s 49(4)(a) *Fair Work Act 2009* (Cth) *Industrial Relations Act 1988* (Cth)
Result	:	Appeal dismissed
Representation:		
Appellant	:	Mr P Mullally (as agent)
Respondent	:	Mr J F Raftos (of counsel)
Solicitors:		
Respondent	:	Piper Alderman

Case(s) referred to in reasons:

Alfresco Concepts Pty Ltd v Franse [2015] WAIRC 00244; (2015) 95 WAIG 437

Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410

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

Cubillo v Commonwealth of Australia [1999] FCA 518; (1999) 89 FCR 528; 163 ALR 395

Fancourt v Mercantile Credits Ltd [1983] HCA 25; (1983) 154 CLR 87

Health Services Union of Western Australia (Union of Workers) v Director General of Health [2008] WAIRC 00215; (2008) 88 WAIG 543

Kioa v West [1985] HCA 81; (1985) 159 CLR 550

Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health [2011] WAIRC 00192; (2011) 91 WAIG 291

Malloch v Aberdeen Corporation [1971] 1 WLR 1578

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

Plaintiff S10/2011 v Minister for Immigration and Citizenship [2012] HCA 31; (2012) 246 CLR 636

Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82

Ridge v Baldwin [1964] AC 40

Russell v Duke of Norfolk [1949] 1 All ER 109

S v The Director-General, Department of Racing, Gaming & Liquor [2012] WAIRC 00700; (2012) 92 WAIG 1630

Shaw v City of Wanneroo [2011] WAIRC 00924; (2012) 92 WAIG 275

Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87; (2006) 32 WAR 179

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2013] WAIRC 00366; (2013) 93 WAIG 1430

The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd (2006) 86 WAIG 1268

United Voice WA v The Minister for Health [2012] WAIRC 00319; (2012) 92 WAIG 585

University of Wollongong v Metwally [No 2] [1985] HCA 28; (1985) 60 ALR 68

Case(s) also cited:

Chee Keong Pek v Lomba Pty Ltd (1995) 75 WAIG 827

Fombason v Kimberley Individual and Family Support Association Incorporated [2015] WAIRC 00491; (2015) 95 WAIG 1430

Hotcopper Australia v Saab [2002] WASCA 190; (2002) 82 WAIG 2020

Johnston v Waldock, Director General, Department of Transport [2013] WAIRC 00924; (2013) 93 WAIG 1771

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

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2013] WAIRC 00754; (2013) 93 WAIG 1431

Reasons for Decision

SMITH AP:

Introduction

1 This appeal is instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision made by the Commission on 17 February 2017 dismissing application B 2 of 2017. Application B 2 of 2017 was an industrial matter referred to the Commission by Sandra Tye pursuant to s 29(1)(b)(ii) of the Act.

2 Ms Tye had been employed by Care Services Administration Pty Ltd. Her contract of employment was terminated on 3 November 2016.

3 In her application, Ms Tye claimed she had not been allowed a benefit she was entitled to under her contact of employment, namely, the payment of salary that she would have earnt if she had continued to work until the date of her fixed term contract expired on 31 October 2018, being an amount of $137,970.

4 Ms Tye's claim was called on for a preliminary hearing, before the learned Chief Commissioner on 13 February 2017, to determine whether Ms Tye's claim should be dismissed, pursuant to the power conferred by s 27(1)(a) of the Act, after Care Services filed a notice of answer stating that:

(a) it was a term of Ms Tye's employment contract that her employment would be subject to a six-month probationary period and during this period Care Services was entitled to terminate Ms Tye's employment by providing one week's written notice, or by paying Ms Tye one week's pay in lieu of notice; and

(b) on 3 November 2016, Ms Tye was provided with written notice of termination of the contract and paid one week's pay in lieu of notice.

5 After hearing the parties, the learned Chief Commissioner dismissed Ms Tye's application on 17 February 2017.

The terms of Ms Tye's contract of employment

6 Ms Tye commenced employment on 1 August 2016. Prior to her commencing work, the parties executed a comprehensive written contract of employment on 27 July 2016. The relevant clauses and schedule of the contract of employment for the purposes of this appeal are:

> **1. Appointment and Commencement**
>
> 1.1 The commencement date of this contract and your terms of employment with the Company will commence on the date set out in Item 2, and will continue until terminated in accordance with item 3 of the Schedule.
>
> 1.2 You will be engaged as a full-time fixed term employee and your employment will cease on the date set out in Item 2 of the Schedule. As a fixed term employee, there is no permanent or ongoing relationship between you and the Company.
>
> …
>
> **3. Probation**
>
> 3.1 Your employment will be subject to a six month probationary period.
>
> 3.2 Unless your employment is terminated for serious misconduct, during this period either you or the Company may terminate your employment by providing one weeks written notice. The Company may elect to pay you in lieu of part or all of your notice period, or alter your duties during the notice period.
>
> **4. Position and Title**
>
> 4.1 You will be employed in the position set out in Item 1 of the Schedule.
>
> 4.2 Initially, you will be required to report to the position listed in Item 6 of the Schedule.
>
> 4.3 The Company may change your position title and your reporting requirements, in accordance with the needs of the business and your skills and abilities. You expressly agree that where there is a change in your position title or reporting requirements, the terms and conditions of this contract will continue to apply to your employment.
>
> …
>
> **6. Hours of work**
>
> 6.1 You will be required to work an average of 38 hours per week, or as otherwise directed by the Company.
>
> 6.2 The Company may require you to work reasonable additional hours that are necessary for you to fulfil the requirements of your position. As this has been taken into account when setting your remuneration under this contract, you will not be entitled to additional remuneration for any work during these additional hours.
>
> …
>
> **18. Termination**
>
> 18.1 Other than where your Employment is terminated during the Probationary Period or where your Employment is terminated for serious misconduct, either you or the Company may terminate your Employment by giving four weeks written notice except when your employment is terminated during the Probationary Period or when your Employment is terminated for serious misconduct.
>
> 18.2 If the Company elects to terminate your employment and you are over 45 years of age and have more than 2 years of continuous service, the Company will provide you with an additional week of notice.
>
> 18.3 In either case, the Company may elect to pay you in lieu of part or all of your notice period.
>
> 18.4 During any period of notice, the Company may vary your duties, or require you not to attend for work, for all or part of your notice period.
>
> 18.5 On termination of your employment, you are required to do all such things to resign from any positions and offices (including any directorship) that you held with the Company, an Affiliate or on behalf of the Company, in connection with your employment.
>
> 18.6 The Post Employment Obligations, Intellectual Property and Confidential Information clauses will survive the termination of your employment with the Company (however occurring).
>
> 18.7 If you fail to provide the Company with the minimum period of notice set out in this clause, you expressly authorise the Company to deduct from any final termination payment payable to you on termination (including remuneration and accrued leave entitlements), an amount equivalent to the remuneration that would have been payable to you during the period of the shortfall in your notice. You agree that if these amounts are insufficient to cover the shortfall in your notice, you will owe to the Company an equivalent amount as a debt, due and payable on termination of your employment.
>
> 18.8 The Company may terminate your employment without notice, if you:
>
> (a) commit any serious or persistent breach of this contract;
>
> (b) are guilty of any serious misconduct or wilful neglect in performing your duties;
>
> (c) fail to comply with any reasonable directions of the Company;
>
> (d) are convicted of a criminal offence which, in the Company's reasonable opinion, affects your position as an employee of the Company;
>
> (e) do an unreasonable act which reflects unfavourably on the Company or any Affiliate.
>
> …

23. Entire agreement

23.1 This document records the entire agreement between the parties about your employment. You expressly agree that this contract contains all relevant terms that relate to your contract of employment with the Company, and that there are no other terms missing.

23.2 This contract supersedes and replaces all prior representations, contracts, agreements (whether oral or in writing) concerning your employment with the Company.

23.3 If there are any other matters that you have relied on during your discussions or communications with any representative of the Company, please let the person in Item 8 of the Schedule know before you sign this contract. The Company will then consider them and discuss them with you. If agreed, the terms of this contract will be amended to cover those matters, otherwise they will not apply.

…

SCHEDULE

Item 1	Position in which employed	Regional Consultant
Item 2	Commencement date of your employment	1st August 2016
Item 3	Termination date of this Contract	31st October 2018
Item 4	Total Remuneration Package (base salary plus superannuation)	$68,985
Item 5	Pay cycle	Fortnightly
Item 6	Report to Position	Regional Manager
Item 7	Place of Work	WA Office
Item 8	Contact person	HR Manager

Notice of termination letter

7 The notice in writing to terminate Ms Tye's contract of employment was set out in a letter to her dated 3 November 2016 from Ms Cassandra McLean, Care Services' Human Resources Manager. In the letter it is stated:

> This letter serves as an official Notice of your Termination from HCA effective 3 November 2016.
>
> As discussed, your probationary employment period with HCA is designed to assist in the evaluation of work performance to ascertain whether your appointment should continue after the expiry of the probation period. During your probationary period to date HCA has monitored your work performance. As discussed today, we wish to advise that you have not met the requirements for the position of Regional Consultant during your probation period.
>
> In accordance with your employment contract, during the probationary period the employee or HCA can terminate an employee's employment on the giving of one week's notice. You will be paid one week's pay in lieu of notice. We have also elected to pay you 2 extra days.

Submissions made on behalf of Ms Tye at first instance

8 It was argued on behalf of Ms Tye that she does have a case that she has an entitlement to claim that she was denied a contractual benefit to continue working for Care Services until her contract was to expire on 31 October 2018.

9 Ms Tye opposed the application made by Care Services that her claim be dismissed and made a submission that the threshold with respect to which Care Services must reach to succeed is to show that her case is so manifestly groundless or her application discloses a case which cannot possibly succeed.

10 The background to Ms Tye's claim is that she had been engaged to work on a project to provide clinical health practitioners to Australian Defence bases across Australia. Care Services' contract to provide these services is to expire in 2018. Ms Tye will say (when called to give evidence) that she was informed prior to entering into the contract of employment it was anticipated that the contract could be extended up to a period of nine years. In light of these circumstances, a submission was put on behalf of Ms Tye that she entered into the employment contract on the understanding that her employment period could be for a period of nine years.

11 In addition, an argument was put on behalf of Ms Tye that Care Services was not justified in terminating the employment of Ms Tye. In particular, a submission was made that Ms Tye disputes that her employment was terminated for the reasons advanced in the letter of termination and will say she was informed by the HR manager that her employment was terminated due to her taking an unauthorised day off work on 1 November 2016. Thus, it was put, to determine whether Ms Tye was authorised to take a day off work required an examination of the facts through the giving of evidence, and if her contentions were found to be the case, she was entitled to claim damages for a breach of contract for that right, as she had a right to work the balance of the term of her employment contract.

Reasons for decision given by the learned Chief Commissioner at first instance

12 In considering the test to be applied in determining whether an application should be dismissed under s 27(1)(a) of the Act, the learned Chief Commissioner observed that there are no rules in this jurisdiction, as there are in a number of courts and tribunals, to govern the way the Commission should deal with such an application. Consequently, she applied the principles that have been applied when considering applications to dismiss civil proceedings in a court in ***Cubillo v Commonwealth of Australia*** [1999] FCA 518; (1999) 89 FCR 528 [53]; 163 ALR 395 and ***Fancourt v Mercantile Credits Ltd*** [1983] HCA 25; (1983) 154 CLR 87, 99. In applying the observations made in these decisions, the learned Chief Commissioner found the

Commission ought to exercise 'exceptional caution' in dealing with an application that a claim be dismissed without the case being run, including evidence being heard and it should never be exercised unless it is clear that there is no real question to be tried. She then found, the question to be answered in the matter before her was whether Ms Tye's case was so clearly untenable that it cannot possibly succeed and whether there is a real question to be tried.

13 The learned Chief Commissioner had regard to the express terms of Ms Tye's contract of employment and to the notice of termination dated 3 November 2016. After considering these matters, she made the following findings:

(a) This is not a claim of harsh, oppressive or unfair dismissal. Nor is it a claim under the *Fair Work Act 2009* (Cth), of unlawful dismissal. It is a claim that seeks to enforce the contract by claiming payment for two years, said to be a term of the contract.

(b) The elements of a claim made under s 29(1)(b)(ii) are that:

(i) the employee has a benefit, not being a benefit arising under an award or order;

(ii) the benefit is one to which the employee is entitled under the contract of employment; and

(iii) the employer has not allowed the employee the benefit.

(c) The circumstances of the decision in ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307 are to be distinguished from the current matter. In ***Perth Finishing College***, the Full Bench dealt with a claim that Ms Watts had a fixed term contract and she had been denied the benefit of the unexpired term of the contract by her employer dismissing her prior to its expiration. In this matter, there is no entitlement to the remainder of the period of the contract because it is not strictly a fixed term contract. This is because there is a provision for it to be terminated during the probationary period, and subsequently, on notice. There is no challenge that Ms Tye was not paid notice in accordance with the contract. There is no allegation of a contravention of a provision of the contract of service. Rather, there is an allegation that the reason given for the termination is not the true reason.

(d) The case of ***Shaw v City of Wanneroo*** [2011] WAIRC 00924; (2012) 92 WAIG 275 can also be distinguished. That matter involved a dispute between the parties about who actually brought the employment to an end, and the Commission enquired as to the circumstances which brought about the termination and found that it was a constructive dismissal. This brought with it certain consequences arising from the terms of the contract. That is not the case in this matter. There is no contention that Ms Tye was not dismissed.

14 In the circumstances of this case, the learned Chief Commissioner found that:

(a) Ms Tye was dismissed on notice, in accordance with the terms of the contract. In those circumstances, there is no real allegation that a provision of the contract, a 'benefit' arising under the contract, has been denied to Ms Tye. The benefit she seeks is not one which arises under the contract. Whether the reason given in the letter is in conflict with other information she received does not mean that Care Services breached the contract by dismissing her and paying notice. She was not denied the benefit she claims, as she had no entitlement to work out the two years of the contract, as the contract allowed termination on notice.

(b) In that sense, there is no real question to be tried. Ms Tye's case is so clearly untenable that it cannot possibly succeed. There are no novel issues of law arising from the matter.

(c) The application will be dismissed pursuant to s 27(1)(a) on the basis that further proceedings are not necessary or desirable in the public interest, that there is no real question to be tried.

Grounds of appeal

15 There are six grounds of appeal. These are as follows:

GROUND A: NO REAL QUESTION TO BE TRIED

1. The learned Chief Commissioner erred in fact and in law when she found that there was no real question to be tried

PARTICULARS

1.1 The appellant was entitled to refer the industrial matter to the Commission pursuant to s29(1)(b)(ii);

1.2 The appellant claimed that she had been denied the opportunity to work the balance of her contract of employment;

1.3 She claimed that the exercise of the power by the respondent to terminate the contract of employment during the probationary period was an abuse of its power, not for a valid reason and a denial of a workplace right.

GROUND B: THAT THE APPELLANT'S CASE WAS SO CLEARLY UNTENABLE THAT IT CANNOT POSSIBLY SUCCEED

2. The learned Chief Commissioner erred in fact and in law when she found that the appellant's case was so clearly untenable that it cannot possibly succeed.

PARTICULARS

2.1 The appellant's case properly articulated was that she had been denied the opportunity to work the balance of her contract of employment when she was terminated;

2.2 The case could not be decided on face of the termination letter when it was asserted by the appellant not to have reflected the real reason for the dismissal;

2.3 No decision could be made under the *Industrial Relations Act 1979* without considering the evidence surrounding the dismissal.

GROUND C: FINDING THAT THE EMPLOYMENT CONTRACT WAS NOT STRICTLY A FIXED TERM CONTRACT

3. The learned Chief Commissioner erred in fact and in law when she found that the employment contract was not strictly a fixed term contract.

PARTICULARS

3.1 The employment contract in its terms was for a fixed period expiring on the 31st October 2018;

3.2 The expiry date of the appellant's employment contract coincided with the end of the respondent's project for which it had recruited the appellant;

3.3 The existence of terms where the respondent could terminate on notice did not derogate from the fixed term nature of the employment contract;

3.4 The appellant was employed on the basis of a fixed term contract;

3.5 The respondent's exercise of the power to terminate the fixed term contract was amenable to review by the Commission under the *Industrial Relations Act 1979.*

GROUND D: BREACH OF THE RULES OF NATURAL JUSTICE

4. The learned Chief Commissioner erred in fact and in law when she dismissed the appellant's case which was a referral of an industrial matter to the Commission by the appellant without proceeding to a full hearing of the evidence on the merits.

PARTICULARS

4.1 The appellant's case properly articulated was that she had been denied the opportunity to work the balance of her contract of employment when she was terminated;

4.2 The rules of natural justice require that where a person's property stands to be effected by a decision maker, then the appellant had the right to be heard and in this case the appellant had lost the opportunity to work for a substantial period for a substantial income in a position for which she had been recruited.

GROUND E: NOT NECESSARY OR IN THE PUBLIC INTEREST

5. The learned Chief Commissioner erred in fact and in law when she found that the appellant's case should be dismissed pursuant to s27(1)(a) of the *Industrial Relations Act 1979*

PARTICULARS

5.1 The appellant's case properly articulated was that she had been denied the opportunity to work the balance of her contract of employment when she was terminated;

5.2 Absence [sic] the benefit of a hearing and the evidence of the parties, the Learned Chief Commissioner had no basis to make findings that further proceedings were not necessary or desirable in the public interest.

GROUND F: FAILURE TO APPLY THE LAW WITH RESPECT TO SUMMARY DISMISSAL OF PROCEEDINGS

6. The learned Chief Commissioner erred in fact and in law when she found that the appellant's case came within the category of cases where the claim could be dismissed without the case being run.

PARTICULARS

6.1 The Learned Chief Commissioner cited previous legal authorities and precedents dealing with the summary dismissal of legal proceedings, but failed to apply or properly apply these principles to the appellant's claim;

6.2 In any event the Learned Chief Commissioner failed to apply the principles set out in s26(1)(a) namely when exercising the jurisdiction under the *Industrial Relations Act 1979* to act according to equity, good conscience and the substantial merits of the case;

6.3 Alternatively by the summary dismissal of the case, the Learned Chief Commissioner prevented the appellant from having her case heard and determined according to equity, good conscience and the substantial merits of the case and proceeding further with her claim.

Ms Tye's submissions at the hearing of the appeal

16 In grounds A, B and F, Ms Tye claims that the learned Chief Commissioner erred in fact and law in dismissing her claim summarily without allowing her to present her case by calling of evidence and for failing to determine the claim on the merits.

17 It is accepted that the learned Chief Commissioner did not err in applying leading authorities which require 'exceptional caution' and the need for the case to be hopeless and untenable for a matter to be dismissed without proceeding to evidence.

18 The case mounted in the claim by Ms Tye is that the dismissal was for reasons which may have breached her workplace right to take a day off work in lieu of overtime, and if such were the case, the dismissal could be reviewed by the Commission exercising its powers under the Act, according to equity, good conscience and the substantial merits of the case (s 26(1)(a)). Thus, it is said, if it is accepted that Ms Tye's contract of employment was unlawfully terminated, such a finding would trigger a common law right to damages.

19 When questioned about this argument at the hearing of the appeal, Mr Mullally, on behalf of Ms Tye, said that Ms Tye was seeking to have the dismissal measured against the 'general law', as expressed in the *Fair Work Act* which provides for a workplace right to take a day off work, which, if found to be breached, would result in Ms Tye being able to claim she was denied the right to work the balance of the term of her contract of employment. This is said not to be a claim for wages as such, but constitutes a claim for an award in the nature of damages to redress the matter by resolving the conflict in relation to the industrial matter in dispute between the parties.

20 It is not argued that the provisions of the *Fair Work Act* are implied into the contract of employment. It is argued that, by operation of law, the provisions of the *Fair Work Act* apply.

21 When questioned by the Full Bench as to why Ms Tye's claim was not brought in the Fair Work Commission, Mr Mullally said that a claim had been instituted for a general protections application for breach of workplace rights, but the claim was dismissed as it was brought out of time.

22 It is also argued that there is a legal tension between the fixed term of the contract, which Ms Tye says she was induced to accept by the representations made to her prior to entering into the contract of employment and the provisions of the contract therein for termination in the probation period and within the balance of the term. It is also said there is a 'classic' opportunity for an argument for the inclusion of an implied term in these circumstances (that if the termination clauses are exercised unreasonably, Ms Tye is entitled to be paid the remuneration she would earn during the balance of the term). Alternatively, an argument could be put that Care Services be estopped from exercising the power of termination except in cases of wilful and serious misconduct.

23 Thus, it is said with these points in mind, it could not be found that Ms Tye's case was completely devoid of merit.

24 In respect of the issues raised in grounds D and E of the appeal, it is argued that it is fundamental that Ms Tye was entitled to be heard and that this entitlement also raises a matter in the public interest. It is said, it follows therefore, that by being denied a right to be heard the rules of procedural fairness have been breached. In particular, Ms Tye should have been afforded more than just the opportunity to make a submission about her case; she should have been afforded the opportunity to present evidence and have her claim heard and determined on the merits.

25 In ground C, it is argued that Ms Tye's contract of employment was not intended to expire until at least 31 October 2018 and this was made clear from a representation made in an email from Mr Bud Ranasinghe, the Regional Manager, Defence Health, sent to Ms Tye on 26 July 2016 in which Mr Ranasinghe stated:

> Thank you for meeting with Shane and I this morning. It was great to catch up and I hope we did not overwhelm you with information!
>
> I am very pleased that you will be joining Healthcare Australia on 1 August 2016. I will forward a contract over in the next couple of days (all going to plan) and then you will have a chance to review the details. As discussed your base salary will be $63,000.
>
> Our contract with Medibank is for a period of two years commencing 1 November 2016. As such, your employment contract will reflect this and will be on a full time fixed term basis until 31 October 2018. However we hope that our contract with Medibank will be extended for a further nine years thereafter.
>
> I really believe you will add value to our team and the business and there are a lot of opportunities for you to grow and develop HCA Defence Health.
>
> If you have any queries please feel free to contact me.

26 In light of the representation that the employment contract would be on a full-time fixed term basis until 31 October 2018, a submission to the effect of the following was made that:

(a) as the contract was for a fixed term, the provisions for termination by the giving of notice to terminate cannot sit side-by-side with the fixed term;

(b) the Commission is empowered to examine the application of the terms of a contract allowing termination not only in an unfair dismissal claim but also in a claim for a denied contractual benefit; and

(c) arguments for an implied term that Care Services not act unreasonably when exercising a power of termination, or that Care Services be estopped by the representations, are arguments available to be made in support of Ms Tye's claim to preserve the integrity of the fixed term contract.

27 The email was not sought to be tendered at first instance, but was attached to Ms Tye's outline of submissions which was filed prior to the hearing of the appeal. Care Services objected to the admission of the document at the hearing of the appeal.

Conclusion

(a) Should the email dated 26 July 2016 be admitted into evidence?

28 Whilst s 49(4)(a) of the Act does not prohibit the Full Bench from admitting fresh evidence, it only does so if special or exceptional circumstances are made out. In ***Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health*** [2011] WAIRC 00192; (2011) 91 WAIG 291 it was observed [59] - [60]:

> The test to be applied by the Commission for admission of fresh evidence on an appeal was for many years set out in the decision of the Full Bench in ***Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Ltd*** (1990) 70 WAIG 3040, 3041 in which the Full Bench held that fresh evidence is only admissible if:
>
> (a) The evidence was not available to the parties seeking to tender it at the time of the trial and the evidence would not have been available to that party with reasonable diligence in the preparation of their case; and

(b) The evidence must be such that it would have had an important influence on the result of the trial and must be credible, but not necessarily beyond controversy.

The Full Bench modified this criteria in ***Underdown v Dowford Investments Pty Ltd*** [2005] WAIRC 01243; (2005) 85 WAIG 1437, when Sharkey P and Kenner C with whom Scott C agreed, said at [8] and [9] that fresh evidence 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. They also observed that they had put this last condition too low in ***George Moss Ltd*** and they wished to retract what they said in that case and substitute the stricter criteria. The modified principle was applied by the Full Bench in ***Merredin Customer Service Pty Ltd as trustee for Hatch Family Trust t/a Donovan Ford/Merredin Nissan and Donovan Tyres v Green*** [2007] WAIRC 01150; (2007) 87 WAIG 2789 [10].

29 In this matter, no explanation has been provided as to why the email was not sought to be tendered at first instance. In the absence of any explanation that could be said to raise special or exceptional circumstances, I am of the opinion the email should not be admitted by the Full Bench.

(b) Principles to be applied where an application is made to dismiss a matter on grounds no question to be tried

30 In ***United Voice WA v The Minister for Health*** [2012] WAIRC 00319; (2012) 92 WAIG 585, the Full Bench considered an appeal against a decision of the Industrial Magistrate's Court to summarily dismiss applications for enforcement of an industrial agreement, on grounds the claims did not disclose a reasonable cause of action. At [65] I observed:

Exceptional caution is required by courts and tribunals when exercising the power to summarily dismiss. A claim should not be dismissed other than when it is clear there is no real question of fact or law to be tried: ***General Steel Industries Inc v Commissioner for Railways (NSW)*** [1964] HCA 69; (1964) 112 CLR 125, ***Fancourt v Mercantile Credits Ltd*** [1983] HCA 25; (1983) 154 CLR 87. President Steytler in ***Talbot & Oliver (a firm) v Witcombe*** [2006] WASCA 87 summarised the applicable principles as follows:

[21] … An action should only be dismissed as frivolous or vexatious if it cannot possibly succeed. Moreover, in deciding whether an action could possibly succeed, a court of first instance should be astute not to risk stifling the development of law by summarily disposing of actions in respect of which there is a reasonable possibility that it will be found in the development of the law, still embryonic, that a cause of action does lie: *Hospitals Contribution Fund of Australia v Hunt* (1983) 44 ALR 365 at 373.

[22] Similar principles apply in the case of an application to strike out a statement of claim as not disclosing a reasonable cause of action: *Kimberley Downs Pty Ltd v State of Western Australia* unreported; SCt of WA; Library No 6414; 25 August 1986 at 6–7. In *Dalgety Australia Ltd v Rubin* unreported; FCt SCt of WA; Library No 5485; 24 August 1984, it was held that it is only in cases in which it can be seen from the outset that, however the facts be found, there is no basis for the legal conclusion contended for by the plaintiff that the pleading should be struck out. It has also been held in this jurisdiction that, in a case in which an application for summary judgment is combined with an application to the Court's inherent jurisdiction and with an application under O 20 r 19(1)(a) to strike out a pleading upon the basis that it discloses no reasonable cause of action, the Court is not confined by the manner in which the plaintiff has formulated his or her case on the pleadings and may consider not only the undisputed facts but also facts which are in dispute: *Bride v Peat Marwick Mitchell* [1989] WAR 383 at 394; and see, generally, Seaman *Civil Procedure Western Australia* (Vol 1) at [16.0.1] and [20.19.6].

31 The Commission has, however, a broader power to dismiss a matter than an Industrial Magistrate and is not confined to circumstances where it is clear there is no real question of fact or law to be tried: ***S v The Director-General, Department of Racing, Gaming & Liquor*** [2012] WAIRC 00700; (2012) 92 WAIG 1630 [15] - [17]. Pursuant to s 27(1)(a) of the Act, the Commission may dismiss a matter or refrain from further hearing on grounds that:

(a) a matter or part thereof is trivial; or

(b) further proceedings are not necessary or desirable in public interest; or

(c) the person who referred the matter does not have a sufficient interest; or

(d) for any other reason.

32 Notwithstanding the scope of s 27(1)(a), it is my opinion that where an application is made to dismiss a claim for contractual benefits referred to the Commission as an 'industrial matter' pursuant to s 29(1)(b)(ii) of the Act, on grounds that there is no real question to be tried in fact or in law, the principles that should be applied by the Commission, when considering whether to exercise the discretion to dismiss, are the principles considered by Steytler J in ***Talbot & Olivier (A Firm) v Witcombe*** [2006] WASCA 87; (2006) 32 WAR 179 [21] - [22].

33 When regard is had to the reasons given by the learned Chief Commissioner in considering whether to dismiss the application, it is clear that no error was made in the principles applied by her.

(c) The requirements of procedural fairness

34 In hearing and determining an application instituted pursuant to s 29(1)(b) of the Act, in respect of the statutory power conferred on the Commission by s 23(1) to enquire into and deal with any industrial matter, the Commission must observe the rules of procedural fairness. This is a well-established principle by application of the rule of common law that a power conferred by statute is to be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power: ***Plaintiff S10/2011 v Minister for Immigration and Citizenship*** [2012] HCA 31; (2012) 246 CLR 636 [97] (Gummow, Hayne, Crennan and Bell JJ); ***Re Refugee Review Tribunal; Ex parte Aala*** [2000] HCA 57; (2000) 204 CLR 82 [39] - [41] (Gaudron and Gummow JJ).

35 What the principles of procedural fairness require in particular circumstances depends upon the circumstances known to the decision-maker at the time of the exercise of the power: ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 627 (Brennan J). The duty is to act reasonably and fairly: ***Kioa*** (627) (Brennan J).

36 The hearing rule requires a decision-maker to provide a party to proceedings a reasonable opportunity of presenting his or her case: ***Russell v Duke of Norfolk*** [1949] 1 All ER 109, 118.

37 The direction in s 26(1)(a) of the Act, requiring each member of the Commission to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms, does not assist Ms Tye's arguments. As Ritter AP pointed out in ***Health Services Union of Western Australia (Union of Workers) v Director General of Health*** [2008] WAIRC 00215; (2008) 88 WAIG 543 [163] - [164]:

(a) section 26(1)(a) is not a source of jurisdiction;

(b) section 26(1)(a) applies only to the exercise of jurisdiction conferred by legislation; and

(c) the Commission cannot ignore the substantive law in the exercise of its jurisdiction.

38 Section 27(1)(a) of the Act expressly empowers the Commission to dismiss any matter before it at any stage of the proceedings (which includes hearing an application to dismiss at a preliminary or interlocutory stage) without a full hearing of evidence and submissions going to the merits of a claim, providing the preconditions for the exercise of the power are made out.

39 Consequently, when regard is had to the relevant circumstances of an express statutory power to dismiss an application referred pursuant to s 29(1)(b) of the Act, what constitutes a fair hearing as required by the rules of procedural fairness in this matter cannot be elevated to require a full hearing on the merits of a claim.

40 Where the preconditions for the exercise of the power to dismiss are properly raised in a matter before the Commission, the fair hearing rule will simply require the member of the Commission who is called upon to dismiss a matter pursuant to s 27(1)(a) of the Act, without the hearing of evidence, to hear the party as to why the matter should not be dismissed. If after hearing the parties the Commission is satisfied that in the circumstances the preconditions of s 27(1)(a) are met, the Commission is authorised to exercise the discretion conferred to dismiss the claim without a hearing on the merits.

41 In this matter, the learned Chief Commissioner clearly provided a reasonable opportunity to Ms Tye to be heard about why her claim should not be dismissed. After Care Services made an application to dismiss Ms Tye's s 29(1)(b) application, the learned Chief Commissioner listed Care Services application for hearing on 13 February 2017. At the hearing, Ms Tye's representative was afforded an opportunity of making a submission about whether Ms Tye's claim raised a real question to be tried. In particular, she was provided with an opportunity to make a submission about the effect of the express and implied terms of her contract of employment and grounds upon which she relies to ground her claim of a denied contractual benefit.

(d) Did the learned Chief Commissioner err in finding Ms Tye's case to be so untenable that it cannot possibly succeed?

42 The express term of Ms Tye's contract of employment was as the learned Chief Commissioner characterised not strictly for a fixed term in the conventional sense.

43 A fixed term contract usually describes a contract which has a term that has the effect of binding both parties to the term stated in the contract, the term of which cannot be unfixed by notice. Such a contract does not contain any express term enabling a party to terminate the contract by the giving of notice and a court or tribunal will not imply a term permitting notice to be given to terminate: Irving M, *The Contract of Employment* (2012) [11.18].

44 However, a contract that contains a term which states a date of commencement and a date upon which the contract expires and also contains a term or terms which enables a party or parties to terminate the contract by the giving of notice within the specified period can be characterised either as:

(a) a contract for a fixed term that is determinable by notice within that period; or

(b) a contract of specified maximum duration that is determinable by notice within the period specified.

45 The central issue in this matter is whether it was open to Ms Tye to argue that she had not been allowed a benefit, being an alleged right to work until the date of the expiry of her contract, which entitled her to be paid damages for the unexpired period of the term.

46 In support of her claim, Ms Tye's representative raised two issues. The first is that it is open to Ms Tye to claim that Care Services be estopped from relying upon the notice provision in her contract of employment on grounds that a representation was made to Ms Tye (upon which she relied on in accepting the offer of employment) that the term of the contract of employment was for a fixed term of two years. Alternatively, it is argued that it should be implied that the express powers in the contract enabling Care Services to give notice to terminate the contract of employment not be exercised unreasonably.

47 There are fundamental difficulties with these arguments which in my opinion make it clear these arguments are untenable.

48 Firstly, the email from Mr Ranasinghe was not tendered in the proceedings at first instance, nor referred to and no argument was raised in the proceedings before the learned Chief Commissioner which addressed the point arising from the matters stated in the email. It is an elementary principle that a party must be bound by its case that it puts to the Commission at first instance and it is not open to put a different case on appeal: ***University of Wollongong v Metwally [No 2]*** [1985] HCA 28; (1985) 60 ALR 68, 71. There are exceptions to this principle. In exceptional cases, where to allow a new point can be found to be expedient in the interests of justice, the point can be allowed. However, in general, where the point is one to be met by the calling of evidence, the point will not be allowed: see the discussion in ***Alfresco Concepts Pty Ltd v Franse*** [2015] WAIRC 00244; (2015) 95 WAIG 437 [114] - [116].

49 Secondly, even if the email sent to Ms Tye on 26 July 2016 was to be admitted in this appeal, the statement that, 'Our contract with Medibank is for a period of two years commencing 1 November 2016. As such, your employment contract will reflect this and will be on a full time fixed term basis until 31 October 2018', is merely a statement of subjective intention and could be said to be at its highest a precontractual representation. It is a well-established principle of construction of contracts that evidence of parties' subjective intention is not admissible to construe the terms of a contract: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337, 352. In any event, the express terms of

cl 23.1 of the contract of employment declare that the written terms are the only terms of the contract and cl 23.2 expressly declares that the contract supersedes and replaces all prior representations.

50 Thirdly, the effect of cl 23.3 is that if Ms Tye had relied upon any matters during her discussions or communications with any representative of Care Services, she was directed to communicate with the HR manager about that matter prior to signing the contract and, if she did so and an agreement was reached, the terms of the contract would be amended to cover those matters. Given that it appears clear from the documents before the Commission at first instance that Ms Tye signed the contract of employment containing the notice provisions the day after she received the email from Mr Ranasinghe and four days prior to commencing employment, Ms Tye would be estopped from relying upon any representation made in the email by Mr Ranasinghe by operation of cl 23 of the contract.

51 The argument put, in the alternative, that it is open to imply in the employer's express power to terminate Ms Tye's employment a term that the power to do so should not be exercised unreasonably, was not an argument raised at first instance before the learned Chief Commissioner and is also an argument that has no merit.

52 At common law an employer can dismiss an employee for any reason or for none: ***Ridge v Baldwin*** [1964] AC 40, 65. The employer can act unreasonably or capriciously but the termination is valid, unless the termination is in breach of a term of contract and then the employee's only remedy is in damages for breach of contract: ***Malloch v Aberdeen Corporation*** [1971] 1 WLR 1578, 1581.

53 The basis of an argument that it is implied in the termination provisions of the contract that Care Services is to act reasonably seems to rely upon an argument that, by operation of the provisions of the *Fair Work Act*, Care Services was prohibited from terminating the employment of Ms Tye for reasons that she exercised a workplace right to be absent from work when authorised to do so in lieu of being paid overtime and that the giving of notice to terminate her contract of employment was, in these circumstances, unreasonable.

54 There are two fundamental difficulties with this argument. Firstly, Ms Tye had no contractual entitlement to be paid overtime or to take time off work for additional hours of work. Whilst cl 6.1 of the contract provided that Ms Tye was required to work an average of 38 hours a week, cl 6.2 empowered Care Services to require Ms Tye to work additional hours to fulfil the requirements of the position, for which work no additional remuneration was payable.

55 Secondly, any statutory workplace right that Ms Tye may have had that is conferred by the *Fair Work Act* is not a contractual right. The remedies available to employees for contravention of the *Fair Work Act* arise pursuant to, and subject to, the express provisions of that Act.

56 In ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410, the High Court found that an award created a statutory right that could be enforced through the *Industrial Relations Act 1988* (Cth), but neither the *Industrial Relations Act 1988* nor the award created a contractual right. At (420) Brennan CJ, Dawson and Toohey JJ found:

> A right to the payment of award rates is imported by statute into the employment relationship, which is contractual in origin, and, express promise apart, it is only in that sense that it can be said that award rates are imported into the contract of employment. The award regulates what would otherwise be governed by the contract. But award rates are imported as a statutory right imposing a statutory obligation to pay them. The importation of the statutory right into the employment relationship does not change the character of the right. As Latham CJ points out in his judgment in *Amalgamated Collieries of WA Ltd v True* ((1938) 59 CLR 417 at 423), the legal relations between the parties are in that situation determined in part by the contract and in part by the award. And as the judgment of the Privy Council in that case suggests, a provision in an award may also be made a term of the contract by agreement between the parties, but that is only to emphasise the distinction between an obligation imported by statute and one arising by agreement.

57 Consequently, any statutory right that Ms Tye had to claim a breach of a workplace right, whilst such a right if made out would have been imported into the employment relationship between the parties by statute, the right was not imported into her contract of employment.

58 Thus, when regard is had to the principle enunciated in ***Byrne*** and to the express provisions of cl 6 of the contract of employment, any argument that by giving notice to terminate the contract was in breach of the terms of the contract is untenable.

59 For these reasons, I am of the opinion that the grounds of appeal have not been made out and an order should be made to dismiss the appeal.

KENNER ASC:

60 I have had the advantage of reading in draft form the reasons for decision of Smith AP with which I am in general agreement.

61 Whilst the Commission should always approach the exercise of the power to dismiss a matter or refrain from further hearing a matter under s 27(1)(a) of the *Industrial Relations Act 1979* with caution, that does not mean that in a clear case where a claim is without merit, the power should not be exercised. On the contrary, to not exercise the statutory power in s 27(1)(a) in those circumstances, would be inconsistent with equity, good conscience and the substantial merits of the case, as required by s 26(1)(a). This is because the party against whom such unmeritorious proceedings have been brought, would be put to the time and expense of defending such a claim when it had no reasonable prospect of success.

62 Whilst the learned Chief Commissioner referred [28] of her reasons for decision (AB12) to the dismissal of the application on the basis that further proceedings would not be necessary or desirable in the public interest, in my view s 27(1)(a)(ii) was not enlivened in this case. The dismissal of the appellant's claim at first instance did not involve matters of public interest, as that concept was considered in ***The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd*** (2006) 86 WAIG 1268 [35] and referred to in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2013] WAIRC 00366; (2013) 93 WAIG 1430 [22] and [23].

63 However, it is clear from the reasons of the learned Chief Commissioner read as a whole that she dismissed the application because it had no merit and had no prospect of success, a course plainly contemplated by s 27(1)(a)(iv) of the Act.

64 I therefore agree that the appeal should be dismissed.

EMMANUEL C

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

2017 WAIRC 00690

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANDRA TYE
	APPELLANT
	-and-
	CARE SERVICES ADMINISTRATION PTY LTD
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
DATE	FRIDAY, 28 JULY 2017
FILE NO.	FBA 4 OF 2017
CITATION NO.	2017 WAIRC 00690

Result	Order made
Appearances	
Appellant	Mr P Mullally (as agent)
Respondent	Mr J F Raftos (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 16 June 2017, and having heard Mr P Mullally (as agent) on behalf of the appellant and Mr J F Raftos (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 28 July 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 00452

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. CR 9/2016 GIVEN ON 13 FEBRUARY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2017 WAIRC 00452
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 29 MAY 2017
DELIVERED	**:**	FRIDAY, 14 JULY 2017
FILE NO.	**:**	FBA 5 OF 2017
BETWEEN	**:**	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Appellant AND THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Acting Senior Commissioner S J Kenner**
Citation	**:**	**[2017] WAIRC 00071; (2017) 97 WAIG 324**
File No.	**:**	**CR 9 of 2016**

CatchWords	**:**	Industrial Law (WA) - Termination of employment - Appeal against a decision that dismissal was harsh, oppressive and unfair and order of reinstatement - Disciplinary history found to be a relevant consideration in determining proportionate and appropriate penalty not considered at first instance - Power to make order of reinstatement to a lower increment level pursuant to s 44 of the *Industrial Relations Act 1979* (WA) considered - Decision suspended and remitted for further hearing to reconsider penalty
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 23(3)(h), s 23A, s 23A(3), s 26(1)(a), s 26(1)(c), s 26(2), s 29(1)(b)(i), s 44, s 44(6)(bb), s 44(6)(bb)(ii), s 44(7)(a)(i), s 44(9), pt II div 4
		Labour Relations Reform Act 2002 (WA) s 137, s 141(1)
		Industrial Relations Commission Regulations 2005 (WA) reg 31
Result	**:**	Appeal upheld - Order made
Representation:		
Counsel:		
Appellant	**:**	Mr D Anderson
Respondent	**:**	Mr C Fogliani
Solicitors:		
Appellant	**:**	State Solicitor's Office
Respondent	**:**	W.G. McNally Jones Staff Lawyers

Case(s) referred to in reasons:

Aurion Gold v Bilos [2004] WASCA 270; (2004) 84 WAIG 3759

BHP Billiton Iron Ore Pty Ltd v The Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch [2006] WAIRC 03908; (2006) 86 WAIG 642

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

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

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

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WASCA 86; (2017) 97 WAIG 431

Case(s) also cited:

Landwehr v Director General, Department of Education [2017] WAIRC 00233

Pemberton v Civil Service Insurance Agency Pty Ltd [2008] WAIRC 01116

Burswood Resort (Management) v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch [2000] WASCA 386

House v The King (1936) 55 CLR 499

Mount Lawley Pty Ltd v Western Australian Planning Commission (2004) 29 WAR 273

Reasons for Decision

SMITH AP:

Introduction

1 This is an appeal against a decision of the Commission given on 13 February 2017 reinstating an employee in CR 9 of 2016 ([2017] WAIRC 00071; (2017) 97 WAIG 324).

2 CR 9 of 2016 was an industrial matter referred for hearing and determination under s 44(9) of the *Industrial Relations Act 1979* (WA) (the Act) by The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the union). The parties were in dispute about whether on 8 June 2016 the Public Transport Authority of Western Australia (the PTA) unfairly dismissed Mr Stefano Merlo, a member of the union who was employed by the PTA as a transit officer.

3 Mr Merlo was dismissed because following an investigation the PTA found that he had used excessive force by deploying oleoresin capsicum spray (OC spray) during the course of an incident with an aggressive intoxicated juvenile male ('A') who appeared to be about 16 or 17 years of age.

4 On 15 November 2016, an order was made by the Commission referring the following matters for hearing and determination (AB 9 - 12):

2. The applicant says that:

(a) On the night of Friday 6 November 2015, Mr Merlo was working at the Perth Train Station.

(b) At around 12.49am on Saturday 7 November 2015, Mr Merlo and his partner were called to attend a disturbance at the upper concourse of the Station.

(c) Upon arriving at the upper concourse, Mr Merlo and his partner were threatened by an aggressive male (POI). The POI appeared to be affected by drugs or alcohol.

(d) The POI made verbal threats to punch and spit at Mr Merlo and his partner. Mr Merlo warned the POI that he would use OC spray if the POI attempted to assault them.

(e) Mr Merlo repeatedly asked the POI to go away from the Station.

(f) The POI hocked up some phlegm, pursed his lips, and motioned as if he was going to spit at Mr Merlo. At the same time, the POI also made a fist and motioned as if he was going to throw a punch in Mr Merlo's direction. The POI's motions turned out to be a baulk.

(g) Mr Merlo had a split second to react to the POI's baulk. Mr Merlo felt threatened and in danger. Mr Merlo was concerned that the POI may have had a disease that could have passed through the POI's spit.

(h) Mr Merlo reacted by deploying his OC spray at the POI. This was a reflex action by Mr Merlo that occurred in a split second.

(i) The OC spray did not have any immediate effect on the POI. The POI was offered aftercare but refused it. The POI instead kept threatening the transit officers. The POI eventually left the Station.

(j) Mr Merlo apologised to the respondent for his involvement in the 7 November 2015 incident.

(k) After the incident, Mr Merlo actively sought counselling from his supervisors and peers about how he could have handled things better.

(l) Between 7 November 2015 and 9 June 2016, Mr Merlo continued to work as a transit officer. He was faced with other threatening situations in that time. Mr Merlo took on the advice from his supervisors and peers and increased the distance between himself and other persons who had threatened him with violence.

(m) Mr Merlo offered to undergo retraining and to participate in a performance management process. The respondent refused this offer.

(n) On 9 June 2016, the respondent terminated Mr Merlo's employment due to his involvement in the 7 November 2015 incident.

(o) Mr Merlo has two dependent children. Those children were aged 10 and 12 at the time of the dismissal. Mr Merlo's children rely on Mr Merlo's income from his employment with the respondent to survive. Mr Merlo's income pays for their food, clothing, schooling and accommodation. Mr Merlo has a mortgage on his family home.

(p) Mr Merlo has no other skills, trade or qualifications. The prospects of him finding equivalent work are slim.

(q) Mr Merlo was a good employee. There was no reason for the respondent to suspect that this would change in the future.

3. The applicant contends that Mr Merlo's dismissal was harsh, oppressive and unfair because it was not open to the respondent to make the finding it did and further, or in the alternative, the penalty applied is disproportionate to the misconduct alleged.

4. The respondent says the following by way of response:

(a) By memorandum dated 17 November 2015, the respondent informed and invited Mr Merlo to respond to an allegation received on 7 November 2015:

> 'On 7 November 2015, you deployed OC spray whilst located on the Eastern Concourse of the Perth Railway Station on a 12 year old juvenile. This deployment may have been in contravention of section 3.17.3 of the Transit Officer Operations Manual due to the potential threat posed by that juvenile in relation to his comparative size and location to you.'

(b) By letter dated 3 December 2015, Mr Merlo wrote to the respondent in response to its memorandum dated 17 November.

(c) By memorandum dated 10 December 2015, in accordance with clause 2.11.8 of the Public Transport Authority (Transit Officers) Industrial Agreement 2015 (Agreement), of a formal allegation of breach of discipline:

> 'On 7 November 2015, you deployed OC spray whilst located on the Eastern Concourse of the Perth Railway Station on a 12 year old juvenile.'

5. In accordance with clause 2.11.8(d) of the Agreement, Mr Merlo was informed that a formal investigation had commenced.

(a) By letter dated 10 May 2016, the respondent wrote to Mr Merlo to enclose a copy of its investigation report and to invite Mr Merlo to respond to proposed adverse findings and a proposed penalty of dismissal.

(b) By letter dated 21 May 2016, Mr Merlo wrote to the respondent in response to its letter dated 10 May 2016.

(c) By letter dated 8 June 2016, the respondent wrote to Mr Merlo finding:

> 'I find, and you later admitted, that you have engaged in breaches of discipline on 7 November 2015 on the Eastern Concourse at Perth Railway Station when you used excessive force by deploying OC spray at [the POI] off PTA property, therefore breaching Sections *3.17 - Carriage and Use of OC Spray, 3.18 - Off PTA Property* and *7.10 - Use of Force of the Transit Operations Manual*.'

6. The respondent objects to and opposes the applicant's claim. It maintains that in all of the circumstances, Mr Merlo's dismissal was justified.

7. In determining whether the respondent's dismissal of Mr Merlo was harsh, oppressive or unfair, the parties, by agreement, invite the Commission to decide the following issues:

(a) Did Mr Merlo deploy OC spray at the POI in self-defence?

(b) Did Mr Merlo cease the use of the OC spray once the threat to his safety, health and well-being had subsided?

(c) Was Mr Merlo's use of force against the POI commensurate with the force that the POI applied to Mr Merlo?

(d) Did Mr Merlo issue the POI with a verbal warning about his intention to deploy OC spray? If not, was it impracticable to do so?

(e) Once Mr Merlo had drawn his OC spray, did he conceal it from the POI's view?

(f) Did Mr Merlo deploy OC spray at the POI solely for the purpose of keeping the POI from coming on to PTA property?

(g) Was Mr Merlo's use of OC spray on the POI authorised by section 3.17.3 of the Transit Officer Manual?

(h) Did Mr Merlo use excessive force by deploying OC spray at the POI?

(i) Did Mr Merlo admit to using excessive force by deploying OC spray at the POI?

(j) Did Mr Merlo breach section 3.17, 3.18 or 7.10 of the Transit Officer Operations Manual?

(k) Was dismissal a proportionate and appropriate penalty for Mr Merlo's conduct?

5 After hearing evidence given by witnesses on behalf of the union and the PTA, the learned Acting Senior Commissioner made the following declaration and order (AB 13 - 14):

(1) DECLARES that the dismissal of Mr Stefano Merlo by the respondent on 8 June 2016 was harsh oppressive and unfair.

(2) ORDERS the respondent to reinstate Mr Merlo as a Transit Officer Level 3 in accordance with the Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2015.

(3) ORDERS that Mr Merlo be paid an amount in respect of remuneration lost from the date of his dismissal to the date of his reinstatement in accordance with the rate of pay, entitlements and benefits applicable to the position of a Transit Officer Level 3.

(4) ORDERS that Mr Merlo's service with the respondent otherwise be deemed continuous for all benefit purposes.

The incident on the night of 6 November 2015

6 At the time of the incident, Mr Merlo was a transit officer, level 5, and was in his sixth year of employment with the PTA. Mr Merlo usually worked on the Midland line where he regularly encountered customers who were affected by drugs and alcohol and on occasions he, like other transit officers, was required to use OC spray as a force option in dealing with certain situations.

7 On the night of Friday, 6 November 2015 Mr Merlo had been assigned to work at the Perth train station with another transit officer as his partner, Ms Ariana Warr.

8 At about 12.50am on Saturday, 7 November 2015, Mr Merlo and Ms Warr were at the Perth train station, downstairs near the train platform. They received an urgent radio call from a revenue officer who asked Mr Merlo and Ms Warr to go upstairs to assist with some aggressive disorderly males.

9 When Mr Merlo and Ms Warr headed up the escalators to the eastern concourse section of the Perth train station they saw two young males who were on the concourse but off PTA property near the fare gates. One of the males was A who was behaving in an aggressive and abusive manner. The other appeared to be his friend and was attempting to persuade A to leave. Mr Merlo thought that both the males looked between 15 and 16 years old because of their size. A was as tall as and heavier set than Ms Warr. A was intoxicated and abusive and was behaving in a manner that sometimes happens when 15 to 17-year-old males get drunk on a night out with their friends. Although A was actually only 12 years old, it is accepted by the PTA that it was reasonable for Mr Merlo to assume at the time that A was a lot older.

10 Mr Merlo and Ms Warr were on the PTA property side of the fare gates on the eastern concourse with three revenue officers. A and his friend were still on the other side of the fare gates. The fare gates are just under waist height. Ms Warr told the males to leave. A started abusing Ms Warr and Mr Merlo. A said words to the effect of 'You fucking Maori slut', 'You fucking cunt' and 'I'm going to come over there and smash you cunts'. Mr Merlo's evidence was that initially most of the abuse was directed at Ms Warr. At that stage A was in a fighting stance. He was spitting on the ground and making sudden jolting movements towards Ms Warr and Mr Merlo. A continued with the abuse. He was threatening to 'smash' the officers.

11 Ms Warr's evidence was when A first saw her and Mr Merlo he tried to jump over the fare gates but was unsuccessful. She said that A was shadowboxing, spitting on the ground and yelling words to the effects of, 'Do you want to have a go, you motherfuckers'.

12 Mr Merlo's evidence was that whilst standing at the gates and A continued with his abuse, he asked Ms Warr to step back. Ms Warr's evidence was that Mr Merlo did not give that instruction. She did, however, turn around with her back towards A and Mr Merlo and walked away. She was smiling as she walked away from A. She said she did so as she did not find A's comments threatening, she found them to be funny. Her evidence was that she disengaged because the verbal abuse was not solely directed at her, A was off PTA property and she did not feel threatened. She also said she disengaged to give A an opportunity to come onto PTA property or to leave as he had been instructed. However, Ms Warr's evidence was that she believed if A had have come onto PTA's property, then he most likely would have done something.

13 When Ms Warr turned and walked away from the confrontation she thought that Mr Merlo would be walking back with her. She did not realise that Mr Merlo remained where he was and she did not hear any further communications between Mr Merlo and A, nor did she see Mr Merlo deploy the OC spray.

14 Mr Merlo's evidence was that he spoke to the two males and told them if they went away and grabbed something to eat they could come back later and catch the last train out of the city. Mr Merlo told A to go away and gave him several warnings that he was going to be sprayed with OC spray if he did not leave. Mr Merlo said he made this threat because sometimes it encourages patrons who have been sprayed before to think twice and move on. A then turned his attention towards Mr Merlo. A remained very close to but on the side of the fare gates off PTA property. Mr Merlo took a step backwards away from A. He took that step back so that he could get out of A's 'punching range' because at this point in time the only threats that A had made against him and Ms Warr were that he was going to jump over the fence and physically attack them. Mr Merlo unclipped his OC spray which was located on his belt and rested his hand on it. A looked at it and pointed to Mr Merlo's OC spray and said to Mr Merlo words to the effect of 'I am going to spit at you. You can't do fuck all if I spit at you'. It appeared that these words were heard only by Mr Merlo. A then made a sound as if he was hocking phlegm up into his mouth and at the same time Mr Merlo said A lifted his hand as if he was going to strike at him. Simultaneously, A cocked his head back and then moved forward towards Mr Merlo and the fare gates motioning as if he was going to spit phlegm at him. By that time Mr Merlo was about one to one and a half metres away from A on PTA property and was outside A's punching range but was at a distance where A could have reached him with a spit. Mr Merlo had a second or less to decide how to react to A's sudden movement. Mr Merlo believed that A had spat at him and in that split second he made a decision to pull his OC spray and spray it at A. When he did so he stepped towards A. CCTV footage shows his arm reaching over the gates of the PTA boundary when he sprayed A. Mr Merlo's evidence was the only reason he used his OC spray was because he thought he was being attacked by A. A responded to the OC spray by retreating. He then grinned at Mr Merlo and said words to the effect of 'Yeah, is that it? Give me some more'.

15 Shortly after discharging his OC spray, Mr Merlo realised that A had not actually spat at him. The actions of A are described by the parties as a baulk by A. A baulk is a baseball term. It refers to a situation where the pitcher fakes a movement so as to trick the batter into believing that the pitcher is pitching the ball. It is common ground that Mr Merlo did not know that A was baulking at the time when he sprayed OC spray at A.

16 When giving evidence Mr Merlo denied that he used the OC spray in order to keep A off PTA property. He said his decision to use the OC spray was an instinctive response to the threats and motion that A had made towards him.

17 Mr Merlo's evidence was that he had prior experiences with members of the public spitting saliva and blood at him. On two occasions, he had been spat at in the face which required him to be tested for hepatitis or anything else. He described the process of waiting for the test results after such an attack as gruelling.

18 Once Ms Warr had realised what occurred she asked Mr Merlo whether he had done the 'right thing'. She was surprised about what had happened. She went off the PTA's property to provide aftercare assistance to A. However, A refused aftercare and continued to behave abusively and made threats. A and his friend then ran away and returned later in the night. At that point A's friend informed Ms Warr that A was 12. A was taken into protective custody, was assessed by an ambulance officer, but found not to have an imminent health risk and was taken home to his mother by transit officers.

19 When asked about the circumstances that confronted both Mr Merlo and herself on the night in question, Ms Warr said she acted according to what she understood from her training, that is in cases where an individual is threatening a transit officer, the appropriate course is for the officer to disengage and where possible walk away. This is so a safe distance can be established between the officer and the individual concerned. She also said that she has had occasions where individuals confronting her had 'baulked' and she has responded by moving back to create further space between her and the person. She also testified that she has faced abusive people on the eastern concourse at the Perth train station and has experienced situations of people spitting at her, which required her to cover her face. She agreed, however, that being spat upon was a very unpleasant and stressful experience, given the possibility of transmission of infectious diseases through spitting.

20 Mr George Steven Svirac, the transit manager of security for the PTA, who oversees the operations of the transit officers on the urban network, testified that the authority of transit officers only extends to the exercise of powers on PTA property as an offender must be on PTA property to commit an offence that can be dealt with by a transit officer. Mr Svirac said that if someone behind the barrier fence threatened to spit at him he would have taken a few extra steps back and if the person then jumped the fence he would have pulled the OC spray and sprayed the person.

21 After having reviewed the CCTV footage of the incident, Mr Svirac's view is that Mr Merlo should have disengaged, moved back and called for backup. He said these types of issues are regularly discussed in safety committee meetings and by taking a step back and creating further distance, Mr Merlo would have been out of range for A to have spat on him. Mr Svirac said from a training perspective, a key component is teaching officers to disengage with potential offenders by moving away from them and creating distance.

22 Mr Svirac, however, agreed that:

(a) Mr Merlo had stood back, to be sufficiently out of range to stop any attempted punch from A striking Mr Merlo.

(b) The incident, as revealed in the CCTV footage, occurred over only a couple of seconds. This was from the point where A moved towards Mr Merlo, threatened to spit, baulked and Mr Merlo deploying his OC spray.

(c) Mr Merlo from the CCTV footage only used his OC spray when A appeared to try to spit at him.

23 Mr Svirac's evidence was that if a member of the public spits at a transit officer, it is a circumstance, depending on the context, where a transit officer may use OC spray to defend them self. Mr Svirac also accepted that a transit officer may use their OC spray in self-defence. However, he also said that in his view the first option is always to attempt to disengage. Having regard to all of the circumstances of the incident, Mr Svirac's opinion was that Mr Merlo should have distanced himself from A so as to put himself out of the range of any potential hazard.

24 Mr Svirac agreed that being spat on was one of the worst things that could happen to a transit officer and described the act of spitting at someone as an aggressive movement and as disgusting. Mr Svirac said that being spat at is worse than being punched. Ms Warr disagreed and said that being spat at is no better or worse than being punched.

25 Transit officers receive training on how to deal with people who are attacking them, but Mr Merlo said that the training does not teach transit officers how to respond to or defend against people who are spitting at them. Ms Warr disagreed with that evidence.

26 Mr Svirac testified that there was no training specific to spitting, rather transit officers are trained about situational awareness and protecting yourself by a defensive stance, by putting your hands up to block your face to reduce the amount of spit that connects.

Findings made by the PTA

27 The grounds upon which the PTA relied upon in dismissing Mr Merlo are set out in a letter dated 8 June 2016 sent to Mr Merlo from Mr Pasquale Italiano, General Manager, Transperth Train Operations. In the letter Mr Italiano stated:

> I refer to the Investigation Report No. I0039/15 into the allegation that you used excessive force in regards to the manner in which you deployed Oleoresin Capsicum (OC) spray on a 12 year old juvenile.
>
> Final Determination on Alleged Breaches of Discipline
>
> Having reviewed the evidence and having regard to:
>
> - your memorandum responding to the first notification dated 3 December 2015;
> - the Investigation Report;
> - correspondence to you from the Principal Consultant Labour Relations, Ms Anita Ryan dated 10 May 2016 advising of potential adverse findings and proposed penalty;
> - your letter dated 21 May 2016 responding to that advice;
> - your past employment history which includes:
>   - disciplinary matters of
>   - 18 November 2011 - Warning - Failure to follow direction - Parking on PTA property whilst not rostered on shift
>   - 2 December 2011 - Reprimand - Breach of Transit Officers Operations Manual (the Operations Manual) - Failure to submit an action report, request CCTV footage and use of force
>   - 23 January 2013 - Counselled - Breach of Operations Manual - Off PTA Property
>   - 15 October 2014 - Warning - Breach of Operations Manual - Punctuality
>   - 28 October 2014 - Counselled - Breach of Operations Manual - Security Officers Purpose
>   - 17 February 2016 - Warning - Breach of Operations Manual - Station Duties
>   - performance development - My Action Plans dated
>   - 5 March 2013
>   - 17 February 2014
>   - 28 July 2014
>   - 8 July 2015
> - your length of service (since commencing on 3 September 2010) and progression through the Transit Officer salary increments;
> - when you last undertook Defensive Tactics Refresher Training;
> - our evening meeting of 26 May 2016 where you nominated Transit Line Supervisors Mr Lee Crane and Mr Steve Svirac as character references; and
> - Mr Crane and Svirac's written references:
>
> it is my task as the nominee of the Chief Executive Officer to make a final determination on the allegation that you committed breaches of discipline.
>
> I find, and you later admitted, that you have engaged in breaches of discipline on 7 November 2015 on the Eastern Concourse at Perth Railway Station when you used excessive force by deploying OC spray at [A] off PTA property, therefore breaching *Sections 3.17 - Carriage and Use of OC Spray, 3.18 - Off PTA Property* and *7.10 - Use of Force* of the *Transit Officer Operations Manual*.

Considerations Relevant to Imposition of Revised Penalty

Having determined that you have committed breaches of discipline, I must now decide which if any penalty should be applied.

The penalties available to be imposed as disciplinary action in response to a breach of discipline include those available at *Clause 2.11.21* of the *Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2015* (the Industrial Agreement). These include:

a) No penalty;

b) A reprimand (which may include a final reprimand);

c) Deferring the payment and anniversary date for annual increments by a period not exceeding six months;

d) A permanent or temporary transfer to another location within the PTA or to another employment position within the PTA, including to a position to which this agreement does not apply;

e) A permanent or temporary demotion or reduction to a lower increment or to a lower grade or position to which this agreement applies;

f) A permanent or temporary demotion to another position to which this agreement does not apply; and/or

g) Dismissal.

In Ms Ryan's correspondence of 10 May 2016, the Labour Relation Division recommended I consider dismissal due to the severity of this incident and two previous disciplinary matters for breaches of the Operation Manual relating to:

1) a reprimand for failure to submit an action report, failure to request CCTV footage and excessive use of force on 2 December 2011 and

2) counselling for chasing an offender off PTA property in 23 January 2013.

My decision is again based on the documents and meeting referred to above.

Your service since September 2010 with the PTA is acknowledged.

In considering the appropriate penalty, I note that:

- in your memorandum responding to the first notification you:
  - deny breaching Section 3.17.3 of the Operations Manual citing that you deployed the OC spray in '*self-defence*' as the POI was actioning to spit at you; and
  - apologise for any inconvenience or embarrassment this matter may have caused.
- the Investigator, in the Investigation Report, found that:
  - [A] continually behaved in a disorderly and threatening manner but during the course of his actions did not come onto PTA property.
  - you were standing behind the barrier fence away from [A] and had sufficient room to extend that gap between him and yourself if you believed he was going to spit at you or may have jumped the barrier fence.
  - the footage shows [A] remained behind the barrier fence and whilst he was behind the barrier fence, feigned a movement towards you and you reacted to that movement.
  - as a result of his action, you deployed your OC spray, striking him in the facial area whilst he remained off PTA property. Furthermore, you stepped towards him thus closing the distance between you and him.
  - You cannot use force to stop somebody coming onto PTA property if they are off property.
  - given the instruction in the Operations Manual, you deployed OC spray when [A] was off PTA property and the use of the OC spray was not in accordance with the Operations Manual and as such the force used by you could be considered excessive.
- in your letter responding to the potential adverse findings and proposed penalty correspondence dated 21 May 2016, you state that:
  - with the benefit of hindsight, you would not have deployed your OC spray at him.
  - you have gained a greater appreciation of how critical it is to be aware of PTA boundaries.
  - you could have handled the incidence better, given his threats, increased the distance between yourself and [A].
  - you recognise '*that self-improvement is essential to being a good employee and will continue to try to improve my own practices and understanding*' as well your willingness to undergo retraining and participate in performance management if a lesser penalty than dismissal is considered.

At our meeting of 26 May 2016, we discussed that the four additional disciplinary matters and four My Action Plans listed above would be used to form part of my understanding of your past pattern of behaviour, conduct and service to assess the appropriate penalty.

When discussing what type of worker you have been and why you should keep your job, you invited me to seek character references from your Midland Transit Line Supervisors, Mr Lee Crane and Mr Steve Svirac. I have received written advice from them on your ability to perform as a Transit Officer and they have not provided me with any additional information to dissuade me from the recommended penalty.

I have considered the matters you raised in your letter of 21 May 2016 and during our meeting, including the impact a decision to dismiss would have on you and your family, noting what you have told me about your two dependant [sic] children and mortgage.

> In the end, however, when considering whether dismissal is a proportionate and reasonable response after taking into account and weighing up all of these circumstances, I consider this latest lapse in judgement justifies your dismissal, noting that your actions during the incident exacerbated this situation, leading to your subsequent deployment of OC spray.
>
> When viewing this incident in the context of you [sic] past employment record, I have concluded that you have demonstrated that you are not suitable for continued employment as a Transit Officer. Regrettably, I am not persuaded that allowing you another reprieve is likely to prevent a recurrence of such conduct.
>
> Having taken all these matters into account, I have therefore decided that dismissal is the appropriate penalty in all the circumstances. This penalty is being imposed in accordance with Clause *2.11.21 g)* of the Industrial Agreement.
>
> Our established procedures are designed for the safety of our employee and patrons. Compliance with them is not optional.

28 Part of Mr Italiano's responsibilities is to deal with disciplinary matters as the delegate of the chief executive officer, in accordance with the disciplinary procedure set out in the *Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2015*. Mr Italiano interviewed Mr Merlo, after reviewing the investigation report. There were two issues for Mr Italiano to decide. The first was to make findings in relation to the allegations of misconduct and, if established, the second issue was what penalty should apply.

29 Mr Italiano did not accept all of what Mr Merlo had told the investigators. In particular, having reviewed the CCTV footage he did not agree that A had raised a fist towards Mr Merlo. He was of the opinion A had raised his left arm and hand. He also did not necessarily accept Mr Merlo's assertion that he had issued three to four warnings to A that he would use his OC spray because Ms Warr had no recollection of it. He was also critical of Mr Merlo because Mr Merlo had no recollection of stepping forward when he deployed his OC spray. Mr Italiano thought Mr Merlo should have recollected this aspect of the incident.

30 Mr Italiano formed the opinion that having reviewed the investigation report and the CCTV footage, Mr Merlo should not have put himself in the position that he did. He did not accept that Mr Merlo was in an imminent position of danger because:

- (a) there was a barrier between Mr Merlo and A;
- (b) Ms Warr did not apprehend any imminent threat to her safety or well-being at the time; and
- (c) Mr Merlo had sufficient room behind him to distance himself from A's actions.

31 When cross-examined, however, Mr Italiano conceded that he had formed this opinion with the benefit of hindsight.

Commissioner's reasons for decision at first instance

32 After setting out a summary of the facts of the incident and subsequent events and noting the events were not significantly in dispute, the learned Acting Senior Commissioner had regard to Mr Merlo's work history. He pointed out that there had been some prior issues of performance raised, which were set out in Mr Italiano's letter of 8 June 2016. He then observed that:

- (a) Mr Italiano's evidence of those matters was that he had no difficulty with Mr Merlo's competency or integrity as a transit officer, or anything arising from the various 'My Action Plans' in evidence;
- (b) what Mr Italiano drew from Mr Merlo's work history was that there were some issues of punctuality in the past, but he accepted that they had been remedied;
- (c) Mr Italiano was concerned about what he described as breaches of various parts of the transit officer operations manual (the manual) and his lack of confidence that this would not continue to occur;
- (d) Mr Italiano had some reservations as to Mr Merlo's temperament, having regard to the duties and responsibilities of a transit officer; and
- (e) Mr Italiano did consider the options of demotion and transfer in the alternative to dismissal, but he did not consider they were appropriate, having reached the view that Mr Merlo seemed to have difficulties with compliance with procedures.

33 The learned Acting Senior Commissioner then turned to a consideration of the evidence and in doing so had regard to the principle in ***Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385 that it must be demonstrated there has been an abuse of the employer's right to dismiss an employee, such that the dismissal is rendered harsh or oppressive. He also had regard to the principles that:

- (a) it is not for the Commission to assume the role of a manager in considering whether the dismissal is or is not unfair; and
- (b) the test is an objective one in accordance with the Commission's duty pursuant to s 26(1)(a) and s 26(1)(c) of the Act.

34 Before specifically addressing each of the questions posed in the matters referred for hearing and determination, the learned Acting Senior Commissioner found that having regard to all of the circumstances of the case and the particular aspects of the incident that occurred on 7 November 2015, the dismissal of Mr Merlo was harsh, oppressive and unfair. He also found that the appropriate penalty that should have been imposed on Mr Merlo was that Mr Merlo should be demoted to a transit officer, level 3, which would mean the loss of two increment levels and he should be provided with any necessary refresher training that the PTA considers appropriate. The learned Acting Senior Commissioner made these findings on grounds that with the benefit of hindsight, Mr Merlo could have taken an alternative course by creating more distance between himself and A. However, the learned Acting Senior Commissioner found that this did not detract from the fact that finding himself in the position he did, Mr Merlo acted with reasonable cause.

35 The learned Acting Senior Commissioner then addressed each of the questions posed in the memorandum of matters referred for hearing and determination as follows.

(a) Did Mr Merlo deploy OC spray at the POI in self-defence?

36 Having regard to all of the circumstances of the case and having carefully viewed the CCTV footage, the learned Acting Senior Commissioner found Mr Merlo deployed his OC spray in self-defence and did not accept that Mr Merlo did so in any way to provoke or inflame the situation with A as it unfolded. He found that:

(a) the evidence clearly revealed that A did 'baulk' and appeared to clearly prepare to spit at Mr Merlo;

(b) taking the evidence as a whole, Mr Merlo had a basis to believe, on reasonable grounds, that he was about to be spat upon by A and his deployment of OC spray was to prevent that occurring and the fact of the existence of the fence barrier between A and Mr Merlo would not have prevented this from occurring; and

(c) the deployment of the OC spray only occurred in response to A's actions and was responsive to it.

(b) Did Mr Merlo cease the use of the OC spray once the threat to his safety, health and well-being had subsided?

37 The learned Acting Senior Commissioner found Mr Merlo ceased the use of OC spray after its first application and it was clear that A was no longer prepared to or intended to spit at him.

(c) Was Mr Merlo's use of force against the POI commensurate with the force that the POI applied to Mr Merlo?

38 The learned Acting Senior Commissioner found it was necessary to put oneself in Mr Merlo's position on the night in question, without the benefit of hindsight, having to make a split-second decision in response to a person engaging in the behaviour and conduct that A was at the time. In doing so, he found that he considered that Mr Merlo's use of OC spray in all of the circumstances was commensurate with responding to A's threat.

39 The learned Acting Senior Commissioner went on to find that whilst there was some conjecture as to whether A raised a fist towards Mr Merlo as the CCTV footage appeared to suggest something less than that, the accounts of the incident given by Revenue Officer Aurang and Revenue Officer Webb, referred to in the investigation report supported the contention that A 'tried to take swing' and 'started air boxing or throwing punches across the gate' in Mr Merlo's direction. The learned Acting Senior Commissioner observed that while these officers were not called to give evidence, those statements were open to be taken into consideration by the PTA in its decision concerning the disciplinary allegations against Mr Merlo.

40 The learned Acting Senior Commissioner then found that:

(a) most importantly, however, it must be borne in mind that Mr Merlo's use of force option was in response to what he regarded as a clear threat of A spitting on him at a distance where Mr Merlo would be affected;

(b) the evidence revealed that Mr Merlo had a genuine belief, based on reasonable grounds, that this was going to occur; and

(c) it was not contended by the PTA that being spat upon by an intoxicated and very disorderly member of the public would not only be a very unpleasant experience, but may also constitute an obvious risk to the health and safety of an officer.

(d) Did Mr Merlo issue the POI with a verbal warning about his intention to deploy OC spray? If not, was it impracticable to do so?

41 The learned Acting Senior Commissioner observed that Mr Merlo's evidence was that he warned A several times of his intention to deploy OC spray and Ms Warr's evidence was that she did not hear such a warning but had turned around and was walking away from Mr Merlo and A. The learned Acting Senior Commissioner then found:

(a) that Ms Warr may not have been close enough to hear anything said to A by Mr Merlo;

(b) notably, Revenue Officer Jakovlev, when interviewed during the investigation, referred to Mr Merlo saying something to A, but he was not sure what it was; and

(c) having regard to all of the evidence he accepted Mr Merlo's version of events that he did warn A that he would use his OC spray before he deployed it. Simply because there was no precise corroboration of Mr Merlo's version of events in this regard, did not preclude the acceptance on balance, of his evidence, having regard to the totality of material before the Commission.

(e) Once Mr Merlo had drawn his OC spray, did he conceal it from the POI's view?

42 The learned Acting Senior Commissioner found that Mr Merlo did not conceal the OC spray when he withdrew it from its pouch. The evidence revealed A was aware that Mr Merlo had his hand on his OC spray canister pouch. A pointed to it and clearly saw it. Once drawn, the OC spray canister was visible.

(f) Did Mr Merlo deploy OC spray at the POI solely for the purpose of keeping the POI from coming on to PTA property?

43 From all of the evidence the learned Acting Senior Commissioner found that Mr Merlo did not deploy his OC spray at A solely for the purpose of preventing A coming onto PTA property and was satisfied on balance that the predominant reason for Mr Merlo deploying his OC spray was his genuine belief, on reasonable grounds, that A was about to spit upon him.

(g) Was Mr Merlo's use of OC spray on the POI authorised by s 3.17.3 of the manual?

44 Section 3.17.3 of the manual provides as follows:

> 3.17.3 The PTA will supply either Defence Industries Mk3 X2 OC spray or Sabre Red Crossfire Mk3 OC spray to authorised personnel and these spray [sic] may only be deployed under the following guidelines:
>
> - For the personal protection (self defence) of the Security Officer or any other person where there is an imminent and immediate danger to safety, health and well-being.
> - That the use of the OC spray is ceased when the threat to the safety, health and well-being of the Security Officer or any other person subsides.
> - The use of force is justified commensurate with the force applied to the victim.
> - A verbal warning must be given of the intention to deploy OC spray unless it is impracticable to do so.

- If OC spray is drawn, it must not be concealed but is displayed in an overt manner.
- OC spray is not to be deployed within the confines of a railcar.
- After care (decontamination) must be provided to persons who have been directly sprayed or received a secondary exposure of OC spray.

45 Having regard to the findings already made, the learned Acting Senior Commissioner found he was satisfied on balance that Mr Merlo's deployment of OC spray on A during the incident did not contravene s 3.17.3 of the manual.

(h) Did Mr Merlo use excessive force by deploying OC spray at the POI?

46 The use of force is set out in s 7.10 of the manual which is in the following terms:

7.10 Use of force

Security Officers have been authorised to utilise any reasonable force in order to remove a person from PTA property or to affect an arrest. Although sect 58 of the *PTA Act 2003* does not directly authorise the use of force in effecting an arrest; however, sect 231 of the *Criminal Code* states '*It is lawful for a person who is engaged in the lawful execution of any sentence, process, or warrant, or in making any arrest, and for any person lawfully assisting him, to use such force as may be reasonably necessary to overcome any force used in resisting such execution or arrest*.'

7.10.1 In any circumstances where the use of force is justified; the minimal amount of force required to establish control should be utilised and once achieved, lower force options are to be employed at the earliest opportunity.

7.10.2 Excessive use of force can be defined as:

- Any force when none is needed;
- More force than is needed in a particular situation;
- Any force or level of force continuing after the necessity for that use has ended;
- Knowingly wrongful use(s) of force; or
- Well intentioned mistakes that result in undesired use of force.

7.10.3 The use of a Defensive Push:

- The use of a defensive push against a person is only lawful when that person is approaching officers or members of the public in an aggressive manner and they are in close proximity. The use of pushing or shoving to an offender in order to remove them from PTA property is not a defensive push and as such is unlawful.
- If the member of public is standing flat footed and an officer steps forward towards that person, thus instigating physical contact, then this can be classified as an assault and any reaction from the person towards the officer could be defended by citing 'Provocation'. This could result in the case against the offender being dismissed for any offences committed.
- To use a defensive push against a person to move them away from an officer is not a physical strike or push to that persons chest area; but is effected by way of an outstretched arm, allowing the person to move no closer than an arm's length from the officer. Where-ever possible, the officer should also take one step rear-ward in order to open a safe distance, between the officer and the person.

7.10.4 The use of a Forward Leg Sweep:

- The Forward Leg Sweep when utilised to place a person face down onto the ground in order to restrain that person is an uncontrolled take-down method that consistently results in injuries to the subject and to Security Officers.
- This technique is not part of the PTA's Intercept-Stabilise-Resolve Training package and therefore is not to be utilised.

7.10.5 In accordance with Section 3.13 of this Manual - Reporting of accidents and incidents, in any occurrence where force has been used (including the arrest of a person under an Outstanding Warrant), an Action/Incident Report (PTA form 4030-700-029) accompanied by a CCTV Imagery Request form (PTA form 4030-700-032) must be submitted.

47 Whilst there was some argument as to whether s 7.10 of the manual had any application to the circumstances of the deployment of OC spray because it speaks of reasonable force being used in order to remove a person from PTA property or to affect an arrest, the learned Acting Senior Commissioner found that:

(a) the use of force principles in s 7.10 of the manual do apply to the use of OC spray;

(b) OC spray is clearly a use of force option as it is available to security officers as an alternative to the use of concussive force, such as a tactical baton, whereas concussive force may not be appropriate; and

(c) the use of OC spray is a lower level force option and should be seen as such in the hierarchy of force options available to security officers.

48 The learned Acting Senior Commissioner was not persuaded on the evidence that having regard to all of the circumstances, Mr Merlo used excessive force against A. He found that:

(a) Mr Merlo apprehended a threat to his person which could have had significant adverse health effects on him; and

(b) it was a judgment made in a split second where Mr Merlo was confronted with appalling conduct by an intoxicated individual, making threats to both him and others in circumstances where Mr Merlo had every reason to believe the threat to spit would be carried out.

(i) Did Mr Merlo admit to using excessive force by deploying OC spray at the POI?

49 The learned Acting Senior Commissioner found that Mr Merlo did not make an admission that he used excessive force but simply acknowledged that his employer obviously had a different view of his conduct. With the benefit of hindsight, had Mr Merlo known that when A baulked and prepared to spit at him he did not actually spit, Mr Merlo would not have deployed his OC spray.

(j) Did Mr Merlo breach s 3.17, s 3.18 or s 7.10 of the manual?

50 The learned Acting Senior Commissioner observed that Mr Italiano conceded the allegation that Mr Merlo contravened s 3.18 of the manual was erroneous. This was because there was no suggestion that A had committed an offence whilst on PTA property.

51 The learned Acting Senior Commissioner also found that Mr Merlo did not breach s 3.17 or s 7.10 of the manual.

(k) Was dismissal a proportionate and appropriate penalty for Mr Merlo's conduct?

52 The learned Acting Senior Commissioner found that self-evidently, his answer to this question was, having regard to all of the circumstances, no.

53 In making this decision he had regard to disciplinary action taken against other transit officers employed by the PTA where some of those incidents led to disciplinary outcomes short of dismissal, including reprimands and demotion. In particular, he had regard to an incident in September 2015 where a senior transit officer deployed OC spray at a patron who was displaying his buttocks at the officers seconds after the deployment of OC spray to the face region of several offenders. It also appeared that the officer concerned chased the offenders away from the station over an area not deemed to be PTA property, contrary to established procedures. The learned Acting Senior Commissioner found that whilst great care must be exercised when looking at other incidents such as this, without the benefit of knowing all of the circumstances, it was self-evident that the discharge of OC spray towards a person displaying their buttocks could not be regarded as the use of reasonable force or an action reasonably taken in self-defence. He then observed that in that particular case the officer was demoted from a senior transit officer to a transit officer position and found that although he did not place great weight on this comparative incident, it was a matter that some regard could be had to when considering the PTA's response to Mr Merlo's conduct on the night in issue in this matter. The learned Acting Senior Commissioner also took into account Mr Merlo's contrition after the incident, in particular, that he was clearly remorseful as to what had occurred and sought advice from others as how to better manage such a situation in the future.

The grounds of appeal

54 At the hearing of the appeal leave was granted to the PTA to amend the grounds of appeal as follows:

1. The Senior Commissioner erred in law by finding, at [36] of the reasons for decision, that Mr Merlo did not use excessive force by deploying his OC spray at A on the night in question.

Particulars

(a) Mr Merlo was dismissed on the basis of a finding by the Appellant that he used excessive force by deploying OC spray at a person off PTA property.

(b) The question asked of the Senior Commissioner as a part of the referral of the dispute under section 44(9) of the *Industrial Relations Act 1979* (WA) was whether Mr Merlo used excessive force by deploying OC spray at A on the night in question.

(c) The Senior Commissioner answered a narrower question, at [36] - [38] of the reasons for decision, namely whether Mr Merlo had reasonable cause to deploy OC spray in self-defence.

2. The Senior Commissioner erred in law by taking into account, at [38] of his reasons for decision, irrelevant considerations, namely that:

(a) Mr Merlo apprehended a threat to his person which could have had significant health effects on him;

(b) it was a judgment made in a split second where he was confronted with appalling conduct by an intoxicated individual making threats; and

(c) Mr Merlo had every reason to believe the threat of spit would be carried out.

Particulars

(a) The above considerations are only relevant to the question of whether Mr Merlo used excessive force by deploying OC spray at A on the night in question in the absence of a finding that earlier Mr Merlo could have taken an alternative path.

3. The Senior Commissioner erred in law by finding, at [23] of his reasons for decision, that the fact that Mr Merlo could have taken an alternative course does not detract from the fact that, finding himself in the position he did, he acted with reasonable cause.

Particulars

(a) The Senior Commissioner did not give reasons to explain why he found at [23] that Mr Merlo misconducted himself by failing to take an alternative course by creating more distance between himself from A.

(b) The respondent led evidence that the 'barking dog training' given to transit officers is to disengage by creating distance between themselves and aggressive people not on PTA property and that the mischief that the training seeks to avoid is interaction between transit officers and aggressive people not on PTA property.

(c) Mr Merlo did not find himself in a position where he was required to use spray on an aggressive person not on PTA property, he put himself in that position by misconducting himself.

(d) Mr Merlo's misconduct in failing to distance himself from a person not on PTA property acting aggressively wholly detracts from Mr Merlo relying on A's aggression to constitute a reasonable cause to deploy OC spray.

4. The Senior Commissioner erred in law by failing to consider a relevant consideration, namely Mr Merlo's previous disciplinary history.

Particulars

(a) The Senior Commissioner failed to give consideration to Mr Merlo's documented disciplinary history which was tendered as evidence during the proceedings and is contained in the Appeal Book at pages 181 - 198.

5. The Senior Commissioner erred in law by ordering that Mr Merlo be reinstated to the position of Transit Officer Level 3 in accordance with the *Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2015*.

Particulars

(a) The Senior Commissioner was not empowered by section 23A of the *Industrial Relations Act 1979* to reinstate Mr Merlo to his former position on conditions less favourable than the conditions on which Mr Merlo was employed immediately before dismissal.

The heart of the PTA's case on appeal

55 Whilst the appellant does not challenge any of the findings of fact made by the learned Acting Senior Commissioner, it challenges the relevance and evidentiary weight of the findings made.

56 During the incident in question A was aggressive, appeared intoxicated and engaged in threatening behaviour. Immediately before and when Mr Merlo deployed the OC spray A was at the fare gates which are on the boundary of PTA property. At all material times, it appears A was not on PTA property. He was on the other side of the fare gates.

57 At the heart of the PTA's case is the contention that if Mr Merlo believed that A was acting aggressively he was required to extend the distance between himself and A such that A would either leave or come onto PTA property where Mr Merlo would be able to respond with A's aggressive behaviour in accordance with the procedures set out in the manual. In particular, the PTA argues that in dealing with such a person who is near to the boundary of PTA property, but off PTA property, a transit officer is trained to and required by the policies, procedures and rules set out in the manual to disengage from the abuse by moving back from the person. By taking this action the PTA says the situation may be diffused if the person walks away or if they come onto PTA property the person can be dealt with, if necessary, by the use of force.

The PTA's submissions - Grounds 1 to 3 of grounds of appeal

58 Transit officers are provided with training and a manual. The PTA says that the manual comprises of rules, policies and procedures that transit officers must follow. However, the manual does not prescribe every scenario that could arise in the work of a transit officer.

59 Section 3.18 of the manual provides (AB 73):

Off PTA property

In order for Security Officers to effectively and legally deal with offenders, the offences in question must have been committed whilst the person was on PTA property. The *PTA Act 2003* defines PTA property as any property that belongs to the PTA; property where the PTA has care, control and management; or any property operated on behalf of the PTA.

3.18.1 When escorting a person from PTA property, Security Officers should disengage at a safe distance from the edge of property boundary. If the person returns to property, they can be arrested safely within the property boundary with no risk of injury to staff or offenders which may occur by doing this adjacent to or on public roads. Offenders that continue with offensive behaviour on general public property for any extended time will be dealt with by Police who will be contacted by the Shift Commander.

3.18.2 Security Officers are not to chase offenders off or from PTA property.

3.18.3 Security Officers are also reminded that following an OC deployment, the duty of care only exists whilst a person is in the custody of the PTA and an exposure to OC spray does not justify the movement off PTA property for the sole purpose of taking the person into custody in order to issue OC aftercare.

3.18.4 If an offender escapes lawful custody and is no longer under the control of the PTA, duty of care does not apply; however, if Security Officers are in pursuit and the offender or any other person is injured (struck by a vehicle, falls over, etc ...), the PTA is deemed to still be in custody of the offender and is responsible for their welfare.

3.18.5 Security Officers are not to enter private residences whilst in the conduct of PTA duties. If is known that the location of offenders is private property the matter will be passed on to police to deal with.

60 The PTA concedes there is nothing in the manual that provides a direction 'Do not use OC spray on people off property', but what the manual does say in s 3.18 is that:

(a) transit officers cannot chase people off or from property;

(b) people need to be on PTA property if a transit officer is going to arrest them;

(c) a transit officer cannot arrest a person unless the person has committed an offence on property; and

(d) if a person is being aggressive on property they are to be escorted off property by taking them to the boundary and letting them go at the boundary.

61 In particular, s 3.18.1 provides that when escorting a person from PTA property, transit officers should disengage at a safe distance from the edge of property boundary. By this statement the PTA says the manual contemplates that a transit officer should disengage before the edge of PTA property.

62 Consequently, the PTA's argument is that the matters set out in the manual reflect that transit officers work within boundaries and, when read as a whole, the rules, policies and procedures in the manual tells you that people off property are not the concern of transit officers and the reason why the manual takes that approach goes to the legal authority of the transit officers to exercise their duties and to protect transit officers and their safety.

63 When an aggressive person is at the boundary threatening to come across onto PTA property the training that transit officers are given to deal with such a person is called 'black mat' training and a component of that training is called the 'barking dog' policy. Mr Svirac described the training in the following way:

> Transit Officers work within boundaries. One of the things that we've found over the years is that if we sit there and we stand on the boundaries, we create what's referred to as the barking dog syndrome. The barking dog syndrome is when you're on the boundary and people are arguing with you.
>
> The instruction to Transit Officers is to sit there and disengage if you find yourself in that situation.

64 Thus, it is said that the thrust of the training is that a transit officer is to disengage from an aggressive person to give them a choice as to whether to leave or to come onto PTA property. The training contemplates two things. Firstly, a transit officer cannot do anything when the aggressive person is off property. Secondly, an aggressive person may not come onto PTA property, they will just leave. The whole point of the procedure is that a transit officer cannot diffuse an aggressive interaction situation on the edge of the property so why engage with a person at that point. Thus, it is said that the barking dog training supplements the procedures stated in the manual which speak about escorting people off property. Consequently, it is said that the manual and the training provided to transit officers makes it clear that aggressive people off property are to be ignored and that point is well understood by transit officers. This it is said was made clear from the evidence given by Mr Svirac and Ms Warr.

(a) Ground 1

65 Mr Merlo was found by the PTA to have misconducted himself by using excessive force against A off PTA property, thereby breaching s 3.17 of the manual.

66 In appeal ground 1, the PTA submits that the learned Acting Senior Commissioner asked himself the wrong question when he was asked to determine whether Mr Merlo used excessive force when he deployed OC spray at A and whether Mr Merlo had breached s 3.17 of the manual. In construing this question, the PTA argues that the learned Acting Senior Commissioner should have had regard to, as contextual consideration, the fact that transit officers are trained to distance themselves from aggressive persons on the boundary who are off PTA property, a principle reinforced by s 3.19.2 of the manual, and the fact that if Mr Merlo believed that A was acting aggressively, he was required to extend the distance between himself and A such that A would either leave or come onto PTA property where Mr Merlo would be able to respond with force if necessary.

67 The PTA's argument is that Mr Merlo used excessive force because the rules, policies and procedures in the manual prohibit a transit officer using force off PTA property and training provided to transit officers requires disengagement from aggressive males on or near the boundary of PTA property.

68 The PTA rely upon the definition of excessive force in s 7.10.2 of the manual which provides, among other situations, the use of 'any force when none is needed'. The PTA argues that whilst the learned Acting Senior Commissioner accepted that the 'use of force' principle set out in s 7.10 of the manual applies to the use of OC spray, the facts reveal that Mr Merlo did not retreat from A to diffuse and distance himself from the threat as he was required to do by the terms set out in the manual and the training he had received. Instead Mr Merlo flipped open his OC spray canister pouch, approached A, warned A several times that he would be sprayed if he did not leave and leaned over the barrier when deploying the OC spray after A threatened to spit directly at him. The PTA says that Mr Merlo used excessive force because had Mr Merlo followed correct procedure by distancing himself from A's abuse and threats it would not have been necessary to use force on a person who was not on PTA property.

69 In support of its argument, the PTA points to the evidence of Mr Svirac that:

(a) instead of unclipping his OC spray canister pouch and advancing, it would have been appropriate for Mr Merlo to disengage and distance himself from A to, among other reasons, reduce the risk of being spat on;

(b) if he was in Mr Merlo's shoes he would have distanced himself from the threat by taking a few more steps back, noting that Mr Merlo had some eight metres behind him; and

(c) Ms Warr did exactly what she was trained to do. She disengaged from A and walked away.

70 Thus, the PTA says that Kenner ASC erred by asking a narrower question than the PTA considered, that is, he should have answered the question whether Mr Merlo used excessive force by having regard to all of the circumstances. Instead, without regard to all of the circumstances he only had regard to whether Mr Merlo's split second judgment to use force, when A

motioned towards him with a threat that he would spit at him, was reasonable. Consequently, it is said Kenner ASC examined Mr Merlo's conduct isolated from the circumstance that he had put himself at risk of a threat from A when doing so was in breach of the provisions of the manual and the training.

(b) Ground 2

71 In ground 2 of the appeal, the PTA contends that the learned Acting Senior Commissioner was required to consider whether Mr Merlo's decision to deploy the OC spray was excessive in light of his failure to adhere to procedure which would have obviated the need to use the OC spray. It is said that the use of the OC spray was a direct consequence of Mr Merlo's misconduct. It is also argued that necessity is a precondition to the use of force and it is self-evident that if Mr Merlo had not misconducted himself by failing to disengage from A he would not have had to use the OC spray on A while A was off PTA property. It is also argued on behalf of the PTA that if a precondition to the use of force is necessity, it was not open for the learned Acting Senior Commissioner to consider the factors set out in appeal ground 2.

72 In finding that Mr Merlo could have taken an alternative course by creating more distance between himself and A and that Mr Merlo should be demoted to a transit officer, level 3, it is said that it is implicit in this finding that the learned Acting Senior Commissioner found that Mr Merlo misconducted himself. However, it is argued that the learned Acting Senior Commissioner did not properly articulate the conduct the subject of the finding of misconduct, that is, why and at what point Mr Merlo was required to take an alternative course. Yet it is implicit in this finding that the PTA's 'barking dog' training, in particular, the testimony of Ms Warr and Mr Svirac that Mr Merlo was required to disengage and distance himself was accepted.

73 Whilst s 3.17.3. of the manual provides that the OC spray may be only deployed in accordance with the guidelines, which include use for personal protection (self-defence) of a security officer or any other person where there is an imminent and immediate danger to safety, health and well-being, the PTA argues that s 3.17.3 does not provide a test of whether the use of OC spray is used reasonably and appropriately. Also, they say that this rule does not authorise the use of OC spray, rather it sets out guidelines for its use.

74 The requirement for the use of OC spray to be reasonable and appropriate is found in s 3.17.6 which provides:

> The use of OC spray must be reasonable and appropriate, any misuse could have significant impact on the image of the PTA and in particular the Security Services Branch. Additionally, misuse of OC spray will result in an internal review of the incident and could lead to criminal action being commenced against the Security Officer(s) involved.

75 The PTA says the use of OC spray on people off property can never be reasonable and appropriate. The PTA relies upon the evidence given by Mr Italiano that in his opinion Mr Merlo's failure to distance himself or retreat from the danger posed by A was a factor affecting whether or not his use of the OC spray was reasonable and appropriate. Mr Italiano's evidence was that given Mr Merlo's training he would have been in a better position had he retreated and should have been in a better position to have not found himself confronting A over a fare gate. Thus, Mr Italiano explained these factors led him to find that Mr Merlo had used excessive force because, as per the definition in s 7.10 of the manual, force had been used when no force was needed.

76 Thus, the PTA says the live issue at the hearing at first instance was whether it was necessary for Mr Merlo to use OC spray on A while he was off PTA property, necessity being a precondition in s 7.10 of the manual to use force. That question it is said is not answered solely by whether Mr Merlo felt threatened in a moment of time, but rather by what lower force options (including retreat) he could have, and was required to, employ prior to the incident. Whether Mr Merlo's use of OC spray was necessary, and therefore not excessive, needed to be considered in light of all of the circumstances and not only at a moment in time.

(c) Ground 3

77 The PTA puts appeal ground 3 as an alternative to grounds 1 and 2. It is submitted that the learned Acting Senior Commissioner did not properly exercise his discretion when considering whether the dismissal of Mr Merlo was harsh, oppressive and unfair.

78 The PTA points out that whilst it was found that the dismissal of Mr Merlo was harsh, oppressive and unfair it was also found that the appropriate penalty that should have been imposed on Mr Merlo, having regard to the particular features of the incident, with the benefit of hindsight, was a demotion. It is argued that the learned Acting Senior Commissioner did not properly articulate the conduct the subject of the finding that Mr Merlo misconducted himself by not taking an alternative course, but says that his reasoning is implicit. Yet the basis of the finding of misconduct is not clear. It is said that Mr Merlo was authorised to tell A to go away or to leave, but he was not authorised to warn A when A was off PTA property that he would be sprayed with OC spray if he did not leave. The PTA says the misconduct was that Mr Merlo failed to disengage and distance himself from the threat at the barrier of the PTA property.

79 It is argued on behalf of the PTA that if the finding of misconduct made by the learned Acting Senior Commissioner is a finding that Mr Merlo failed to disengage and distance himself from an aggressive person who was not on PTA property, then the finding of misconduct wholly detracts from the finding that Mr Merlo, finding himself in the position he did, acted with reasonable cause. It is said it follows that Mr Merlo did not find himself in a position where he was required to use OC spray on an aggressive person not on PTA property, but that he put himself in that position by misconducting himself. The use of OC spray by Mr Merlo it says was the unnecessary and predictable consequences of his misconduct, which exposed an intoxicated 12-year-old juvenile to the deleterious effects of OC spray whilst not on PTA property.

80 Thus, it is said the error in the learned Acting Senior Commissioner's reasons is that he analysed and treated the incident as two transactions, rather than one. In doing so, the learned Acting Senior Commissioner rationalised Mr Merlo's decision to use OC spray on a person off property despite the PTA's procedures being designed to prohibit such conduct. Consequently, the learned Acting Senior Commissioner's finding that Mr Merlo misconducted himself by failing to distance himself from an

aggressive person not on PTA property must be regarded as significantly or wholly detracting from his later finding that A's aggression constituted a reasonable cause for Mr Merlo to deploy OC spray in self-defence.

Conclusion

(a) Discretionary decisions - relevant principles of appellate review

81 The decision made by the learned Acting Senior Commissioner that the dismissal of Mr Merlo was harsh, oppressive and unfair was made on an assessment of the evidence given in the proceedings at first instance.

82 The Full Bench is empowered to set aside a discretionary decision in limited circumstances. A decision cannot be set aside because members of the Full Bench would have exercised the discretion in a different way. A Full Bench is to accord an evaluative decision made at first instance that a dismissal was or was not fair with sufficient deference: ***Michael v Director General, Department of Education and Training*** [2009] WAIRC 01180; (2009) 89 WAIG 2266 [139] (Ritter AP). After making this observation, Ritter AP in ***Michael*** set out the well-established principles [140] - [143]:

> The relevant principles were set out in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505 as follows:
>
> > 'The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.'
>
> As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19]-[21]. At [19] their Honours explained by reference to the reasons of Gaudron J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76, that a discretionary decision results from a 'decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result"'. Instead 'the decision-maker is allowed some latitude as to the choice of the decision to be made'. At [21] their Honours said that because 'a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process'. Their Honours then quoted part of the passage of *House v King* which I have quoted above.
>
> Similarly, Kirby J in *Coal and Allied* at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with 'caution and restraint'. His Honour said this is 'because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view'. (See also *Norbis v Norbis* (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535).
>
> These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519. There, his Honour explained that although 'error in the proper weight to be given to particular matters may justify reversal on appeal, … disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge'. This is because, in considering an appeal against a discretionary decision it is 'well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion', and that when 'no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight'. (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]).

(b) Grounds 1, 2 and 3 of the appeal

83 Whilst the PTA's submissions have been set out in these reasons at some length, the central point to its arguments is that the learned Acting Senior Commissioner failed to have regard to the evidence given on behalf of the PTA that established Mr Merlo was required through the training he received and relevant sections of the manual to have taken an alternative course of action when confronted by A's aggressive behaviour at the fare gates (on the boundary of PTA property) by disengaging and stepping back to put distance between himself and A.

84 There are a number of difficulties with this point.

85 Firstly, whilst the breach of discipline found by the PTA does not specifically prohibit the raising of this point, the breach found did not directly raise this issue. The finding by the PTA was that Mr Merlo had used excessive force by deploying OC spray at A off PTA property therefore breaching s 3.17, s 3.18 and s 7.10 of the manual.

86 Secondly, the issues the Commission was invited to decide in the memorandum of matters for hearing and determination did not on their face directly point to this issue. In particular, questions (a) to (c) appear on their face to raise questions that went only to the actions of Mr Merlo once A had lunged towards him as if to spit in his face. Questions (d) and (e) went to the issue whether Mr Merlo had warned A and whether A could have clearly seen Mr Merlo draw the OC spray. Question (f) went to the issue of the reason why Mr Merlo drew the OC spray. Question (g) essentially raised the same question as (a).

Question (g) asked whether the use of the OC spray by Mr Merlo was authorised by s 3.17.3 of the manual, that is in self-defence. This question, on its face, like (a) directly raised an examination of Mr Merlo's conduct when he used the OC spray and not what he did prior to being in the position where he found himself in the position of A lunging towards him as if to spit. Question (h) also required an examination of the facts from the point of deploying the OC spray. Question (i) raises an issue that arose during the investigation. Question (j) went to whether specific provisions of the manual were breached and not to directions given to transit officers during their training. Question (k) raised the issue of whether the penalty imposed by the PTA was proportionate and appropriate for Mr Merlo's conduct.

87 Thirdly, in opening the case for the PTA at first instance, Mr Anderson, counsel for the PTA, did not put this point in the same way it is not raised in this appeal. Mr Anderson put as the central point of the PTA's case the proposition that Mr Merlo had used force off PTA property. Mr Anderson said (ts 39 - 40):

> **ANDERSON, MR:** Now, the respondent's - the respondent concedes, I think, for all intents and purposes that [A's] behaviour is aggressive and threatening.
>
> Ultimately, what the respondent found was that the use of force in the circumstances couldn't be justified. It found that Mr Merlo used excessive force, but it's not excessive in the sense that, you know, disproportionate to the spit. It's not a question of, you know, in self-defence terms, weighing it up in that context. The use of excessive force, as it's defined in the Manual, includes a definition of:
>
> > 'Using force when no force is necessary.'
>
> So the finding was essentially that it ought not to have been used at all, that there was perhaps no cause for it, if you like.
>
> You know, it's unnecessary to say that it - has to be used for self-defence. And I don't think the respondent concedes that there was an imminent danger posed by [A], but nor does it, you know, cede to contest it. And equally, I don't think that the respondent made a finding that [A] [sic] didn't intend to, as a part of the deployment, to use in self-defence. What we know is that Mr Merlo threatened three or four times to spray [A], and that's in Mr Merlo's response to the respondent in his memorandum. He made those sort of - he made that sort of warning, if you like, that if [A] didn't cease threatening and leave he'd be sprayed. And ultimately that was a warning he carried through with.
>
> The point that we're here debating before the Commission, if you like, is the respondent's finding that Mr Merlo used OC spray to stop [A] coming onto the property. Okay?
>
> But that finding isn't inconsistent with Mr Merlo's explanation that he used it in self-defence because, of course, no doubt he was probably worried about [A] coming on and - or perhaps he just wanted him to leave so that he wasn't a threat - didn't pose as a threat anymore. Or whatever the reason is, the respondent can't know what was in Mr Merlo's head, definitively. But on the evidence, it said there's enough there for us to make a finding that, 'Given that what you've said to the investigator, you were principally concerned, if not entirely concerned, with preventing him from coming onto the property. You were fed up with him, basically',
>
> And the tension between the parties' respective positions is that Mr Merlo's explanation that - well, Mr Merlo knows that he can't justify the use of OC spray to deter a person - or at least he should know now anyway. So his explanation is that he used the OC spray to prevent being spat upon. And that's what's at odds with the respondent's finding, because he says, 'That's the only reason I used the spray. I wasn't concerned with his threats to come on property, with his - and keeping him off property. I wasn't concerned with his threats of violence. The only reason I used the spray was because I didn't want to be spat at'. And the respondent just simply says that's unlikely because of the evidence that he gave to the investigator.
>
> So that's - - -
>
> **KENNER SC:** Even if the - even if Mr Merlo's partial motivation was to prevent being spat upon, given all of the circumstances and the - obviously aggressive and threatening and fairly outrageous behaviour by these two young people, even a partial motivation would be self-defence, wouldn't it?
>
> **ANDERSON, MR:** Yes. And that's why the finding's not necessarily at odds.
>
> I mean, you can use OC spray in a force that's not - I mean, there is conflict in one sense because on the one hand you have a provision which says, you know, you can use OC spray in self-defence, on another one you have a provision saying you can't use any force to stop someone coming onto property. And there's a crossover, if you like, when the threat is off-property and you need to use self-defence in those circumstances. But the way that's overcome is that there are provisions in the Manual that prevent people - you know, stop you from getting that close. But before we get to that point, we say that principally he - Mr Merlo used the OC spray to stop him coming on the property.
>
> But if we get to the point where we need to talk about whether or not the use of OC spray is self-defence partially, is a situation warranted and justifiable in the circumstances, then what we then have to do is to question the reasonableness of the - or the appropriateness of the use - the choice to use OC spray in those circumstances. And that's a separate question. So you have - is the respondent's finding legitimate? Yes, it might be. It may also be the case Mr Merlo used the spray in self-defence. Okay. Then we need to consider whether that was reasonable in the circumstances separately. Because that, of course - if it wasn't reasonable for him to use OC spray in self-defence in those circumstances, then it's still a contravention of the policy.

88 Mr Anderson in opening then said (ts 41):

> [T]here was the option for Mr Merlo to walk away. And that - and he didn't do that, he chose to step forward and use force. So we say that it - you know, in that situation, albeit in a split second, the use of O spray - C, sorry - was unreasonable.
>
> But otherwise, the respondent says, 'Okay, you do have a split second'. Maybe he didn't. He was fearful for his safety. Otherwise the respondent says in those - in that situation the first thought of - instinct you do is you put up your hands or

> you protect your face and you sort of retreat. There are things that he should have done, the respondent says, before whipping out the OC spray. I mean, it's important, you know, to assess of all this in the context, of course, with the timing, the split second. But that militates against the use of the OC spray, the respondent says.
>
> But then the respondent also says - and I think this is probably the most sort of critical point of the respondent's case, is that had Mr Merlo not contravened other aspects of the Manual in failing to distance himself from [A's] threats and aggression at any stage prior to the incident itself when you see all the other Transit Guards standing back, he wouldn't had been required to use any force. So it's a situation of his own making.

89 Thus, it appears in opening Mr Anderson on behalf of the PTA put to the learned Acting Senior Commissioner that after Mr Merlo took a step back from A, Mr Merlo had the 'option' to walk away but instead of doing so, he stepped forward and unreasonably used force because he did not exercise the option of walking away.

90 Whilst it was not put on behalf of the PTA in closing that Mr Merlo had the option of stepping back, this point was accepted and adopted by the learned Acting Senior Commissioner in his reasons for decision when he found that with the benefit of hindsight Mr Merlo could have taken an alternative course by creating more distance between himself and A [23].

91 In closing, Mr Anderson reiterated the point that the PTA made the factual finding that Mr Merlo used the OC spray to prevent A from coming onto PTA property (ts 149). He then, put the point that Mr Merlo concedes with hindsight that he should have distanced himself from A and made the submission (ts 150):

> [H]e's admitted in his testimony, and I think in the investigation report, that, you know, in hindsight he should have distanced himself. And we know that there's an obligation in the Manual in 3.19 that, you know, codifies that requirement so it's not something Mr Merlo's simply formed a view to of his own realisation on reflection. It's something that he needed to do at the time.
>
> And so I think, you know, that's quite an important point because when considering if Mr Merlo used his OC spray in self-defence, we don't assess that reasonableness in a snapshot at the moment that the incident occurred. It's not, you know, take the chain of events and pick out the frame where you say, 'There's a split-second decision here and therefore it must be reasonable and appropriate because it's a, you know, subjective assessment and that's what he feared'. My client says, well, it says what it did, and that is it looked at all the circumstances of his conduct during the exchange and formed a view as to whether or not deployment of the OC spray was reasonable in those circumstances.
>
> He looked at whether or not Mr Merlo had exposed himself a threatening situation, you know, was the situation unnecessarily inflamed, where did the threat emanate from, was it on property, off property, did the Manual give guidance and prevent force being used when a person's off property, is a person required to distance themselves from a threat, you know, a threatening situation either on or off property, is a person trained to distance themselves from people off property making threats? And if the answer to all those things is 'Yes', or even if the answer to some of those things is 'Yes', then the decision-maker has to sit down and attempt to rationalise the person's conduct not by virtue of the decision made in a split second but by reference to the chain of events.

92 Mr Anderson then made a submission that the requirement to disengage is in the manual (ts 151):

> If you look at the Manual, the Manual says you can't use force off property on someone. The Manual says you can use OC spray in self-defence. But in the middle, the Manual says if you find yourself or you assess the situation as threatening or endangering you disengage, you distance yourself from that situation, and that's what Ms Warr's evidence was. She disengaged. She saw it, she thought it was disorderly, she didn't consider it threatening but she still disengaged because, well, if you disengage the person's either going to leave or the person's going to come on property, in which case you effect an arrest. You know, and that's what they're trained to do.
>
> So if you comply with the Manual there is no tension. As soon as you fail to comply with the Manual you find yourself in the situation Mr Merlo's found himself, contrary to his training, which is - we've heard about, from the barking dog, and then you do find yourself in a situation and you have to say, 'I had a split second. I couldn't make a decision. One person reacts differently to another'. But you don't get there if you comply with the Manual and that's why you look at the - you read the Manual as a whole.
>
> It's a very difficult - you can't prescribe for every circumstance that might arise. With the benefit of hindsight my client will probably go back and write into the Manual, 'Don't use OC spray on persons off property even in self-defence'. But it doesn't need to be spelt out in that sense because they've had so much training drilled into them.

93 Thus, the requirement to disengage from an aggressive person who is near the boundary but is off PTA property is said on behalf of the PTA to arise from a construction of s 3.18 of the manual. The first difficulty with this submission is that the PTA does not appeal against the finding that Mr Italiano admitted that the allegation that Mr Merlo contravened s 3.18 of the manual was erroneous as there was no suggestion that A had committed an offence on PTA property ([42], AB 31).

94 Secondly, some of the provisions of the manual could be construed as directions that do not require strict compliance, but instead confer a discretion that is to be exercised in accordance with the guidelines. In the heading 'About this Manual' it is stated (AB 53):

> This Manual is to provide guidance to Transit Officers, Transit Supervisors and Shift Commanders on PTA policies and procedures. It constitutes essential rules, policies and procedures to provide guidance for the level of professionalism expected in order to fulfill the role as a Security Officer. Work performance will be assessed against relevant sections of this Manual.

95 Whilst many of the provisions are expressed as directions and some of the provisions in s 3 of the manual are expressed as requirements (such as s 3.4.2 which provides that in the absence of revenue officers, security officers are required to be at fare gates for the entire peak period), some provisions are not specific. In particular, with the exception of the requirement not to

use OC spray in a railcar, s 3.17.3 sets out guidelines for the use of OC spray in circumstances, of self defence/protection of others, that are generally defined, whereby an officer who wishes to use OC spray is required to exercise his or her discretion within those guidelines.

96 In any event, s 3.18 provides no specific guidance to a security officer dealing with a person off the boundary of the PTA who by their physical action constitutes a threat to use force immediately against a security officer who is and remains on PTA property. The act of A moving to the PTA boundary and feigning to spit in Mr Merlo's face, which if carried out would have resulted in Mr Merlo being assaulted on PTA property, is a circumstance or situation that is not addressed by s 3.18 or addressed directly by any another other provision in the manual.

97 Thirdly, the submission that Mr Merlo was in all of the circumstances required to disengage from A cannot be said to be entirely supported by all of the evidence given by PTA witnesses. In particular, Mr Italiano gave the following evidence (ts 115 - 116):

> Yes?--- - - - ah, ah, in the circumstances even if he was heated and he thought the guy was getting excited and all the rest of it, I still don't see that, ah, the use of OC spray was the appropriate defence.
>
> If Mr Merlo - if you had believed Mr Merlo that he held a belief that there was an imminent threat to his safety, health and wellbeing - - -?---Mm.
>
> - - - then his use of the OC spray would have been justified by the earlier provision that we've just gone through. You accept that, don't you?---No, I - I don't necessarily accept that, no.
>
> Why don't you? Why do you say that's wrong?---Because again, I say even in those circumstances with the guy on the other side of the barrier, ah, he could have called the back - for - for backup, he could have called for the - for the, ah, the - the, ah, his partner to come along and actually assist him to arrest him.
>
> Yes, but isn't that missing the point with all due respect, because the reason why Mr Merlo used the OC spray was because the kid had made a baulk; Mr Merlo was - he didn't - - -?---Yeah, but he - he could have grabbed him then and called for - for - for back up, you know.
>
> Well, how can he grab him if he wasn't on the property?---Well, you've asked me what his reaction should have been - - -
>
> And you're saying he should have grabbed this person?---Well, if he - if he felt it was in such - such a - I mean, my first response would be to move back - - -
>
> Yes?--- - - - but - but if he felt that he was in such danger and rather than use the pepper spray which is almost the penultimate, you know, it's - - -
>
> Well, it's not almost because if that is the penultimate which - the Transit Manual says that - - -?---Well, yeah, a - a softer option would have been to - to grab him to try and restrain him.
>
> But there's the barrier in-between?---Yes.
>
> So how - - -?---Yeah. Well, yeah, he was just there.
>
> Okay?---Yeah.
>
> So you're saying it - I mean, because really the two relevant provisions for what you're saying if he's - 7.10.1 and 7.10 - - -?---But - and 2.
>
> - - - 1.02, the others I - - -?---Correct. That's right.
>
> - - - with the defensive portion - - -?---No, they're at - no. No, it's only those. Exactly.
>
> And you're saying what Mr Merlo should have done is if he did have that belief that there was an imminent threat to his safety and health, he should have grabbed the kid instead of spraying?---No, he should have backed off and called for backup, that's - - -
>
> Yes?--- - - - what he should have done.
>
> But if he had to use force you say he should have grabbed him?---Yeah, I - I would have probably tried to restrain him, yeah.

98 Whilst a submission to the contrary was made during the hearing of the appeal on behalf of the PTA, Mr Italiano did not directly address this issue or depart from this evidence when re-examined (ts 120 - 122).

99 As the learned Acting Senior Commissioner answered the questions as they were framed and considered the case of the PTA as it was put to him, I am not satisfied that any error is demonstrated in the exercise of his discretion insofar as the decision is sought to be impugned in grounds 1 to 3 of the grounds of appeal.

100 For these reasons, I am of the opinion that grounds 1 to 3 of the grounds of appeal have not been made out.

(c) Ground 4 of the appeal

101 In appeal ground 4, the PTA contends that the learned Acting Senior Commissioner erred in law by failing to consider a relevant consideration, namely Mr Merlo's previous disciplinary history when determining whether dismissal was a proportionate and appropriate penalty for Mr Merlo's conduct. The PTA relied on Mr Merlo's previous disciplinary history when exercising its right to dismiss, yet it says it is apparent from the reasons for decision that the learned Acting Senior Commissioner failed to take it into account.

102 In making the finding that it was 'self-evident' that the dismissal was disproportionate and an inappropriate penalty, the learned Acting Senior Commissioner relied upon the conduct of Mr Merlo and had regard to a comparable case involving another transit officer which had not attracted a penalty of dismissal and to the fact that Mr Merlo was contrite, but had no regard to Mr Merlo's disciplinary history.

103 The PTA says it is not its case that Mr Merlo's previous disciplinary matters of themselves could support dismissal, rather that the severity of the incident on 6 November 2015, taken together with the continued and repeated past contraventions of the

manual, led to the PTA reasonably losing confidence in Mr Merlo's temperament to be a transit officer and to have trust in his ability to comply with directions, policies and procedures.

104 The PTA says the reason it dismissed Mr Merlo was not only because of his actual conduct on the night in question, but because its lack of confidence in Mr Merlo in the future to follow procedures.

105 It says by the date of the incident Mr Merlo should have been aware what was required of him and if not he should have sought further information from Ms Warr on the night of the incident as:

(a) he was dealing with an inflammatory and provocative situation that transit officers' work inevitably entails which requires self-control;

(b) Mr Merlo had been involved in two related disciplinary matters which related to self-control in the past;

(c) Mr Merlo had been reprimanded and cautioned in the past for two related disciplinary matters and warned of more severe consequences in future; and

(d) in light of past incidents, Mr Merlo had been directed in the past to be mindful of not using excessive force and to review all relevant sections (particularly use of force) of the manual and had been explicitly warned against placing himself in danger.

106 Consequently, the PTA says that Mr Italiano's evidence about why Mr Merlo's disciplinary history was a relevant consideration should have been considered by the learned Acting Senior Commissioner. Mr Italiano is uncertain as to what Mr Merlo would do next and saw him as a high risk for the PTA that he would continue to breach the provisions of the manual in the future. Because of past disciplinary matters involving Mr Merlo go to Mr Merlo's 'self-control' to manage his impulses, Mr Italiano has doubts about Mr Merlo's temperament to be a transit officer after the most recent incident and because of his continued infractions.

107 The union argues that this ground is without merit. It points out that the learned Acting Senior Commissioner documented Mr Merlo's disciplinary history in his reasons for decision as follows ([20], AB 24):

> In terms of Mr Merlo's work history there have been some prior issues of performance raised, which were set out in Mr Italiano's letter of 8 June 2016 dismissing Mr Merlo. Mr Italiano's evidence as to those matters was that he had no difficulty with Mr Merlo's competency or integrity as a transit officer, or anything from the various 'My Action Plans' in evidence before the Commission. What Mr Italiano said he drew from Mr Merlo's work history were some issues of punctuality in the past, but accepted they had been remedied. He was however, also concerned about what he described as breaches of various parts of the Manual and his lack of confidence that this would not continue to occur. Mr Italiano also testified that he had some reservations as to Mr Merlo's temperament, having regard to the duties and responsibilities of a transit officer. When asked about alternatives to dismissal, Mr Italiano said that he did consider the options of demotion and transfer. However, he did not consider they were appropriate, having reached the view that Mr Merlo seemed to have difficulties with compliance with procedures.

108 The union argues that when making his decision to dismiss, Mr Italiano considered six disciplinary matters each of which were of a minor nature. It also points out that not every matter Mr Italiano referred to in the letter of dismissal resulted in Mr Merlo being disciplined. Further, that one incident was a reprimand issued on 2 December 2011 for failing to fill out an action report, a use of force form and failing to request the CCTV footage of an incident on 31 August 2011 involving a use of force by Mr Merlo. However, contrary to the finding made by Mr Italiano in the letter setting out his reasons for dismissal of Mr Merlo, this incident did not result in Mr Merlo being reprimanded for excessive use of force (AB 186; AB 234).

109 The union contends Mr Merlo's disciplinary history could not justify dismissal as Mr Merlo has not prior to the incident on 7 November 2015 been disciplined for use of excessive force. Further, it says that even if it is found that the learned Acting Senior Commissioner failed to have regard to Mr Merlo's disciplinary history, the error if made out was not material because there was nothing in the history that would lead to a conclusion that the appropriate penalty for the incident on 7 November 2015 is dismissal.

110 When regard is had to the whole of the learned Acting Senior Commissioner's reasons for decision, it is apparent that he only had regard to:

(a) the relevant circumstances of the incident as found by him in answer to questions (a) to (j) and to the finding that with the benefit of hindsight Mr Merlo could have taken an alternative course by creating distance between him and A;

(b) the fact that a penalty of demotion had been imposed on another transit officer who had deployed OC spray in an unrelated incident in circumstances that could not be regarded as the use of reasonable force or action taken in self-defence; and

(c) Mr Merlo's contrition after the incident.

111 Whilst the learned Acting Senior Commissioner referred to the prior issues of performance set out in Mr Italiano's letter of 8 June 2016, he made no analysis of the circumstances of or whether the history of breaches was correctly recorded ([20], AB 24). Also, although he referred to Mr Italiano's evidence, which goes to the PTA's claim that dismissal was a proportionate penalty on grounds that the PTA could not have a sufficient level of trust and confidence in Mr Merlo that he has the appropriate temperament for the duties of a transit officer and that he would in the future not breach the provisions of the manual, the learned Acting Senior Commissioner did not have regard to this evidence and whether the opinion of Mr Italiano is soundly and rationally based.

112 The Full Bench considered at length the principles that apply to the discretion to order reinstatement pursuant to the power conferred in s 23A of the Act in ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch*** [2016] WAIRC 00236; (2016) 96 WAIG 408 (***Vimpany FB***). Although the principles were enunciated in context of the specific statutory provisions that authorise the making of orders

pursuant to the power conferred by s 23A, the following principles may have application in an appropriate case to the making of an order pursuant to the power conferred under s 44 of the Act. In that matter, Scott ASC and I found [106]:

> In our opinion, when regard is had to s 23A of the Act, the statutory scheme to provide remedies to a claimant who has been harshly, oppressively or unfairly dismissed and the decided cases the following principles should apply to an exercise of discretion when considering whether to order reinstatement of a claimant where a relevant circumstance is a claim by the employer that there has been a loss of trust and confidence in the claimant:
>
> (a) Reinstatement is the primary remedy afforded by s 23A. If reinstatement of a claimant who has been harshly, oppressively or unfairly dismissed is impracticable, the Commission is to consider whether another position is available and suitable for the claimant to be re-employed. If reinstatement or re-employment is impracticable, the Commission may order the employer pay compensation.
>
> (b) The onus is on the employer to establish credible reasons why reinstatement of the claimant is impracticable.
>
> (c) Trust and confidence can be a relevant factor to consider when considering whether reinstatement is impracticable. Whether it is a relevant factor will depend upon the factual circumstances of a particular matter. Trust and confidence is not the sole criterion or even a necessary one in determining whether reinstatement is impracticable.
>
> (d) For reinstatement to be impracticable on grounds of trust and confidence, some embarrassment or doubt by the employer, friction between the claimant, the employer and/or other employees is not sufficient to make the relationship unviable.
>
> (e) The reluctance of an employer to shift from the view of the claimant's conduct, despite an assessment by the Commission that the conduct in question had not been made out, does not provide a sound basis to conclude that the necessary level of trust and confidence is irreparably damaged or destroyed.
>
> (f) The employer's opinion about whether there is a necessary level of trust and confidence must be genuine, credible and rationally based. The necessity of an appropriate level of trust and confidence to restore an employment relationship will depend upon not only the attitude of the claimant towards the employer and/or any other relevant employees and the employer to the claimant, but also whether the attitudes expressed have a reliable foundation and the nature and function of the duties of the employee.
>
> (g) The level of sufficient trust and confidence in an employment relationship will vary depending upon the circumstances of a particular matter.
>
> (h) The assessment of whether there is a sufficient and cogent loss of trust and confidence is a matter for the Commission to determine. The degree of trust and confidence an employer could be said to reasonably expect of one category of employee may be higher or lower than another.
>
> (i) The question to be determined by the Commission is whether there can be, in the circumstances, a sufficient level of trust and confidence restored to make the employment relationship between the employer and the claimant viable and productive.

113 In an appeal to the Industrial Appeal Court against this decision, these principles were approved: ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2017] WASCA 86; (2017) 97 WAIG 431 (***Vimpany IAC***). As a high level of trust and confidence is to be expected in the employment relationship of a transit officer, the evidence of the opinion of Mr Italiano is a matter that the learned Acting Senior Commissioner should have had regard to when considering whether dismissal was a proportionate and appropriate penalty for Mr Merlo's conduct.

114 In making such an assessment, regard should also have been had to the fact that it appears that the disciplinary history recorded in Mr Italiano's letter of 8 June 2016, in which he set out the matters he relied upon in making the decision to impose a penalty of dismissal on Mr Merlo, is incorrect in that Mr Merlo had not in the past been disciplined for excessive use of force (AB 186; AB 234).

115 For these reasons, I am of the opinion ground 4 of the appeal has been made out.

(d) Ground 5 of the appeal

116 In ground 5 of the appeal, it is argued that the learned Acting Senior Commissioner erred in law by ordering that Mr Merlo be reinstated to the position of transit officer, level 3. The parties agree that the power to make this order does not arise from s 23A(3) of the Act, as s 23A(3) only empowers an order of reinstatement of Mr Merlo to his pre-dismissal position as a transit officer, level 5. This consequence arises because s 23A(3) expressly restricts the power to make an order that an employer reinstate an employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.

117 The issue raised in this appeal is whether the power to make the order requiring the PTA to reinstate Mr Merlo as a transit officer, level 3, arises pursuant to the powers conferred by s 44(9) of the Act by operation of s 23(3)(h) of the Act. Section 23(3)(h) provides:

> The Commission in the exercise of the jurisdiction conferred on it by this Part shall not —
>
> (h) on a claim of harsh, oppressive or unfair dismissal —
>
> (i) in the case of an application under section 44, make any order except an order that is authorised by section 23A or 44; and
>
> (ii) in any other case, make any order except an order that is authorised by section 23A.

118 Following the hearing of oral submissions in respect of grounds 1 to 4 of the appeal, the parties filed written submissions about the effect of s 23(3)(h) of the Act.

119 On 6 June 2017, the parties filed joint submissions. On the same day, the PTA filed supplementary submissions in which it set out its position in respect of the matters not agreed between the parties. On 9 June 2017, the union filed its submissions in respect of the matters that go beyond the agreed position set out in the joint submissions.

(i) The parties' joint submissions on the effect of s 23(3)(h) of the Act

120 In the parties' joint submissions, the parties point out that s 23(3)(h) of the Act, in its current form, was inserted into the Act by s 137 of the *Labour Relations Reform Act 2002* (WA).

121 They also point out that the second reading speech for the *Labour Relations Reform Bill* did not make any specific reference to the amendments to s 23(3)(h) of the Act. They do, however, raise that in the second reading speech for the Bill the amendments to s 44 of the Act were referred to. In the speech, it was stated:

> The following key changes will be made to the unfair dismissal and associated enforcement provisions of the Act: reinstatement will be the primary remedy regardless of whether an employer agrees to pay compensation and the commission will in certain circumstances be able to make interim orders under section 44, Compulsory conference, as to reinstatement or re-employment pending the resolution of the claim … (Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 February 2002, 7519 (Mr Kobelke).

122 The joint submissions observe that some passing comments were made to the amendments to s 23(3)(h) of the Act at the committee stage of the *Labour Relations Reform Bill* in the Legislative Council (Western Australia, *Parliamentary Debates*, Legislative Council, 20 June 2002, pp 11747 - 11774). They then point to the recent decision of the Industrial Appeal Court of Western Australia in ***Vimpany IAC*** in which it was made clear that the Commission should be cautious about relying upon committee debates in determining legislative intention [146] - [147].

123 The parties make a submission it may be arguable, based on the second reading speech and the committee discussion in the Legislative Council, that the mischief that s 23(3)(h) of the Act was aimed at was allowing the Commission to make interim orders in relation to s 44 unfair dismissal claims. They point out, however, that the words in s 23(3)(h) are not confined to the making of interim orders under s 44 of the Act. They appear broad enough to encompass any type of order that the Commission may make under s 44 (including final orders). The parties state the explanatory memorandum for the *Labour Relations Reform Bill* and the long title of the Bill are of no assistance.

124 The parties drew to the attention of the Full Bench that the interaction between s 23(3)(h) and s 44(9) of the Act was addressed by Ritter AP in ***BHP Billiton Iron Ore Pty Ltd v The Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch*** [2006] WAIRC 03908; (2006) 86 WAIG 642, 652 (***BHP v TWU***). In that matter, Ritter AP (with whom Beech CC and Gregor SC agreed) clearly accepted that s 23(3)(h) empowered the Commission, in relation to an unfair dismissal arbitration instituted under s 44(9), to issue a remedy that was not contemplated by s 23A (albeit, not in the case that was put before them) [79]. However, in order to do so, the remedy would need to be a 'part of a dispute remaining for determination under s 44(9) of the Act, following the conclusion of a conference'. The parties say it is implicit within the reasoning in ***BHP v TWU*** that in order to determine the jurisdiction of the Commission to make orders under s 44(9), it is necessary to consider the parameters of the dispute referred to the Commission by the memorandum of matters for hearing and determination.

125 In ***BHP v TWU***, Ritter AP said [75] - [79]:

> In this matter, the application did claim harsh, oppressive or unfair dismissal under s44, and therefore s23(3)(h) limited the orders which could be made. It limited the orders to those which could be made under s23A or s44 of *the Act*. S23A does not provide jurisdiction to make any order of the type made by the Commissioner with respect to the counselling note.
>
> With respect to the orders which could be made under s44 of *the Act*, s44(9) is relevant. This provides:-
>
> > 'Where at the conclusion of a conference held in accordance with this section any question, dispute, or disagreement in relation to an industrial matter has not been settled by agreement between all of the parties, the Commission may hear and determine that question, dispute, or disagreement and may make an order binding only the parties in relation to whom the matter has not been so settled.'
>
> Accordingly, the Commissioner had jurisdiction to hear and determine the dispute which had not by then been settled by the parties. As contained in the schedule to the Memorandum of the Commission dated 5 August 2005, that dispute was about the unfairness of Mr Johnston's termination of employment, and whether he ought to be reinstated with consequential orders. In my opinion, s44(9) of *the Act* and the Memorandum of Matters for Hearing and Determination did not provide the Commissioner with the jurisdiction to make order 6.
>
> I note that s26(2) of *the Act* provides that in granting relief or redress under this Act the Commission is not restricted to the specific claim made or to the subject matter of the claim. In my opinion, this general power is subject to the specific prescription of the jurisdiction and powers of the Commission when dealing with a claim for '*unfair dismissal*' as set out in s23(3)(h) of *the Act*.
>
> It may be that an order of the type which was made could be within jurisdiction if the making of such an order was explicitly part of the dispute remaining for determination under s44(9) of *the Act*, following the conclusion of a conference. Alternatively, if during the hearing of a dispute under s44(9), the issue of the making of such an order was raised by the parties or the Commission, the order could perhaps be made, by the Commission, in reliance upon s26(2). Neither of the possibilities applied, however, in this case.

(ii) The PTA's submissions

126 In the PTA's written submissions filed on 6 June 2017, it says that the observations made by Ritter AP in ***BHP v TWU*** are obiter and the ratio decidendi of the decision of the Full Bench in ***BHP v TWU*** is that the matter referred under s 44(9) in that

case was merely a referral of a dispute as to an unfair dismissal, and therefore neither the memorandum of matters referred for hearing and determination, nor s 44(9), provided the Commission with the jurisdiction to make orders that fell outside of s 23A of the Act. The PTA says that the present case before the Full Bench is on all fours with this point. It therefore submits it is not necessary for the presently constituted Full Bench to determine whether the obiter observations in ***BHP v TWU*** were correct and it is not appropriate to consider that question until it is squarely raised.

127 Despite making that submission, the PTA goes on to make a submission which goes to an analysis of the matters referred for hearing and determination in the memorandum in this matter. It says:

(a) paragraph 1 of the memorandum sets out that this matter is a dispute about whether the PTA unfairly dismissed Mr Merlo;

(b) paragraphs 2 to 6 set out the respective parties' contentions regarding the dispute as to whether Mr Merlo was unfairly dismissed; and

(c) paragraph 7 relevantly provides:

> In determining whether the respondent's dismissal of Mr Merlo was harsh, oppressive or unfair, the parties, by agreement, invite the Commission to decide the following issues:
>
> …
>
> (k) Was dismissal a proportionate and appropriate penalty for Mr Merlo's conduct?

128 When regard is had to these paragraphs of the memorandum, the PTA argues that the only dispute referred to the Commission was whether the dismissal of Mr Merlo was unfair. Accordingly, they say unless paragraph 7 of the memorandum provides a power for the Commission through s 44(9) of the Act to make orders other than those authorised by s 23A, there was no power for the learned Acting Senior Commissioner to make the order that he did (ordering that Mr Merlo be 'reinstated' to a position with conditions less favourable than that which he originally occupied).

129 It is said that it is clear from the prefatory words of paragraph 7 of the memorandum that paragraph 7 neither expands upon the dispute as between the parties, nor confers any extra powers on the Commission to make orders binding on the parties through s 44(9) of the Act. This construction might be characterised as an argument that the ambit of the dispute arises because paragraph 7 makes it clear that the questions set out in subparagraphs (a) to (k) are merely questions that the Commission was invited to answer in its process of determining whether the dismissal was unfair. Consequently, it argues it was not necessary for the Commission to answer those questions, nor does the answering of those questions provide the Commission with powers to make orders not authorised by s 23A.

130 The PTA also contends that whilst it may be argued that paragraph 7(k) of the memorandum provides a source of power for the Commission to make further orders not authorised by s 23A, such an argument must fail for three reasons:

(a) Firstly, this question is merely one that the Commission may wish to consider in the process of determining whether the dismissal was unfair, it does not provide a power to make further orders outside of the dispute as to whether the dismissal was unfair.

(b) Secondly, even if the Commission chooses to answer this question, the question on referral simply leads to a 'yes' or 'no' answer. There has been no conferral of jurisdiction upon the Commission to make a binding order for the PTA to impose a penalty (which the Commission considered proportionate) upon Mr Merlo.

(c) Thirdly, even if the Commission considered that the conduct of Mr Merlo did not warrant dismissal, it does not follow that a lesser penalty should have been imposed upon Mr Merlo (this is because the employer imposed a penalty of dismissal both due to Mr Merlo's conduct, and due to the PTA's loss of confidence in Mr Merlo's suitability to continue in his employment as a transit guard (due to previous disciplinary matters)). Even by answering the question posed by the parties in paragraph 7(k), the Commission is not placed in a position where it is able to determine whether some other penalty would have been appropriate both for Mr Merlo's conduct and for the loss of confidence that the PTA had in Mr Merlo's suitability for the role of a transit guard.

131 In all of the circumstances, the PTA says the Commission had no power to make an order which required the PTA to reinstate Mr Merlo as a transit officer, level 3. It says the only order that could be made is an order made pursuant to s 23A(3) to reinstate Mr Merlo as a transit officer, level 5.

(iii) The union's submissions

132 The union in its written submissions filed on 9 June 2017 says that its case is that the reinstatement order was within the scope of s 44(9) of the Act because:

(a) the express terms of cl 2.11.22 of the Industrial Agreement required the disciplinary penalty issued to Mr Merlo to be proportionate and reasonably suitable; and

(b) the parties expressly requested the learned Acting Senior Commissioner to consider whether the penalty of dismissal was proportionate.

133 Clause 2.11.22 of the Industrial Agreement reads:

> The type of penalty applied must be proportionate to the conduct which gave rise to the breach of discipline or must be reasonably suitable in consideration of all of the circumstances of the case.

134 Consequently, the union argues a review of whether the PTA's decision to dismiss Mr Merlo was harsh, oppressive, or unfair required an assessment of the proportionality and suitability of that penalty.

135 In support of its argument, the union relies upon the question put in paragraph 7(k) of the memorandum which was 'Was dismissal a proportionate and appropriate penalty for Mr Merlo's conduct?'

136 The union argues that:

(a) the proportionality of the disciplinary penalty issued to Mr Merlo was in dispute between the parties and the memorandum of matters referred for hearing and determination empowered the Commission to resolve that issue;

(b) in dealing with the issue of proportionality, the learned Acting Senior Commissioner first needed to determine what penalty would have been proportionate and appropriate in the circumstances. The answer to that question would provide the learned Acting Senior Commissioner with a yardstick to measure against the penalty of dismissal. After considering the circumstances of this case, Kenner ASC found that the proportionate penalty in relation to Mr Merlo was a demotion to the position of transit officer, level 3. Given that finding, the harsher penalty of dismissal was consequentially found to have been disproportionate and not appropriate; and

(c) the union says that the order requiring the PTA to reinstate Mr Merlo as a transit officer, level 3, merely gave effect to Kenner ASC's ruling that the proportionate and appropriate penalty in the circumstances should have been a demotion to the position of transit officer, level 3.

137 In the circumstances, the union submits that Kenner ASC was empowered to make the order he did by the combination of the effect of s 23(3)(h) of the Act, s 44(9) of the Act, cl 2.11.22 of the Industrial Agreement and the memorandum of matters referred for hearing and determination.

(iv) Conclusion - Ground 5

138 Prior to the enactment of s 137 of the *Labour Relations Reform Act*, s 23(3)(h) provided the Commission shall not:

(h) on a claim of harsh, oppressive or unfair dismissal make any order except an order that is authorized by section 23A.

139 At the time s 137 of the *Labour Relations Reform Act* was enacted s 44 was also amended by the enactment of s 141(1) of the *Labour Relations Reform Act*. Section 141(1) amended s 44(6)(bb) to provide:

The Commission may, at or in relation to a conference under this section, make such suggestions and give such directions as it considers appropriate and, without limiting the generality of the foregoing may —

(bb) with respect to industrial matters —

(i) give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under this Act; and

(ii) without limiting paragraph (ba) or subparagraph (i) of this paragraph, in the case of a claim of harsh, oppressive or unfair dismissal of an employee, make any interim order the Commission thinks appropriate in the circumstances pending resolution of the claim;

140 As the parties point out in their joint submissions, the amendment to s 23(3)(h) by the enactment of s 137 of the *Labour Relations Reform Act*, does not restrict the Commission to making interim orders, at or in relation to a conference convened under s 44 of the Act, in the case of an industrial matter that raises a case of a claim of harsh, oppressive and unfair dismissal. If that was the case, given the enactment of s 44(6)(bb)(ii) at the same time s 23(3)(h) was amended, then it could be expected that s 23(3)(h) would have been amended to only authorise interim orders on a claim of harsh, oppressive or unfair dismissal made pursuant to s 44(6)(bb)(ii) or final orders made pursuant to s 23A of the Act.

141 In ***Aurion Gold v Bilos*** [2004] WASCA 270; (2004) 84 WAIG 3759 EM Heenan J observed that the jurisdiction to deal with an industrial matter concerning a claim for relief for a harsh, oppressive and unfair dismissal in a matter brought before the Commission pursuant to s 44 of the Act is more extensive than the Commission's power to provide relief for a claim referred under s 29(1)(b)(i) of the Act. This is because the effect of s 23(3)(h) of the Act authorises orders under s 44 and because the prescribed time limit for referring a claim pursuant to s 29(1)(b)(i) does not apply to a matter that comes before the Commission under s 44 [50] - [56].

142 In ***BHP v TWU*** the memorandum of matters referred for hearing and determination were brief. It set out the facts upon which the TWU relied to support a claim of unfair dismissal and stated that in all of the circumstances the termination of the employee in question is unfair and sought an order of reinstatement without loss of entitlement. After hearing the parties, the Commission at first instance made an order requiring reinstatement of the employee and ordered that a counselling note be placed on his personal file. At the hearing of the appeal, the TWU conceded that the Commission had no jurisdiction to make an order stipulating a counselling note. Despite this concession, as this was an issue of jurisdiction, Ritter AP found it was necessary to consider and determine the matter [73]. As the dispute referred for hearing and determination was solely about the unfairness of the termination of the employee's employment and his reinstatement with consequential orders, the effect of the finding made by Ritter AP was that the scope of the matter referred to did not extend to whether a counselling note should by order of the Commission be placed on the employee's file.

143 Whilst the observations made by Ritter AP at [79] of his Honour's reasons for decision in ***BHP v TWU*** were obiter, I reject the argument that it is not necessary or appropriate in this matter to determine whether some of those observations are correct. The point, whilst not raised at first instance, is squarely raised by the PTA in ground 5 and both parties have filed comprehensive submissions addressing the point. In my opinion, his Honour's observations in the first sentence at [79] are clearly correct. As the other possibilities referred to at [79] are not raised in this matter, it is not necessary to consider those in this appeal.

144 Clause 2.11.21 of the Industrial Agreement, when read with cl 2.11.22, provides for a range of penalties that the chief executive officer may impose on a transit officer where a breach of discipline has been found to have been committed that must be proportionate to the conduct which gave rise to the breach of discipline or reasonably suitable in consideration of all of the circumstances of the case. These are:

a) No penalty;

b) A reprimand (which may include a final reprimand);

c) Deferring the payment and anniversary dates for annual increments by a period not exceeding six months;

d) A permanent or temporary transfer to another location within the PTA or to another employment position within the PTA, including to a position to which this agreement does not apply;

e) A permanent or temporary demotion or reduction to a lower increment or to a lower grade or position to which this agreement applies;

f) A permanent or temporary demotion to another position to which this agreement does not apply; and/or

g) Dismissal.

145 In paragraph 3 of the memorandum, the case for the union is put as two contentions. The first is that the dismissal of Mr Merlo was harsh, oppressive and unfair because it was not open to the PTA to make the finding it did. The second, expressed in the alternative, is that the penalty applied is disproportionate to the misconduct alleged. When this paragraph is read with paragraph 7(k), it is clear that the ambit of the dispute before the learned Acting Senior Commissioner extended to:

(a) the proportionality of the penalty imposed on Mr Merlo;

(b) an assessment of Mr Merlo's conduct which gave rise to the breach of discipline; and

(c) what penalty would have been proportionate when considering the circumstances of the case.

146 When considering all of the circumstances of the case in determining a proportionate penalty it was open to the learned Acting Senior Commissioner as he did to have regard to:

(a) the circumstances of the conduct of Mr Merlo during the incident on 7 November 2015, including an assessment of the conduct which constituted a breach of discipline;

(b) an assessment of matters going to Mr Merlo's character and temperament; and

(c) penalties imposed on other transit officers who had been disciplined for deploying OC spray on grounds of a breach of discipline for use of excessive force.

147 As found in these reasons, the learned Acting Senior Commissioner should have also had regard to Mr Merlo's disciplinary history, including an assessment of the veracity of the PTA's contention of loss of confidence in Mr Merlo.

148 Having made a finding that dismissal was not a proportionate penalty (leaving aside the disposition of this appeal raised in ground 4 of the appeal), and then determining a demotion was a proportionate and appropriate penalty, these findings were findings that were squarely part of or put another way explicitly part of the industrial matter referred for hearing and determination pursuant to s 44(9) of the Act. Consequently, by the power conferred in s 44(9) to hear and determine a dispute, it was open to the learned Acting Senior Commissioner to make the order reinstating Mr Merlo to a position of transit officer, level 3, and to make the order for loss of remuneration assessed at the rate of pay, entitlements and benefits applicable to the position of transit officer, level 3.

149 For these reasons, I am of the opinion that ground 5 of the appeal has not been made out.

Disposition of the appeal

150 In my opinion, the consequence that flows from upholding ground 4 is that the decision should be suspended and the matter remitted for further hearing and determination on grounds that the Full Bench is not in a position to properly weigh and assess all of the evidence of relevant matters to draw its own inferences and a conclusion whether in all of the circumstances the dismissal of Mr Merlo was a proportionate and appropriate penalty for Mr Merlo's conduct. This is because the Full Bench has not had the opportunity to see and hear the witnesses give their evidence in respect of the issues that go to trust and confidence. In particular, it is not in a position to make a proper assessment of all of the matters going to the character of Mr Merlo.

SCOTT CC:

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

MATTHEWS C:

152 By grounds 1 to 3 the PTA contends that the Acting Senior Commissioner failed to have proper regard to the fact that if Transit Officer Merlo had not put himself in the situation that he did occasion to use the OC spray would not have arisen. That is, if Transit Officer Merlo had, in accordance with his training, disengaged as Transit Officer Warr had done then A would not have made to spit at him and Transit Officer Merlo would not have discharged his OC spray.

153 The PTA says that, viewing the circumstances in their totality, Transit Officer Merlo was the author of his own misfortune.

154 This issue was squarely raised in the disciplinary proceedings of the PTA. An example is found at page 41 of the Investigation Report, which is page 174 of the Appeal Book. Transit Officer Merlo addresses the issue in his response to the Investigation Report, which may be found at pages 179 and 180 of the Appeal Book.

155 The memorandum of matters produced pursuant to regulation 31 *Industrial Relations Commission Regulations 2005* (WA) raises, at paragraph 7, various questions but none of these detract from the main issue being whether the dismissal was harsh, oppressive or unfair nor from the PTA's contention that it was not because, in all the circumstances, including that Transit Officer Merlo did not disengage, that the decision to dismiss was fairly open to the PTA.

156 The relevant circumstances, as the PTA saw them, clearly emerge from the paperwork produced as part of its disciplinary proceedings against Transit Officer Merlo and included whether, if Transit Officer Merlo had distanced himself from A, the occasion to use the OC spray in self-defence would have arisen.

157 A review of the evidence at the hearing shows, in my view, that this point was very much alive before the Acting Senior Commissioner. There was a great deal of evidence, none of it objected to, on the matter.

158 It was not put against the PTA on the appeal that the point raised by the PTA on appeal was, in effect, a new or different point or something that had not been alive in the proceedings before the Acting Senior Commissioner.

159 I consider however that the grounds of appeal must fail because the PTA has failed to establish that the Acting Senior Commissioner did not take account of the point or, having done so, erred in his conclusions in relation to it.

160 At [23] of his reasons for decision the Acting Senior Commissioner summarised his findings by saying, and here I paraphrase the Acting Senior Commissioner, dismissal was too harsh an outcome but that some penalty must be applied because Transit Officer Merlo should have put more distance between himself and A and, had he done so, the use of the OC spray, while justified when done, would not have occurred.

161 With respect to the Acting Senior Commissioner the outcome is succinctly, logically and well put and any suggestion that he has not understood or dealt with the issue must fail.

162 A finding that Transit Officer Merlo should probably not have been where he was but, finding himself in that situation, had reasonably deployed the OC spray was open to the Acting Senior Commissioner as was a finding that, in all of the circumstances, Transit Officer Merlo had misconducted himself but not in such a way as to, in itself, warrant dismissal.

163 In my respectful view what the Acting Senior Commissioner did was a classic and uncontroversial example of taking into account all of the circumstances.

164 I agree with the majority in relation to ground 4 and for the reasons given.

165 By ground 5 the appellant contends that if the Acting Senior Commissioner found that Transit Officer Merlo had been unfairly dismissed, and his reinstatement was not impracticable, the Acting Senior Commissioner was obliged to reinstate him to his former position on conditions no less favourable than those on which Transit Officer Merlo was employed immediately before his dismissal and had no power to, as the Acting Senior Commissioner did, order "reinstatement" to his pre-dismissal position but at a lower level.

166 The parties both contend, and I find, as the majority has, that section 23A *Industrial Relations Act 1979* does not give the Acting Senior Commissioner power to make the order he made. It is clear that the Acting Senior Commissioner did not act under section 23A *Industrial Relations Act 1979*. Reinstatement to a former position but on terms less favourable than those on which an employee had been employed immediately before dismissal is not contemplated or allowed by section 23A.

167 However, I am of the view that the power to make such an order may be found in section 44 *Industrial Relations Act 1979*.

168 The present matter commenced as an application by the respondent, an organisation registered under Division 4 Part II *Industrial Relations Act 1979*, brought under section 44(7)(a)(i) *Industrial Relations Act 1979*.

169 The Notice of Application tells the reader that the dispute related to whether Transit Officer Merlo was unfairly dismissed by the appellant, presented facts as the respondent saw them, gave particulars of the dispute as the respondent saw them and concluded with an "Orders Sought" section.

170 Under the heading "Orders Sought" the respondent stated that it sought that Transit Officer Merlo be reinstated to his former positon on conditions at least as favourable as the conditions on which he was employed immediately before dismissal or, in the alternative, re-employed or, in the alternative, awarded compensation.

171 On its face the Notice of Application is a normal unfair dismissal application contesting the dismissal and seeking, by way of remedy, an exercise of powers provided for in section 23A *Industrial Relations Act 1979*.

172 The question then is how can the Western Australian Industrial Relations Commission, in these circumstances, end up making an order within jurisdiction not provided for by section 23A *Industrial Relations Act 1979*?

173 The answer to this is provided by section 44(9) *Industrial Relations Act 1979* and regulation 31 *Industrial Relations Commission Regulations 2005*.

174 Section 44(9) *Industrial Relations Act 1979* provides as follows:

> Where at the conclusion of a conference held in accordance with this section any question, dispute, or disagreement in relation to an industrial matter has not been settled by agreement between all of the parties, the Commission may hear and determine that question, dispute or disagreement and may make an order binding only the parties in relation to whom the matter has not been so settled.

175 It is the common experience of the Western Australian Industrial Relations Commission, and organisations, associations and employers who participate in conferences under section 44 *Industrial Relations Act 1979*, that at a conference held under that section questions, disputes and disagreements touching upon the matter brought to the Western Australian Industrial Relations Commission, but not necessarily raised on a strict reading of the Notice of Application, are discussed.

176 Such questions, disputes and disagreements may not have been settled by the agreement of the parties at the conclusion of the conference.

177 In my view, so long as those questions, disputes or disagreements are in relation to an industrial matter the Western Australian Industrial Relations Commission, pursuant to section 44(9) *Industrial Relations Act 1979*, "may hear and determine" them and "may make an order binding…the parties…" in relation to them.

178 So that the Western Australian Industrial Relations Commission and parties know the exact nature of the questions, disputes and disagreements regulation 31 *Industrial Relations Commission Regulations 2005* provides as follows:

> Where at the conclusion of a conference under section 44 of the Act a matter is to be heard and determined by the Commission, the Commission is to draw up or cause to be drawn up and sign, a memorandum of the matter requiring hearing and determination and for that purpose may direct parties to file statements of claim, answers, counter-proposals and replies in such manner and within such time as the Commission sees fit.

179 It is obvious that the parties entering arbitration must know the boundaries of that arbitration. If regulation 31 *Industrial Relations Commission Regulations 2005* did not exist there would be a good argument that the boundaries of arbitration must be found in the Notice of Application and that section 44(9) *Industrial Relations Act 1979* cannot have been intended to extend those boundaries beyond it.

180 The conference process under section 44 *Industrial Relations Act 1979* is too dynamic and fluid for parties to, in each case, come away from it, where settlement is not achieved, knowing the exact questions, disputes and disagreements which remain, especially given that the issues discussed may be wider than those raised by a strict reading of the initiating document.

181 However, that potential problem is avoided by regulation 31 *Industrial Relations Commission Regulations 2005*.

182 Section 44(9) *Industrial Relations Act 1979* gives the Western Australian Industrial Relations Commission the power to hear and determine, and make binding orders, on **any** question, dispute or disagreement in relation to an industrial matter that is not settled by agreement and regulation 31 *Industrial Relations Commission Regulations 2005* ensures that the parties know the particulars of the question, dispute or disagreement to be ventilated at the hearing and resolved by orders made following it.

183 A Commissioner, of course, would have to ensure, in drawing up the memorandum under regulation 31 *Industrial Relations Commission Regulations 2005*, or agreeing to hear matters included in the memorandum he or she has caused to be drawn up, and in authorising the hearing of those matters by his or her signature, that the questions, disputes or disagreements contained therein were questions, disputes or disagreements in relation to an industrial matter and which were not settled, after attempts to do so, by agreement between all of the parties at the section 44 conference.

184 Subject to those things however, section 44(9) *Industrial Relations Act 1979*, in my view, clearly gives the Western Australian Industrial Relations Commission the power to make orders on what is included in the memorandum signed pursuant to regulation 31 *Industrial Relations Commission Regulations 2005*.

185 In ***BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union, Industrial Union of Workers, Western Australian Branch*** (2006) 86 WAIG 642 at 652 the Full Bench said, without needing to decide, that:

> **It may be that an order of the type which was made could be within jurisdiction if the making of such an order was explicitly part of the dispute remaining for determination under s44(9) of the Act, following the conclusion of a conference.** Alternatively, if during the hearing of a dispute under s44(9), the issue of the making of such an order was raised by the parties or the Commission, the order could perhaps be made, by the Commission, in reliance upon s26(2). (my emphasis)

186 In my view the Western Australian Industrial Relations Commission may, within jurisdiction, make an order that was "explicitly part of the dispute remaining under section 44(9) of the Act." That is, I consider that the comment of the Full Bench in bold above was clearly correct.

187 The only question then in this matter is whether the issue in relation to which the Acting Senior Commissioner made orders was "explicitly part of the dispute remaining under section 44(9)."

188 Whether or not the issue was "explicitly" part of the dispute is a matter, in my view, of determining whether it was "clearly expressed" (Macquarie Dictionary 3rd edition) in the memorandum signed pursuant to regulation 31 *Industrial Relations Commission Regulations 2005*.

189 Paragraph 7(k) of the memorandum says as follows:

> In determining whether the respondent's dismissal of Mr Merlo was harsh, oppressive or unfair, the parties, by agreement invite the Commission to decide…was dismissal a proportionate and appropriate penalty for Mr Merlo's conduct.

190 The question is self-evidently different from, in the event of a finding that Transit Officer Merlo's dismissal was unfair, which subsection of section 23A *Industrial Relations Act 1979* the Western Australian Industrial Relations Commission should act under.

191 It is a question which only needs to be answered if there was a finding of wrongdoing on the part of Transit Officer Merlo. This in itself makes it a different question than one touching upon section 23A *Industrial Relations Act 1979*.

192 It is a question that assumes wrongdoing, as found by the Western Australian Industrial Relations Commission, and which can only sensibly be answered by considering the range of disciplinary penalty options available to the employer in the event of a finding of wrongdoing by the employee. It is only in that context the question makes sense.

193 It is assumed by me, given that it appears in the memorandum signed pursuant to regulation 31 *Industrial Relations Commission Regulations 2005*, that the question was one which was raised at the section 44 conference but which had not been settled by agreement at that conference.

194 In those circumstances the Western Australian Industrial Relations Commission had jurisdiction, under section 44(9) *Industrial Relations Act 1979*, to "hear and determine" the question and "make an order binding on the parties" in relation to it.

195 This is exactly what the Acting Senior Commissioner did. In relation to the question, having found wrongdoing, he determined that dismissal was not a proportionate and appropriate penalty and that demotion from Transit Officer Level 5 to Transit Officer Level 3 was the proportionate and appropriate penalty. He went on to make an order reflecting that finding.

196 The alternative would have been for the Acting Senior Commissioner to find that dismissal was not appropriate but say no more. In my view this would not have been answering the question but more to the point would not have resolved the dispute that the Acting Senior Commissioner was hearing and determining.

197 Given that the Western Australian Industrial Relations Commission exists to provide practical solutions to problems between registered organisations and employers, and section 44(9) *Industrial Relations Act 1979* empowers the Western Australian

Industrial Relations Commission to hear and determine questions, it would have been inappropriate to return the matter of penalty back to the appellant and allow the dispute to continue.

198 I should add in conclusion that I have only considered the first sentence in the paragraph quoted above from ***BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union, Industrial Union of Workers, Western Australian Branch*** (2006) 86 WAIG 642 at 652. Reliance upon section 26(2) *Industrial Relations Act 1979* is not raised by the appeal.

2017 WAIRC 00469

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPELLANT
	-and-
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 21 JULY 2017
FILE NO.	FBA 5 OF 2017
CITATION NO.	2017 WAIRC 00469

Result	Appeal upheld - Order made
Appearances	
Appellant	Mr D Anderson (of counsel)
Respondent	Mr C Fogliani (of counsel)

Order

This appeal having come on for hearing before the Full Bench on Monday, 29 May 2017, and having heard Mr D Anderson (of counsel) on behalf of the appellant and Mr C Fogliani (of counsel) on behalf of the respondent, and reasons for decision having been delivered on Friday, 14 July 2017, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is upheld.
2. The decision made by the Commission in matter CR 9 of 2016 on 13 February 2017 [2017] WAIRC 00071; (2017) 97 WAIG 324 is suspended.
3. The matter is remitted to the Commission for further hearing and determination.

By the Full Bench

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

PRESIDENT—Matters dealt with—

2017 WAIRC 00731

A STAY OF OPERATION OF THE ORDER IN MATTER NO. B 189 OF 2016 WHICH IS THE SUBJECT OF FBA 12 OF 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2017 WAIRC 00731
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	FRIDAY, 4 AUGUST 2017
DELIVERED	**:**	TUESDAY, 15 AUGUST 2017
FILE NO.	**:**	PRES 3 OF 2017
BETWEEN	**:**	STASS ENVIRONMENTAL PTY LTD AS TRUSTEE FOR THE STASS FAMILY TRUST
		Applicant
		AND
		NOLAN PAUL GROBLER

Respondent

CatchWords	:	Industrial Law (WA) - Application to stay operation of order - An appeal instititued - Whether there is a real risk that it would not be possible for a successful appellant to be restored substantially to its former position if the judgment against it is executed considered - Turns on own facts
Legislation	:	*Industrial Relations Act 1979 (WA) s 33, s 33(3), s 33(4), s 33(5), s 49, s 49(11) Fair Work Act 2009 (Cth)*
Result	:	Application dismissed
Representation:		
Applicant	:	Mr A Stasikowski
Respondent	:	In person

Case(s) referred to in reasons:

Dowell v Custombuilt Homes Pty Ltd [2003] WASCA 176

Federal Commissioner of Taxation v Myer Emporium Ltd (No 1) (1986) 160 CLR 220

John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers [2005] WAIRC 02983; (2005) 85 WAIG 3918

Miller v Wheatbelt Individual & Family Support Association Inc [2014] WAIRC 00028; (2014) 94 WAIG 179

Case(s) also cited:

Spotless Group v Buckle [2017] WAIRC 00063; (2017) 97 WAIG 177

Reasons for Decision

Introduction

1. This is an application under s 49(11) of the *Industrial Relations Act 1979* (WA) (the Act). The applicant seeks an order that the operation of the decision made by the Commission on 4 July 2017 in B 189 of 2016 be stayed, pending the hearing and determination of appeal FBA 12 of 2017. The decision sought to be stayed is:

   (a) a declaration that the applicant (the respondent at first instance) denied the respondent (the applicant at first instance) contractual benefits of annual leave and annual leave loading; and

   (b) an order that the applicant pay the respondent $20,182.06 gross, being the total of the denied contractual benefits, within 14 days of the date of the order ([2017] WAIRC 00383; (2017) 97 WAIG 758).

Grounds of appeal and the grounds in support of a stay

2. The grounds of appeal are said to be set out in an annotated copy of the reasons for decision delivered by the Commission on 4 July 2017. Under numbered paragraphs in the reasons for decision, submissions and points the applicant seeks to make are set out in italics. In this narrative, whilst the annotations are in the form of submissions, it appears that the following points are attempted to be put as grounds of appeal:

   (a) As the applicant is a National System Employer, by operation of the provisions of the *Fair Work Act 2009* (Cth), the Commission does not have jurisdiction to deal with a claim for enforcement of a benefit claimed to arise under a contract of employment.

   (b) The learned Commissioner erred in determining that, the date of termination of the respondent's employment was 28 October 2016 when in fact, the date of termination was 30 September 2016.

   (c) The learned Commissioner erred in finding that the respondent only took 19 days of annual leave whilst employed by the applicant.

   (d) The learned Commissioner erred in calculation of the rates of pay applicable to the claim of annual leave, in that she assessed the rate of pay as the respondent's rate of pay at the date of termination of his employment, rather than at the time the leave was said to have accrued.

   (e) The learned Commissioner erred in finding that annual leave loading was payable.

   (f) The learned Commissioner demonstrated bias against the applicant and its witnesses.

   (g) The learned Commissioner erred in finding the respondent to be a reliable witness and preferring his evidence about annual leave to the evidence given in respect of this issue by Mr Stasikowski.

   (h) The learned Commissioner erred in finding that the respondent was employed to prepare and maintain equipment.

   (i) The learned Commissioner erred in finding that the respondent's entitlement to annual leave accumulated from year to year.

3. Mr Stasikowski is the sole director/secretary of the applicant (exhibit R4). On behalf of the applicant, Mr Stasikowski made an oral submission that if a stay of the order requiring payment of the judgment sum is not granted and the appeal is

successful, there is a real prospect that the applicant would not be able to recover the entire judgment sum from the respondent or the income tax from the Australian Taxation Office (ATO) which is required by law to be paid on the judgment sum. Thus, it is said to follow that an inability to recover the judgment debt in the event of a successful appeal would render the appeal nugatory.

4. Mr Stasikowski also put a submission that if the applicant is successful in its appeal, without a stay of the order for payment of the judgment sum, it would not be possible for it to be restored substantially to its former position because the applicant as the trustee for the trust does not have any assets and if required to pay the judgment sum, at this point in time, it will be forced into administration. He also stated that company tax and payments of goods and services tax (GST) had to be paid in June and July 2017 which resulted in the taxation office clearing all of the accounts and the applicant effectively now has no funds.

5. Mr Stasikowski also made a submission that as the company does not have any assets and has very little cash in the bank, he would have to lend funds to the applicant or borrow money to give to the applicant to satisfy the judgment debt. He said, however, he does not have the personal capacity to pay the judgment debt as he is financially supporting an adult son who has a disability who lives in Brisbane and an adult daughter who has recently had a baby and is unable to work.

6. On behalf of the applicant, Mr Stasikowski objected to the disclosure of the financial position of the applicant and his financial position to the respondent. Pursuant to s 33 of the Act, in this application for a stay, the Commission is prohibited from disclosing the financial position of the parties or any witness without the consent of the witness or party entitled to non-disclosure. Further, it is prohibited from publishing that financial position in these reasons for decision. Section 33(3), s 33(4) and s 33(5) of the Act provide as follows:

   (3) Evidence relating to any trade secret, or to the profits or financial position of any witness or party, shall not be disclosed except to the Commission, or published without the consent of the person entitled to the trade secret or non-disclosure.

   (4) The evidence referred to in subsection (3) shall, if the witness or party so requests, be taken in private.

   (5) All books, papers, and other documents produced in evidence before the Commission may be inspected by the Commission and also by such of the parties as the Commission allows, but the information obtained therefrom shall not be made public without the permission of the Commission, and such parts of the documents as in the opinion of the Commission do not relate to the matter at issue may be sealed up, but such books, papers, and documents relating to any trade secret or to the profits or financial position of any witness or party shall not, without the consent of that witness or party, be inspected by any party.

7. Mr Stasikowski handed to the Commission a copy of a bank account statement he says is a bank record of Stass Environmental Pty Ltd recording transactions from 19 May 2017 to 1 August 2017.

8. Mr Stasikowski provided to the Commission for its inspection, without disclosure to the respondent:

   (a) a copy of a printout of what he says is a record of account debits from his personal bank account from 11 May 2017 to 2 August 2017 which shows rent and other payments he makes on behalf of his son;

   (b) a copy of his individual tax return for the period 1 July 2015 to 30 June 2016 which discloses the income received by him for that financial year; and

   (c) a copy of a recent application made under the Commission's pro-bono scheme for legal assistance. This document contains information in respect of Mr Stasikowski's weekly income, savings, assets, monthly expenses and details of the financial support he provides to his two children.

9. The respondent informed the Commission that he has a full-time permanent position as an irrigation fitter and has the capacity to repay the judgment sum in the event the appeal is successful. He agreed to disclose his financial position to the Commission in the absence of Mr Stasikowski and did so in camera in the absence of Mr Stasikowski.

10. After the respondent's information was provided in camera, the respondent pointed out that pursuant to the deed of removal and appointment of trustee for the Stass Family Trust, Stass Environmental Pty Ltd was appointed as trustee of the Stass Family Trust (exhibit R4) and from 4 July 2016 the assets of the trust were vested in Stass Environmental Pty Ltd as trustee. The respondent claims that the applicant does have assets, as it owned a vehicle and a drilling rig which he used whilst employed, which if sold would more than cover the judgment sum.

11. In response, Mr Stasikowski said that he has a vehicle which is not owned by the business and the applicant's business is now maintained only as a consultancy business operated solely by him. He also said that the vehicle used by the respondent and the drilling rig have been sold to pay debts a long time ago.

Consideration of the application for a stay

12. The principles which apply in deciding whether or not to order a stay of a decision are well established. The discretionary grounds upon which a stay will be granted pending the determination of an appeal require the demonstration of special circumstances to justify the departure from the ordinary rule that a successful litigant is entitled to the fruits of the judgment. Therefore, something special or unusual is required before a stay will be granted. In ***John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers*** [2005] WAIRC 02983; (2005) 85 WAIG 3918 the relevant principles were summarised by Ritter AP at [34] - [37] as follows:

In *Federal Commissioner of Taxation v Myer Emporium Limited (No 1)* [1986] 160 CLR 220, Dawson J at 222 said that the discretion to '*order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal…. Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory…. Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it would not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed*'.

These observations were cited with approval by Pullin J in *Commonwealth Bank v Bouwman* [2003] WASC 205 and by Anderson J, with whom Pidgeon J agreed, in *Hamersley Iron Pty Ltd v Lovell (No 2)* (1998) 20 WAR 79 at pages 89-90. In the latter case, Anderson J said:-

> '*... unless a stay is necessary to preserve the subject matter or integrity of the litigation in the broader sense described above the circumstances will not be regarded as sufficiently exceptional to enliven the discretionary jurisdiction to provide a stay. Only if the applicant can show that a stay is necessary to that end will the High Court go on to consider matters such as whether the application for special leave has a prospect of success, whether a stay will occasion hardship to the respondent, where the balance of convenience lies and so on. I think such matters are always treated as secondary to the question whether a stay is necessary to preserve the subject matter or integrity of the litigation. They come into play only if it appears that the refusal of a stay will substantially deprive the applicant of the benefit to be derived from the appeal. Thus, an applicant may fail to obtain a stay even if the applicant can show that unless there is a stay the appeal would be futile.*'

The reasons of Anderson J were cited with approval by Sharkey P in *G & M Partacini t/as Bayswater Powder Coaters v SDAE* (2005) 85 WAIG 51. In that decision, Sharkey P emphasised that the jurisdiction to grant a stay should also be exercised having regard to the requirements of s 26 of the Act and the '*need to prevent there being any more uncertainty than is necessary, in industrial matters*'.

In *Eastland Technology Australia Pty Ltd and Others v Whisson and Others* (2003) 28 WAR 308, the court (Murray and Parker JJ) at 311 distilled generally applicable principles in relation to applications for stays of orders. These principles were set out as follows:-

> '*• The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.*
>
> *• It is for the applicant for a stay to move the court to a favourable exercise of its discretion.*
>
> *• It will not do so unless special circumstances are shown justifying the departure from the ordinary rule.*
>
> *• The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation, or where refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. It is often put shortly that it will first and foremost be necessary to establish that without the grant of a stay, the right of appeal, whether upon the grant of leave or special leave or not, will be rendered nugatory.*
>
> *• If that can be demonstrated, the stay will generally still be refused unless it can be established that the appeal process, whether upon the grant of leave or special leave or not, has ultimately reasonable prospects of success so as to result in the grant of relief to the appellant.*
>
> *• If that hurdle can be overcome, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant; where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted.*'

13. It is not appropriate for me to reach any conclusion about the strength of the applicant's case on appeal. I am only required to be satisfied that there is some issue of substance to be raised. Having considered what appear to be the grounds of appeal, and having read the reasons for decision given by the Commission on 3 March 2017 in respect of the preliminary issue as to whether the Commission has jurisdiction to deal with the respondent's application, and the reasons for decision given on 4 July 2017, I have formed the opinion that some matters may be arguable.

14. The first requirement of s 49(11) of the Act is that an appeal must be instituted to the Full Bench under s 49. I am satisfied that this has occurred. Secondly, the stay application must be filed by a person or persons who have a sufficient interest to make the application. Again, I am satisfied that as the applicant is the party against whom the declaration and order to pay was made, it has a sufficient interest to make the application for a stay.

15. Having been provided with the information from the respondent about his circumstances, I am not satisfied that there is a real risk that, if a stay is granted and the judgment debt is paid, the respondent will be unable to repay the monies if the appeal is allowed and an order is made by the Full Bench for repayment of the judgment sum. In the event of a successful appeal, the respondent would be required to repay to the applicant not just the net amount. He would be required to repay the entire gross sum the Full Bench assesses as owing. No recovery of income tax paid by the applicant to the ATO, on the judgment sum on behalf of the respondent, would arise. The amount of tax paid on a judgment sum is an amount of taxation that would be assessed at the end of the financial year by the ATO as part of the assessment of the respondent's

entire taxable income (see the discussion in ***Miller v Wheatbelt Individual & Family Support Association Inc*** [2014] WAIRC 00028; (2014) 94 WAIG 179 [98] - [100]).

16. Turning to the capacity of the applicant to pay the judgment debt at this point in time, as Dawson J pointed out in ***Federal Commissioner of Taxation v Myer Emporium Ltd (No 1)*** (1986) 160 CLR 220, special circumstances can arise where for whatever reason there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed. In this matter, the applicant puts an argument that if it is ultimately successful in the appeal and a stay has not been granted, it will, prior to the hearing of the appeal, be forced into administration and Mr Stasikowski, as its sole director, would personally be liable to pay the judgment debt as Stass Environmental Pty Ltd does not have any funds or assets.

17. In ***Dowell v Custombuilt Homes Pty Ltd*** [2003] WASCA 176 [23], Master Newnes observed:

    It was accepted by both parties that the risk of bankruptcy is not, in itself, normally a reason for granting a stay: ***Remta v CBFC Ltd & Ors*** [2000] WASCA 307 and ***State Bank of Victoria v Parry*** [1989] WAR 240. It is, however, in my view, a relevant consideration that the effect of bankruptcy would be to deprive a person of their income and to put their business activities in jeopardy.

18. Whilst the effect of administration can be raised as a relevant matter that is to be taken into account, having reviewed the documents provided to the Commission by Mr Stasikowski, I am not satisfied that the applicant is at risk of administration if the judgment debt is paid. Insufficient evidence has been put before me to satisfy me that it does not have sufficient funds to satisfy the judgment debt. In particular, I am not satisfied that it does not have any assets as there is no documentary material put before me which shows it has, or has not any assets. It is apparent from Mr Stasikowski's bank account records, the recent pro-bono application and his 2016 personal tax return that he draws an income from the trust, but there is no information in the documents which provide any details of income received by the Stass Family Trust and wages paid to Mr Stasikowski or any other expenses since 30 June 2016. The account activity for the document that is said to be a bank account statement of the applicant does not contain account details or the name of the applicant. Whilst it contains six transactions from 19 May 2017 to 1 August 2017, four of those transactions are bank fee transactions. The other two transactions are deposits of small sums and do not show any other credits or debits. In particular, this document does not record any GST or company tax transactions. Consequently, if GST payments and company tax payments were made by the applicant in June or July 2017 as stated by Mr Stasikowski, those payments were not made from this account.

19. When regard is had to these matters, I am not satisfied that the applicant has shown special circumstances justifying the departure from the ordinary rule that the respondent is entitled to the fruits of his litigation pending the determination of an appeal.

20. In these circumstances, I am not satisfied that a stay order should be made and an order dismissing the application has been made.

2017 WAIRC 00711

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STASS ENVIRONMENTAL PTY LTD AS TRUSTEE FOR THE STASS FAMILY TRUST **APPLICANT** **-and-** NOLAN PAUL GROBLER **RESPONDENT**
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	MONDAY, 7 AUGUST 2017
FILE NO.	PRES 3 OF 2017
CITATION NO.	2017 WAIRC 00711
Result	Order made
Appearances	
Applicant	Mr A Stasikowski
Respondent	In person

Order

This matter having come on for hearing before me on 4 August 2017, and having heard Mr A Stasikowski on behalf of the applicant and the respondent in person, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

The application for a stay be and is hereby dismissed.

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

INDUSTRIAL MAGISTRATE—Claims before—

2017 WAIRC 00464

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2017 WAIRC 00464
CORAM	**:**	INDUSTRIAL MAGISTRATE M FLYNN
HEARD	**:**	WEDNESDAY, 14 JUNE 2017
DELIVERED	**:**	THURSDAY, 20 JULY 2017
FILE NO.	**:**	M 157 OF 2016
BETWEEN	**:**	AUSTRALASIAN MEAT INDUSTRY EMPLOYEES UNION, SOUTH AND WESTERN AUSTRALIA BRANCH
		FIRST CLAIMANT
		JOEL CROSSWELL
		SECOND CLAIMANT
		BILL TAMAINU
		THIRD CLAIMANT
		CHRISTOPHER THELANDER
		FOURTH CLAIMANT
		AND
		SHAGAY PTY LTD AS TRUSTEE FOR THE SHAGAY UNIT TRUST TRADING AS WESTERN MEAT PACKERS
		FIRST RESPONDENT
		ANDREW FUDA, CHIEF EXECUTIVE OFFICER
		SECOND RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – FAIR WORK – Enterprise Agreement – Employer entitlement to deduct pay – 'stoppage of work for any cause for which the employer cannot reasonably be held responsible' – onus of proof of exception – powers of 'eligible State or Territory court' – Assessment of pecuniary penalties for contraventions of Enterprise Agreement
Legislation	**:**	*Fair Work Act 2009* (Cth) *Biosecurity and Agriculture Management Act 2007* (WA)
Instruments	**:**	Western Meat Packers (Boners and Slicers) Meat Processing Agreement 2013 Harvey Industries Group Pty Limited Meat Processing & By Products Union Enterprise Agreement 2014
Case(s) referred to in reasons:		***United Voice v Phillip Cleaning Service Pty Ltd*** [2017] FCA 392 ***Townsend v General Motors Holden*** (1983) 4 IR 358 ***John Hay v Gardner Perrott a Division of Brambles Australia Limited*** [1996] WAIRComm 7 ***Re Jack Gordon Kidd v Savage River Mines NSW*** [1984] FCA 418
Result	**:**	Judgment for the claimants
Representation:		
Claimants	**:**	Ms K. Rogers
Respondents	**:**	Mr R. Lewis (of Counsel)

REASONS FOR DECISION

1 Mr Joel Crosswell, Mr Bill Tamainu and Mr Christopher Thelander ('the Employees') were employed by Shagay Pty Ltd ('the Company') as boners at a meat production facility operated by the Company at Osborne Park, Western Australia. On five days in May and July 2016, the Company instructed the Employees not to attend for work ('the Stand Down Days'). The Company told the Employees that it was 'experiencing seasonal shortages in stock availability' and they 'had the opportunity to take paid or unpaid leave' on those days ('the Stand Down Direction'). The Employees complain that the Stand Down Direction is a contravention of an enterprise agreement.

2 In Schedule I of these reasons, I outline the provisions of the *Fair Work Act 2009* (Cth) ('FW Act') and any instrument that is relevant to the jurisdiction, powers and procedure of the court in determining this case. I conclude that the Western Meat Packers (Boners and Slicers) Meat Processing Agreement 2013 ('the Enterprise Agreement' or 'EA') applies to the Company and the Employees.

3 The Company denies that it has contravened the Enterprise Agreement. It relies upon clause 22.4 of the Enterprise Agreement which states that the Company may 'deduct payment for any day that [an] Employee could not be usefully employed' provided 'any stoppage of work was for a cause for which the Company could not reasonably be held responsible' ('the EA Reasonable

Cause Exception'). The Company argues that the stoppage of work was necessary given that adverse weather in northern Western Australia caused cattle suppliers to fail to meet contractual obligations to the Company ('the Forward Cattle Contracts') and that the Company, despite being active in the marketplace, was unsuccessful in attempting to secure replacement cattle. The Company refers to other matters (discussed below) as evidence of its 'reasonableness' when dealing with the Employees on this issue, including a calculation suggesting that the Employees' weekly pay and other entitlements was *not* reduced as a result of processing the available carcass' on the four day working weeks that were a result of the Stand Down Days compared to the weekly pay and other entitlements that would have been the result of processing the same carcass' over the usual five day working weeks.

4 Three issues arise for determination in this case. First, I must determine whether the Employees 'could not be usefully employed on each of the Stand Down Days for a cause for which the Employer could not reasonably be held responsible' i.e. whether the EA Reasonable Cause Exception found in clause 22.4 of the EA authorised the Stand Down Direction. If the EA Reasonable Cause Exception did not authorise the Stand Down Direction, the second issue I must determine is whether the Company has contravened any clause of the EA (and also whether the Company has contravened s 323 of the FW Act requiring payment in full) and the appropriate remedy under s 545(3) of the FW Act. The Union and the Employees allege that the unauthorised Stand Down Direction has resulted in contraventions of the EA by the Company by: failing to pay wages (clauses 9.2, 9.3, 11.1 and 24.6); reduced annual leave entitlements (clause 14) and personal leave entitlements (15.5); and failing to pay superannuation (clause 23). Thirdly, if I am satisfied that the Company has contravened any clause of the EA, it will be necessary to determine the appropriate pecuniary penalty (if any) for the contravention and whether Mr Andrew Fuda, the Chief Executive Officer of the Company, (Mr Fuda) was involved in the contravention: see FW Act, s 50 (EA contravention is a civil remedy provision); s 539(2) & 546(2)(b) (maximum penalty for persons and corporations); s 550 (involvement in contravention) and s 557 (course of conduct).

5 Before examining the three issues just noted, it will be convenient to: describe the Company's operations (see paragraphs 6) and the terms of the Enterprise Agreement (see paragraph 7); and to note the evidence of Mr Fuda to the effect that *not* working on the Stand Down Days *increased* the weekly wage of the Employees (see paragraph 8).

The Company's Operations

6 The facts set out in this paragraph are either not in dispute or are the subject of uncontroverted evidence of Mr Fuda which I consider to be reliable. I am satisfied of each of the facts set out below:

(a) The Employees are among approximately 100 employees of the Company who work at a meat processing facility in Osborne Park. The Company has operations at other locations, including at an abattoir where cattle are slaughtered before being brought to Osborne Park for processing.

(b) The Employees work as beef boners in what is known as the 'big room' or 'room number 1'. A beef boner works alongside a beef slicer to form what is known as 'a team'. The big room was used exclusively for processing beef. Nine or 10 teams work in the big room. Other employees of the Company, performing other duties necessary for processing meat, also work in the big room. In addition to the big room, there is another facility at the Osborne Park site (known as the 'small room' or 'room number 2') that is used for processing both beef and lamb. In May-July 2016, the workforce in the small room comprised two teams and other workers necessary for processing meat. Mr Fuda gave evidence that the two teams employed in the small room were 'trainees' governed by 'the award' and that other workers in the small room were 'supplied by a labour hire company'. The chilled beef carcasses necessary for processing beef in the big room and the small room were transported to Osborne Park from the Company abattoir. In the usual course, the Company purchased a sufficient number of live cattle for killing at the Company's abattoir to meet the volume of processing it planned for the big room and the small room. The Company purchased live cattle for slaughter at its abattoir from three sources.

(c) One source of live cattle was as a result of contracts with one or more of three agents (named by Mr Fuda as 'Landmark', 'Elders' and 'Primary'). These contracts provided for the supply of a specified number of cattle from northern Western Australia at a specified price (per kilogram) to be delivered intermittently over a specified future period of months. The process for concluding such contracts required the Company to nominate to the agent the price that the Company was willing to pay for the cattle. The Company was subsequently told whether it had been successful (i.e. a contract was made) or unsuccessful (i.e. no contract arose). If unsuccessful, there was no opportunity for the Company to continue negotiations i.e. the Company did not have an opportunity to offer a higher price. If a contract was made, the obligation upon the cattle supplier was, in effect, to use its best endeavours to make weekly deliveries of an equal number of cattle to the Company so that, over the specified period of the contract, the total number of contracted cattle were delivered. Both parties acknowledged that factors beyond the control of a cattle supplier may prevent the weekly delivery of equal numbers of cattle. In this event, the obligation remained on the supplier to deliver the total number of cattle throughout the relevant period. However, the supplier was entitled to vary the number of cattle delivered each week. Mr Fuda gave evidence that the effect of such contracts entered into by the Company in 2016 (i.e. the Forward Cattle Contracts) was for the supply of 1500 head of cattle over the winter of 2016 with an expected delivery of 132 head of cattle on each Monday.

(d) A second source of live cattle for the Company is regular cattle auctions. In 2016, a representative of the company, Mr Greg Jones, (Mr Jones) attended weekly cattle auctions held at Muchea, Boyanup and Mount Barker and a fortnightly cattle auction held at Manjimup. The number of cattle obtained by the Company at these auctions reflected a range of factors: the number of cattle suitable to the requirements of the Company that were available for purchase; whether the bid(s) placed by Mr Jones was the winning bid and the 'attitude' of the auctioneer. Mr Fuda explained it was not unknown for an auctioneer to determine to sell a particular lot to a particular buyer other than the Company, i.e. excluding the Company (and other buyers) from bidding for a particular lot. Mr Fuda stated that, compared to previous years, 'far lower slaughter type cattle numbers' were available at cattle auctions in the winter of 2016.

(e) A third source of live cattle for the Company was said to be 'direct from the farmer'. Mr Fuda stated that wherever possible the Company participated in 'online auction websites'. Mr Fuda stated that in winter of 2016, the Company was 'outbid by other companies on most occasions'.

(f) It is not reasonably practicable for the Company to source live cattle (for the purpose of slaughter at a Company abattoir and then meat processing at Osborne Park) from interstate or overseas. This is because of the time and cost involved in complying with the quarantine requirements resulting from the *Biosecurity and Agriculture Management Act 2007* (WA).

(g) Although the primary source of chilled beef carcasses used by the Company for meat processing at Osborne Park is an abattoir operated by the Company, it *may* be reasonably practicable for the Company to source chilled beef carcasses for the same purpose from a third party supplier. Whether it was reasonably practicable for the Company to source chilled carcasses from a third party supplier was said by Mr Fuda to be dependent upon the suitability of the carcass for meat processing, having regard to factors including: quarantine requirements, the age of the carcass and the requirements of the Company.

The Enterprise Agreement

7 The Employees are 'Full-time employee(s)' for the purposes of the Enterprise Agreement (clause 9.3). The effect of the Enterprise Agreement is that, with respect to a 'Full-time employee':

(a) **Ordinary hours.** The ordinary hours of work must not exceed 38 hours in any one week (clause 11.1). Those ordinary hours must 'be worked consecutively, Monday to Friday inclusive between 5.30am and 7.30pm' (clause 11.2). The 'working day' consists of 7.6 hours (clause 24.6).

(b) **Payment of Wages.** Wages must be paid weekly (clause 22.1).

(c) **Calculating pay**. An employee's pay comprise a '*basic piece rate of pay*' plus any applicable bonuses, allowances and overtime (clauses 9.2; 24.6). The *basic piece rate of pay* comprises:

(1) a '*guaranteed minimum daily payment*' specified in Appendix 1.1 of the EA; and

(2) a '*constant unit rate*' calculated in accordance with a formula set out in Appendix 1.1.

The *guaranteed minimum daily payment* is a fixed daily payment and applies where 16 bodies (64 quarters) or less is completed per team in a working day. In the period May-July 2016, the guaranteed minimum daily payment for a boner was $204.29. The *Tally* is a rate per quarter of a body and reflects the *guaranteed minimum daily payment* divided by 64 i.e. $3.19 per quarter in May-July 2016. Where additional bodies (over 16) are processed by a team in a working day, the *constant unit rate* provides for additional pay calculated on the number of additional quarters: from 17 to 21 bodies, the additional pay is the *Tally* plus 25% (i.e. $3.99 per quarter); over 21 bodies the additional pay is Tally plus 50% (i.e. $4.79 per quarter).

(d) **Clause 24.6: minimum number of cattle supplied by the Company and minimum daily output by the employees.** Clause 24.6 of the EA anticipates that the Company will usually supply and that employees will process at least 21 bodies on each 7.6 hour working day with the result that, in accordance with the calculation described in the preceding paragraph, the employees will receiving a wage comprising the *guaranteed minimum daily payment* and *Tally* plus 25% for each body between 17 and 21. In the period May-July 2016, the result was that the pay per day for each of the Employees was expected to be at least $284.09 ($204.29 *guaranteed minimum daily payment* + 20 quarters x $3.99 per quarter). It is important to note that the obligation upon the Company to supply 21 bodies per team is qualified in the EA. Clause 24.6 states that 'provided the company can supply enough cattle and that there are no factors outside the control of the company supplying cattle', the employees shall process 21 bodies per working day.

(e) **Annual leave and personal leave: rate of pay.** An employee's rate of pay during annual leave and personal leave is based on the employee's *basic piece rate of pay* averaged over the period before going on leave (clauses 14.4, 15.5).

(f) **Annual leave: accruing and taking.** An employee is entitled to four weeks annual leave after each 12 months of continuous service (clause 14.2). Periods of unpaid leave do not count for the purpose of determining annual leave entitlements (clause 14.6). The Company and an employee may 'mutually agree' to the taking of less than four weeks annual leave (clause 14.4).

(g) **Superannuation.** The superannuation levy paid by the Employer is 'paid on the employee's *basic piece rate of pay*' (clause 23.2).

The Stand Down Direction and the Weekly Wage of the Employees

8 Mr Fuda stated that in each of the five weeks where a Stand Down Direction was given, resulting in the Employees working between Tuesday and Friday (inclusive), there were in fact sufficient chilled carcasses for the Employees to have completed between 15.88 and 17 bodies between Monday and Friday (inclusive) of those weeks (see para [25] of Mr Fuda Witness Statement and Attachment 'AF2' to that statement.) The purpose of this evidence was for Mr Fuda to demonstrate the effect of clause 24.6 of the EA on the weekly wages of the Employees as a result of not working on the Stand Down Days. Mr Fuda demonstrated that, after applying the applicable *constant unit rate* to the number of bodies processed on 4 days (Tuesday – Friday) in those weeks where the Stand Down Direction was given, the Employees received a higher weekly wage compared to a weekly wage calculated on the basis of processing the same number of bodies over five days (Monday-Friday). The difference - an extra $300 per week (on average) when working on four days compared to five days – is a result of applying the *guaranteed minimum daily payment* only to the bodies processed over five days compared to the application of the *guaranteed minimum daily payment* and the applicable *constant unit rate* to the same number of bodies processed over four days. Mr Fuda also noted that, to the extent that annual leave rates of pay, personal leave entitlements and the superannuation levy are calculated on the basis of the *basic rate of pay* which includes the *constant unit rate*, the Employees are, again, in a better position by not working on the Stand Down Days, compared to processing the same number of bodies over five days.

9 The Union and the Employees did not dispute the calculations undertaken by Mr Fuda as set out in the previous paragraph (and I am satisfied that the calculations are accurate).

First Issue: Whether the Employees 'Could Not Be Usefully Employed on Each of the Stand Down Days for a Cause for Which the Company Could Not Reasonably Be Held Responsible'?

10 In Schedule 1 of these reasons I note that the claimants bear the onus of proving the claim and that the standard of proof is, 'the balance of probabilities'. The claimants continue to carry this onus with respect to the claim overall. However, it has been held that an employer who relies upon an exception to a general obligation to pay wages by reason of a stand-down, bears the onus of proving the exception on the balance of probabilities: ***United Voice v Phillip Cleaning Service Pty Ltd*** [2017] FCA 392 [25] (Jagot J) The principle has been applied in a number of 'stand down' cases: ***Townsend v General Motors Holden*** (1983) 4 IR 358 [363] (Morling J); ***John Hay v Gardner Perrott a Division of Brambles Australia Limited*** [1996] WAIRComm 7 (Commissioner Beech); ***Re Jack Gordon Kidd v Savage River Mines NSW*** [1984] FCA 418; 6 FCR 398 9 IR 362 [11] (Gray J). In this case, the Company must prove the conditions for the application of the EA Reasonable Cause Exception. It must prove, firstly, that the Employees could not be usefully employed on each of the Stand Down Days *and*, secondly, it must prove that the Stand Down Direction was for a cause for which the Company could not reasonably be held responsible.

11 Employees could not be usefully employed on each of the Stand Down Days? The Company has failed to prove that the Employees could not be usefully employed on each of the Stand Down Days. This finding is an inevitable consequence of the evidence of Mr Fuda at paragraph 25 of his witness statement (and discussed above at paragraph 8), that the Company 'could have chosen to only bone the guaranteed bodies for each day and left carcasses in the chiller to fulfil the 5-day work week'. Mr Fuda has confirmed, albeit for the purpose of (successfully) demonstrating that the Employees received a higher wage for their four day week than if they had of worked a five day week, that there was useful employment available to the Employees on each of the Stand Down Days. The figures in Attachment 'AF2' to the statement of Mr Fuda suggest that the Employees could have been usefully employed on each of the Stand Down Days by boning 17 bodies on 16 May 2016 and 16 bodies on each of 9, 30 May, 11 and 18 July 2016. It is not relevant that (as explained above at paragraph 7(d)), clause 24.6 of the EA anticipated that, *usually*, 21 bodies would be supplied by the Company for processing by the Employees. In a context where the EA provides for a *guaranteed minimum daily payment* for processing up to 16 bodies, the Employees could have been usefully employed in processing the 16–17 bodies that were available on the Stand Down Days. It is also not relevant that the Employees received a higher wage for their four day week than if they had worked a five day week. An employer is not entitled to unilaterally stand down an employee, even in circumstances where, as here, an employee may receive a higher weekly wage as a result. Although the Company has failed prove the application of the EA Reasonable Cause Exception because it has failed to prove that the Employees could not be usefully employed, I will also consider whether the Stand Down Direction was the result of cause for which the Company could not reasonably be held responsible.

12 A cause for which the Company could not reasonably be held responsible? The Company has failed to prove that it could not reasonably be held responsible for the failure to secure a supply of more than 16 chilled carcasses on each of the Stand Down Days. My reasons for this conclusion appear below.

13 I note my findings above (at paragraph 6(c)) to the effect that Forward Cattle Contracts existed for the supply of 1500 head of cattle over the winter of 2016 with an expected delivery of 132 head of cattle on each Monday. I note also the evidence of Mr Fuda on the limited availability of cattle from the north of Western Australia in 2016, compared to 2015, and the significant effect on supply of 'much longer seasonal rains' than usual. I note emails adduced in evidence suggesting, due to unusual weather, an unexpected failure of supply under the Forward Cattle Contracts in mid May 2016 and early-mid June 2016. Given the evidence of the adverse weather and the communications from suppliers, I am satisfied that the Company could not reasonably be held responsible for the failed delivery of cattle that was expected under the Forward Cattle Contracts.

14 Mr Fuda gave evidence of the efforts of the Company to find cattle to 'replace' the cattle that had not arrived from the north of Western Australia. I note my findings (at paragraph 6(d)-(g)) that, in the winter of 2016, the Company was active at weekly cattle auctions in the southwest where 'far lower slaughter type cattle numbers' than normal were available; the Company was 'outbid by other companies on most occasions' when dealing with direct suppliers; whether it was reasonably practicable for the Company to source chilled carcasses from a third party supplier was dependent upon the suitability of the carcass for meat processing having regard to factors including: quarantine requirements, the age of the carcass and the requirements of the Company. There was evidence of two unsuccessful attempts to buy from direct suppliers in circumstances where the Company was not given an opportunity to raise its initial offer (see emails of 14 June 2016 and 23 July 2016). However, there is no evidence of the number of bids placed by the Company at cattle auctions or the price that was bid by the Company compared to the price bid by competitors. There is also no evidence of *any* investigations by the Company of the availability of suitable chilled carcasses from third parties. I have not ignored the fact that the Company, as a result of the last minute securing of cattle, reversed a decision not to offer work to the Employees on 27 June 2016. However, the absence of evidence with respect to efforts undertaken before each of the Stand Down Days is significant. The Company has failed to satisfy the court of reasonable efforts to secure a supply of more than 16 chilled carcasses on each of the Stand Down Days.

15 The Company raised a number of matters that are of limited relevance to my assessment of whether the Company has proven the EA Reasonable Cause Exception. An enterprise agreement covering a competitor of the Company, the Harvey Industries Group Pty Limited Meat Processing & By-Products Union Enterprise Agreement 2014, contains a clause (clause 17.1) conferring upon the employer a right to deduct payment for 'any cause for which the employer cannot reasonably be held responsible, including but not limited to an adequate supply of livestock'. The presence of this example of a 'reasonable cause' in a similar but not identically worded enterprise agreement does not obviate the Company from discharging the onus of proving, as the EA requires, that it could not reasonably be held responsible for any failure to secure an adequate number of chilled carcasses on each of the Stand Down Days. The Company points to earlier occasions when 'stand downs' may have occurred because of supply issues and to a communication from a representative of the Union suggesting an acceptance of this approach to the EA. This history cannot affect my assessment of the significance of the evidence in the case before me.

16 The Union and the Employees have also raised a number of matters that are of limited relevance to my assessment of whether the Company has proven the EA Reasonable Cause Exception. It is a matter for the Company to determine whether to address any ongoing difficulties with its supply of chilled beef carcasses by: utilising 'daily hire' employees; shifting supply from the small room to the big room; increasing the price that it is willing to pay for live cattle or for chilled beef carcasses or by utilising some other method. The issue for the court is not whether the Company has put in place appropriate or preferable systems to ensure an adequate supply of chilled beef carcasses. The issue for the court is whether, on any occasion when the Company deducts payment for a stoppage of work, the Company proves that it could not reasonably be held responsible for the stoppage.

Second Issue: Whether the Company Has Contravened Any Clause of the Enterprise Agreement or the FW Act on Payment of Wages, Annual Leave and Superannuation and the Appropriate Remedy?

17 The EA Reasonable Cause Exception did not authorise the Stand Down Direction. Each of the Employees elected to take varying combinations of unpaid leave and holiday pay (to access his annual leave entitlement as provided in clause 14 of the EA) on the Stand Down Days as follows:

- Joel Crosswell elected to take three of the Stand Down Days as unpaid leave and two of the Stand Down Days on holiday pay
- Bill Tamainu elected to take four of the Stand Down Days on holiday pay. (No claim arises from the fifth day as Mr Tamainu was in receipt of workers compensation for that day.)
- Christopher Thelander elected to take four of the Stand Down Days as unpaid leave and one of the Stand Down Days on holiday pay.

It is convenient to identify any resulting contraventions by separately examining the consequences of taking unpaid leave (see paragraph 18 below) and holiday pay (see paragraph 19 below).

18 Unpaid Leave The Union and the Employees allege that the taking of unpaid leave resulted in a contravention of s 323 of the FW Act and a contravention of the following clauses of the EA: cl 9.2, 9.3, 11.1, 14.4, 15.5, 23 and 24.6. Notwithstanding that the Stand Down Direction was not authorised by the EA, I have explained in paragraph 8 above that: the Employees weekly wage was *higher* in those weeks by working a four day week compared to working a five day week; annual leave rates of pay (clause 14.4), personal leave rates of pay (clause 15.5) and the superannuation levy (clause 23) are calculated in a manner such that the Employees were also *advantaged* by not working on the Stand Down Days. Against this background, I make the following findings where the Employees have elected to take unpaid leave:

- Section 323 of the FW Act creates an obligation on the Company to pay an employee amounts that are payable 'in full'. The Company has not contravened this provision.
- Clause 9.2 and 9.3 are 'definition' clauses. No contravention arises.
- Clause 11.1 (and 11.2) creates an obligation on the Company to provide work, 'Monday to Friday inclusive'. The Company has contravened this clause. It did not provide work on the Stand Down Days. However, subject to what is said below about clause 24.6, no amount is payable by the Company arising from this contravention because the weekly wage paid by the Company to an Employee who took unpaid leave on a Stand Down Day was *higher* than if the Employee had worked on that day.
- Clauses 14.4, 15.5 and 23 provide for the calculation of entitlements to, respectively, annual leave pay, personal leave pay and a superannuation levy, in accordance with the *basic rate of pay*. The basic rate of pay includes the *constant unit rate* that was paid as part of the weekly wage during each week of a Stand Down Day; the Company has not contravened this clause and there has been no loss by any Employee.
- Clause 14.6 provides that any period of unpaid leave does not count for the purpose of determining annual leave entitlements. It follows from the Stand Down Direction that the Company has contravened this clause. The Union and the Employees seek orders to address this 'lost chance' to accrue annual leave by way of an order for the 'credit' of hours of annual leave or pay 'in lieu' (see paragraph 11 and 12 under 'Orders Sought' of the *Claimants Outline of Submissions*.) The power of this court to make orders in this case is prescribed by s 545(3) of the FW Act: the court may order that the Company pay an amount to the Employees if the court is satisfied that the Company was required to pay the amount under the Act or the Enterprise Agreement. I have reservations about whether the court has the power to make either of the orders which have been sought by the claimants. However, the issue was not addressed by either party at the trial. I will invite submissions from the parties on the question before determining whether to make any orders.
- Clause 24.6 provides for a *guaranteed minimum daily payment* for processing up to 16 bodies ($204.29) . The Union and the Employees allege a contravention of this obligation where an Employee has taken unpaid leave on one of the Stand Down Days and seek orders for payment of that amount for each day of unpaid leave (see paragraphs 4 and 5 under 'Orders Sought' of the *Claimants Outline of Submissions*.) However, because the weekly wage paid by the Company to an Employee who took unpaid leave on a Stand Down Day was higher than if the Employee had worked on that day, there has not been a contravention of this clause. I infer from the fact that the Union and the Employees have *not* made a claim under clause 24.6 for the lost 'opportunity' to process 21 bodies on the Stand Down Days ($284.09) that the claimants have not assumed the burden of proving 'there were no factors outside of the control of the Company in supplying 21 cattle'. For completeness I will observe that the Union and the Employees would, in any event, have failed to discharge this burden. The claimants led evidence and made submissions about factors relevant to the availability of cattle in the context of rebutting the Company's reliance upon the EA Reasonable Cause Exception. Mr Graham Smith, the Secretary Treasurer of the Union, asserted that the Company was unwilling to pay the market price necessary to secure

sufficient chilled carcasses. However, the claimants failed to adduce evidence of *any* suitable cattle being available at *any* price on the Stand Down Days.

19 Holiday pay I make the following findings where the Employees have elected to take holiday pay:

- Clause 11.1 (and 11.2) creates an obligation on the Company to provide work, 'Monday to Friday inclusive'. The result is the same as for an Employee who took unpaid leave: there is a contravention by the Company, but there is no 'loss' by the Employee.
- Clause 14.4. The Union and the Employees allege that taking of holiday pay on the Stand Down Days resulted in the contravention of the part of clause 14.4 of the EA which provides that 'annual leave may be taken in periods of less than four weeks with the mutual agreement of the Employer and the employee'. The taking of annual leave by the Employees was a result of the Stand Down Direction. It was not a result of mutual agreement between the Company and the Employees. The Company has contravened this clause. Orders are sought that the Company either 're-credit' the Stand Down Days that were taken as holiday pay *or* that the Company pay each of the Employees an amount which is the equivalent of the holiday pay to which the Employees were entitled (and paid) for those days (see paragraphs 6, 7 and 8 under 'Orders Sought' of the *Claimants Outline of Submissions*.) Again, I have reservations about whether the court has the power to make either of the orders which have been sought and I will invite submissions from the parties.

Third Issue: The Appropriate Pecuniary Penalty (if any) to be Paid by the Company and by any Person Involved in any Contravention of a Civil Remedy Provision.

20 I have explained in paragraph 18 and 19 above that I am satisfied that the Company has contravened the following clauses of the EA:

- Clause 11.1 (and 11.2) in that the Company was required to provide work on 'Monday to Friday inclusive' and it failed to do so on the Stand Down Days ('the Stand Down Contravention'). I also noted that the weekly wage paid by the Company to an Employee as a result of this contravention was, in fact, higher than if the Employee had worked on that day. This finding applies to each of the three Employees on each of the five Stand Down Days.
- Clause 14.6 in that the Company did not 'count' unpaid leave taken on Stand Down Days for the purpose of determining future annual leave entitlements ('the Annual Leave Accrual Contravention'). This finding applies to Joel Crosswell on three of the Stand Down Days and Christopher Thelander on four of the Stand Down Days.
- Clause 14.4 in that the giving of the Stand Down Direction by the Company resulted in the Employees taking annual leave other than by 'mutual agreement' as required by clause 14.4 ('the Annual Leave Entitlement Contravention'). This finding applies to Joel Crosswell on two of the Stand Down Days, Bill Tamainu on four of the Stand Down Days and Christopher Thelander on one of the Stand Down Days.

21 In Schedule II of these reasons, I outline the provisions of the FW Act and the principles relevant in determining an appropriate pecuniary penalty for the above contraventions and whether Mr Fuda was involved in any of those contraventions.

22 The effect of s 557(1) of the FW Act is that two or more contraventions of the EA are taken to constitute a single contravention if they are committed by the same person and arose out of a course of conduct by that person. I am satisfied that no relevant distinction can be made between the Company's treatment of the situation of any one of the Employees and nor can any distinction be made in the conduct of the Company with respect to any one of the Stand Down Days. It follows from this finding of single course of course of conduct by the Company that the Stand Down Contravention, the Annual Leave Accrual Contravention and the Annual Leave Entitlement Contravention will be treated as three single contraventions notwithstanding there are separate contraventions with respect to each of the Employees on each of the Stand Down Days.

23 The following considerations are of significance to me in assessing penalties in this case:

- The maximum penalty with respect to each contravention by the Company is 60 penalty units which equates to $54,000 given that the Company is a body corporate.
- The Stand Down Direction reflected an honest, albeit incorrectly held, view of Company management that the EA permits the standing down of employees by an *assertion* of reliance upon 'seasonal factors'. The correct position is that the Company must be in a position to *prove* a reasonable cause for any stoppage of work that results in a deduction of pay. The Annual Leave Accrual Contravention and the Annual Leave Entitlement Contravention were inevitable consequences of the Stand Down Contravention.
- The Employees did not suffer any reduced weekly wage as a result of the Stand Down Contravention. In fact, their weekly wage was higher than if the Stand Down Contravention had not occurred. The Employees did suffer effects on their entitlements as a result of the Annual Leave Accrual Contravention (a delay in accrual) and the Annual Leave Entitlement Contravention (taking a holiday at a time not of the Employee choosing).
- In light of the above, considerations of punishment and specific deterrence are less important in this case than the need to deter other employers from unlawfully standing down employees without pay.
- The Company is an enterprise of some sophistication given the evidence of its size and work systems. I infer that the decision to issue the Stand Down Direction involved senior management of the Company, albeit the evidence does not permit me to identify the relevant managers.

24 I have reached a conclusion that penalties fixed in the sum of $2,000 on account of the Stand Down Contravention, $500 on account of the Annual Leave Accrual Contravention and $1,500 on account of the Annual Leave Entitlement Contravention, being total penalties of $4,000 is an proportionate reflection of the gravity of the contravening conduct by the Company. In fixing these penalties I have had regard to: the Stand Down Contravention being of clause 11.1 of the EA with respect to each of the Employees on each of five days; the Annual Leave Accrual Contravention being of clause 14.6 with respect to Mr

Crosswell on three days and Mr Thelander on four days and the Annual Leave Entitlement Contravention being of clause 14.4 with respect to Mr Crosswell on two days, Mr Tamainu on four days and Mr Thelander on one day.

25 The Union and the Employees seek orders pursuant to s 546(1) of the FW Act that the penalties be paid in equal shares to the claimants and I propose to order that the Company pay the penalty of $4,000 by way of payments of $1,000 to each of the Union and the (three) Employees.

26 The Union and the Employees have failed to satisfy me that Mr Fuda was involved in either the Stand Down Contravention, the Annual Leave Accrual Contravention or the Annual Leave Entitlement Contravention. I have already noted that I infer that the decision to issue the Stand Down Direction involved senior management of the Company but that the evidence does not permit me to identify the relevant managers. The identity of the author of the Company memorandum of 4 April 2016 foreshadowing the Stand Down Direction that was to follow is not apparent from the evidence. The facts relied upon at paragraphs 43–47 of the *Claimants Outline of Submissions* are consistent with Mr Fuda having a significant role in the senior management of the Company. That finding does not support an inference that Mr Fuda intentionally participated in or urged or counselled a *particular* decision of Company management, namely, the giving of the Stand Down Direction (and the consequential Annual Leave Accrual Contravention or the Annual Leave Entitlement Contravention).

Conclusion

27 For the reasons set out above, there will be an order that the Company pay a penalty of $4,000 ($2,000 on account of the contravention of clause 11.1 of the EA with respect to each of the Employees on each of five days); $500 on account of the contravention of clause 14.6 with respect to Mr Crosswell on three days and Mr Thelander on four days and $1,500 on account of the contravention of clause 14.4 with respect to Mr Crosswell on two days, Mr Tamainu on four days and Mr Thelander on one day). The $4,000 penalty will be paid by way of payments of $1,000 to each of the Union and the (three) Employees.

28 I will hear further from the parties on the issues that I have raised at paragraphs 18 and 19 before determining whether to make any other orders.

M. FLYNN

INDUSTRIAL MAGISTRATE

SCHEDULE I: JURISDICTION, PRACTICE AND PROCEDURE OF THE INDUSTRIAL MAGISTRATES COURT (WA) UNDER THE *FAIR WORK ACT 2009* (CTH)

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FW Act. The Industrial Magistrates Court (WA) ('IMC' or 'the Court'), being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': FW Act, s 12 (see definitions of 'eligible State or Territory court' and 'Magistrates Court'); *Industrial Relations Act 1979* (WA), ss 81, 81B.

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

[3] The civil penalty provisions identified in s 539 of the FW Act include:

- The terms of an enterprise agreement, to the extent that the agreement *applies* to the parties before the Court: s 539; s 50(1); s 51 FW Act. An enterprise agreement *applies* to an employer and an employee if the agreement is expressed to *cover* them and it is in operation as a result being approved by the Fair Work Commission: s 52, 53 and 54 FW Act. It is not in dispute in this case and I am satisfied that an enterprise agreement known as the Western Meat Packers (Boners and Slicers) Meat Processing Agreement 2013 ('the Enterprise Agreement' or 'EA') was approved by the Fair Work Commission and that, as a result of the coverage clause of the EA, it is has the effect of covering the Company and the Employees.
- Other terms and conditions of employment as set out in Part 2 – 9 of the FW Act. For example, s 323 sets out the obligation of an employer on the method and frequency of amounts payable to employees in relation to the performance of work.
- An 'employer' has the statutory obligations noted above if the employer is a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': FW Act, s 14, s 12. The obligation is to an 'employee' who is a 'national system employee' and that term, relevantly, is defined to include 'an individual so far as he or she is employed by a national system employer': FW Act, s 13. It is not in dispute in this case and I am satisfied that the Company is a corporation to which paragraph 51(xx) of the Constitution applies and that the Employees are employed by the Company.

[4] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:

- An employer to pay to an employee an amount that the employer was required to pay under the FW Act or an enterprise agreement: FW Act, s 545(3). In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible state or territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FW Act. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FW Act: ***Mildren and Anor v Gabbusch*** [2014] SAIRC 15.
- A person to pay a pecuniary penalty: FW Act, s 546.

Burden and standard of proof

[5] In an application under the FW Act, the claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

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

[6] In the context of an allegation of the breach of a civil penalty provision of the FW Act it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences [362].

[7] Where in this decision I state that 'I am satisfied' of a fact or matter I am saying that 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

Practice and Procedure of the Industrial Magistrates Court

[8] The *Industrial Relations Act 1979* (WA) (IRA) provides that, except as prescribed by or under the Act, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): IRA, s 81CA Relevantly, regulations prescribed under the IRA provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: Regulation 35(4).

[9] In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation (omitting citations):

40 … The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence.

<u>Schedule II Pecuniary Penalty Orders and Accessorial liability under the Fair Work Act 2009 (Cth)</u>

Pecuniary Penalty Orders

[1] The FW Act provides that the Court may order a person to pay an appropriate pecuniary penalty if the court is satisfied that the person has contravened a civil remedy provision: s 546(1). The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in section 539(2) of the FW Act: FW Act, s546(2). If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: FW Act, s546(2).

[2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): FW Act, s 12. The relevant rate is that applicable at the date of the contravening conduct:

Before 28 December 2012	$110
Commencing 28 December 2012	$170
Commencing 31 July 2015	$180
Commencing 1 July 2017	$210

[3] The purpose served by penalties was described by Katzmann J in ***Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*** [2017] FCA 557 at [338] in the following terms (omitting citations):
In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose.

[4] In ***Kelly v Fitzpatrick*** [2007] FCA 1080; 166 IR 14 at [14], Tracey J adopted the following 'non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty' which had been set out by Mowbray FM in ***Mason v Harrington Corporation Pty Ltd*** [2007] FMCA 7:

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

[5] The list is not 'a rigid catalogue of matters for attention. At the end of the day the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.' (Buchanan J in ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; 165 FCR 560 at [91]).

[6] "Multiple contraventions" may occur because the contravening conduct done an employer: (a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions; (b) was done once only or was repeated; (c) was done with respect to a single employee or was done with respect to multiple employees. The fixing of a pecuniary penalty for multiple contraventions is subject to:

- Section 557 of the FW Act. It provides that 2 or more contraventions of specified civil remedy provisions (including contraventions of an enterprise agreement and a contravention on section 323 on the payments) by an employer are taken be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a "course of conduct", the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153; *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 at [22] (White J) The section does *not* to apply to case where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): ***Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*** [2017] FCA 557 at [411] ff (Katzmann J); ,
- The application of the totality principle. The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** (2008) 165 FCR 560; 246 ALR 35; [2008] FCAFC 8; [47] – [52].

[7] Section 546(3) of the FW Act also provides:

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

[8] In ***Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)*** [2016] FCA 244 at [40] - [44], Mortimer J summarised the law (omitting citations and quotations) on this provision in light of ***Sayed v Construction, Forestry, Mining and Energy Union*** [2016] FCAFC 4:

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

Accessorial Liability

[9] Section 550 of the FWA provides:

Involvement in contravention treated in same way as actual contravention

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
(2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:
(a) has aided, abetted, counselled or procured the contravention; or
(b) has induced the contravention, whether by threats or promises or otherwise; or
(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
(d) has conspired with others to effect the contravention.

[10] Decisions on this (or a comparable) provision have established the following principles:

A. Section 550 is in the same or similar form as the accessorial provision of other legislation, including s 75B of the Trade Practices Act 1974 (Cth) (now see the definition of 'involved' in the Australian Consumer Law. Decisions on those provisions provide guidance to interpreting s 550 of the FWA not least because Parliament is assumed to have appreciated the effect those decisions when enacting s550 of the FWA.
See ***Australian Building & Construction Commissioner v Abbott (No 4)*** [2011] FCA 950 at [188] (Gilmour J); ***Devonshire v Magellan Powertronics Pty Ltd*** (2013) 275 FLR 273; 231 IR 198; [2013] FMCA 207.

B. In order to establish whether any individual respondent was involved in a contravention, it is necessary to examine the state of mind of each respondent separately in relation to each alleged contravention.
See ***Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate (as successor to the Australian Building and Construction Commissioner)*** [2012] FCAFC 178 at [38].

C. The respondent must intentionally participate in the contravention and to form the requisite intent the respondent must have knowledge of the essential matters which go to make up the contravention, whether or not the respondent knows that those matters amount to a contravention.
See ***Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate (as successor to the Australian Building and Construction Commissioner)*** [2012] FCAFC 178 at [38].

D. What constitutes 'the essential matters of the contravention' will depend upon the facts and circumstances of each case.

See the cases reviewed by White J in ***Fair Work Ombudsman v Devine Marine Group Pty Ltd*** [2014] FCA 1365 at [182] ff including ***Potter v Fair Work Ombudsman*** [2014] FCA 187 and ***Fair Work Ombudsman v Al Hilfi*** [2012] FCA 1166.

E. 'Aided, abetted, counselled or procured … have the same meaning as in the common law where they designate participation in a crime as a principal in the second degree or as an accessory before the fact. "Aiding" and "abetting" refer to a person who is present at the time of the commission of an offence and "counselling" and "procuring" refer to a person who, although not present at the commission of the offence, is an accessory before the fact. A person counsels a contravention by another if he or she urges its commission, advises its commission or asks that it be committed and procures a contravention if he or she causes it to be committed, persuades the principal to commit it or brings about its commission; there must also be a causal connection between that action and the conduct impugned:' Cameron FM in ***Guirguis v Ten Twelve Pty Ltd & Anor*** [2012] FMCA 307 at [150] - [151] (omitting citations).

F. 'To be knowingly concerned in a contravention, the respondent must have engaged in some act or conduct which "implicates or involves him or her" in the contravention so that there be a "practical connection between" the person and the contravention': White J in ***Fair Work Ombudsman v Devine Marine Group Pty Ltd*** [2014] FCA 1365 at [178].

G. 'For a person to be liable as an accessory to a contravention on the basis that they are wilfully blind to a certain fact, it still must be shown, albeit by inference, that the person had actual knowledge of such fact. If the term "wilful blindness" is used merely as a shorthand expression to indicate circumstances which warrant the drawing of the necessary inference, then it is acceptable. But it is unacceptable if it is used as a basis for imputing knowledge where actual knowledge is not proved.
Cowdroy J in ***Potter v Fair Work Ombudsman*** [2014] FCA 187 at [82].

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 00698

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT IAN MCGREGOR
	APPLICANT
	-v-
	JOHN O'BRIEN, MANAGER LABOUR RELATIONS DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 7 AUGUST 2017
FILE NO/S	U 48 OF 2017
CITATION NO.	2017 WAIRC 00698

Result	Application dismissed
Representation (by correspondence)	
Applicant	Mr R McGregor
Respondent	Ms A Gifford (as agent)

Order

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

AND WHEREAS on 2 August 2017, the applicant informed the Commission by email that the matter had settled, he had sent a *Form 14 – Notice of withdrawal or discontinuance* over a month ago and he consented to the Commission dismissing his matter;

AND WHEREAS the Commission has not received a *Form 14 – Notice of withdrawal or discontinuance* from the applicant;

NOW THEREFORE the Commission, 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,
[L.S.] Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Brett David Clarke	The Roman Catholic Bishops of WA through the delegated employing authority Catholic Education Office of WA	U 202/2016	Commissioner D J Matthews	Discontinued
Debra Jane Young	Telethon Kids Institute, Inc	B 61/2017	Senior Commissioner S J Kenner	Discontinued
Graham Clark Perry	The Roman Catholic Bishops of WA through the delegated employing authority Catholic Education Office of WA	U 203/2016	Commissioner D J Matthews	Discontinued
Jasmin Brigita Colli	Gold Corporation	U 69/2016	Commissioner T Emmanuel	Discontinued
Mr Amandeep Singh	Curry Leaf	U 33/2017	Senior Commissioner S J Kenner	Discontinued
Mrs Ciara Theresa Johnston	Candlewood Village Pharmacy	U 80/2016	Commissioner T Emmanuel	Discontinued
Salvatore Oriti	The Roman Catholic Bishops of Western Australia through the delegated employing authority Catholic Education Office of WA	U 198/2016	Commissioner T Emmanuel	Discontinued
Stephen McCann	Construction Forrestry, Mining and Energy Union (CFMEU)	B 82/2017	Senior Commissioner S J Kenner	Discontinued
Taria Jade Walker	Gemmill Homes Group	B 30/2016	Commissioner T Emmanuel	Discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	The Public Transport Authority of Western Australia	Matthews C	C 15/2017		Dispute re alleged unfair dismissal on 14 March 2017	Discontinued
The Civil Service Association of Western Australia (Incorporated)	Director General, Western Australian Land Information Authority (Landgate)	Emmanuel C	PSAC 11/2016	14/07/2016	Dispute re Specified Callings positon	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	The Governing Council of North Metropolitan Technical and Further Education (TAFE)	Matthews C	C 20/2017		Dispute re fixed term contract of a union member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00693

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIO GEORGIOU
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 3 AUGUST 2017
FILE NO.	APPL 4 OF 2017
CITATION NO.	2017 WAIRC 00693

Result	Further direction further amended
Representation	(by written correspondence)
Appellant	Mr M Georgiou
Respondent	Mr N van Hattem of counsel

Further amended Further Direction

WHEREAS on 19 June 2017, the Commission issued a Further amended Further Direction ([2017] WAIRC 00353) granting a third further extension of time to 1 August 2017 for the appellant to comply with reg 92 of the *Industrial Relations Commission Regulations 2005*; and

WHEREAS by email dated 28 July 2017, the appellant requested an extension to 1 October 2017 in which to comply with reg 62 of the Regulations; and

WHEREAS the appellant made this request based on the consequences of the sudden death of his ex-wife and the illness of his father, with supporting evidence; and

WHEREAS the appellant also attached to his email of 28 July 2017 a medical certificate dated 26 July 2017 from the appellant's medical practitioner Dr Wright, stating he would be grateful if the appellant's request for an extension of time to 1 October 2017 be considered; and

WHEREAS the respondent does not oppose the request for an extension of time; and

WHEREAS the respondent noted that if the Commission grants the request and the appellant's materials are not provided by the extended date, he would seek the re-listing of the matter for directions for an appropriate disposition; and

WHEREAS having considered the request the Commission believes it would be fair and reasonable to grant it.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s 33S of the Police Act, hereby directs –

1. THAT compliance with reg 92 of the Regulations by the appellant be and is hereby extended to 1 October 2017.
2. THAT if the appellant fails to comply with par 1 the appeal will be listed for further directions.

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

On behalf of the WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

2017 WAIRC 00691

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELLIOT RYAN
	APPLICANT
	-v-
	SHANNON BODEKER AND ASSOCIATES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 2 AUGUST 2017
FILE NO.	B 68 OF 2017
CITATION NO.	2017 WAIRC 00691

Result	Direction issued
Representation	
Applicant	Mr E Ryan
Respondent	Mr J Hammond (of counsel)

Direction

HAVING heard Mr E Ryan on his own behalf and Mr J Hammond (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 16 August 2017.
2. THAT the applicant file and serve outlines of evidence by 30 August 2017.
3. THAT the respondent file and serve outlines of evidence by 13 September 2017.
4. THAT the applicant file and serve an outline of written submissions by 28 September 2017.
5. THAT the respondent file and serve an outline of written submissions by 12 October 2017.
6. THAT this matter be listed for a one day hearing after 1 November 2017.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

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

2017 WAIRC 00466

REFERENCE OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MERCOR GROUP PTY LTD ABN 23 132 461 593
	APPLICANT
	-v-
	LEX MCCULLOCH, WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 20 JULY 2017
FILE NO/S	OSHT 4 OF 2017
CITATION NO.	2017 WAIRC 00466

Result	Order issued
Representation	
Applicant	Mr P Walkemeyer
Respondent	Ms L Ayton of counsel

Order

WHEREAS on 2 June 2017, under s 51A(1) of the Occupational Safety and Health Act 1984, the applicant referred to the Tribunal the decision of the respondent dated 1 June 2017 to issue Improvement Notice 90009755 to the applicant concerning its alleged failure to provide adequate ventilation through the use of local exhaust vacuum equipment in relation to the operation of the applicant's saw equipment;

AND WHEREAS the respondent agrees that the Improvement Notice should be cancelled;

AND WHEREAS the Tribunal, having enquired into the circumstances of the Improvement Notice, is of the view that the decision of the respondent should be revoked;

NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984, hereby orders –

(1) THAT the decision of the respondent of 1 June 2017 be and is hereby revoked.

(2) THAT Improvement Notice 90009755 be and is hereby cancelled.

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

2017 WAIRC 00375

REVIEW OF DECISION TO DEREGISTER PLANT DESIGN

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	:	2017 WAIRC 00375
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	FRIDAY, 25 NOVEMBER 2016, WEDNESDAY, 15 MARCH 2017, MONDAY, 20 MARCH 2017, TUESDAY, 21 MARCH 2017, WEDNESDAY, 22 MARCH 2017
DELIVERED	:	THURSDAY, 29 JUNE 2017
FILE NO.	:	OSHT 5 OF 2016
BETWEEN	:	EXHAUST CONTROL INDUSTRIES PTY LTD
		Applicant
		AND
		LEX MCCULLOCH WORKSAFE WESTERN AUSTRALIA COMMISSIONER
		Respondent

Catchwords	:	*Industrial Law (WA) - Occupational Safety and Health - Application for review of decision to deregister plant design - Principles applied - Units fall within the extended definition of boiler for the purposes of Reg 4.1 - The design alteration in relation to the gas side chambers of the Units meets the requirements for registration and is consistent with sound engineering practice - Altered design is limited to Units at Fiona Stanley Hospital - Exemption requests should be granted - Application to review allowed*
Legislation	:	*Industrial Relations Act 1979* (WA)
		Occupational Safety and Health Act 1984 (WA) ss 5, 61A
		Occupational Safety and Health Regulations 1996 (WA) Regs 4.1, 4.2, 4.3, 4.7, 4.12
		Interpretation Act 1984 (WA)
Result	:	Application to review allowed
Representation:		
Counsel:		
Applicant	:	Mr S Russell of counsel and with him Mr R Stephenson of counsel
Respondent	:	Ms T Hollaway of counsel
Solicitors:		
Applicant	:	Macpherson Kelley
Respondent	:	WorkSafe WA, Department of Commerce

Case(s) referred to in reasons:

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd & Anor [2002] WASCA 231

The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd [2007] WAIRC 01273; (2007) 88 WAIG 22

Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare (1992) 74 WAIG 2

Reasons for Decision

The application

1 The applicant, Exhaust Control Industries Pty Ltd is engaged in the business of designing pollution and noise control products for domestic and international customers. The respondent, WorkSafe, is the general occupational health and safety regulator in Western Australia.

2 In July 2011 ECI commissioned a company named Shearform Pty Ltd to fabricate two waste heat recovery units. The Units were manufactured and delivered to Triple M Mechanical Services and were installed at the Fiona Stanley Hospital in Murdoch, south of Perth. The Units operate by receiving exhaust gases from natural gas engines and generating steam for use in the hospital.

3 The design for the Units was registered with WorkSafe in December 2013. In the course of 2015, a number of issues were raised by WorkSafe with regard to the design of the Units. Design verification was undertaken by consultants to ECI. Amendments to the design were developed and submitted to WorkSafe in August 2015. Concerns about the welds used on the Units were the subject of an independent report in September 2015.

4 Also in September 2015, the design amendment for the Units was registered by WorkSafe. A number of issues were canvassed between the parties from late 2015 until early 2016. In March to April 2016 ECI lodged requests for exemption from compliance with the *Occupational Safety and Health Regulations 1996* (WA) and revised requests for exemption with WorkSafe.

5 By mid-2016, ECI had obtained confirmation from Shearform that the welds used on the Units were in accordance with the relevant Australian Standards and in accordance with the Unit design. WorkSafe were informed of this.

6 By letter of 5 September 2016 WorkSafe informed ECI of its decision that the design registrations for the Units be deregistered. There were five stated grounds for the deregistration. They were:

(a) The internal inspection access opening requirements of the Units do not comply with Cl 3.9.5.2(c) of AS 1228-2006;

(b) The non-destructive testing on the Units show the welds being inconsistent with the design drawings, by being fillet and not butt welds as required;

(c) The low water level cut-off arrangements do not meet the AS 1228-2006 requirements;

(d) The design verification for the Units was done two years' post-manufacture and therefore was not performed on an "as manufactured" basis which would have shown non-compliance with AS 1228-2006; and

(e) The use of AS/NZS 3678-250 steel plates in the manufacture of the Units is not designed to exceed 250°C. The maximum temperature as per the ECI Operations and Maintenance Manual of 475°C for exhaust gases, constitutes a significant deviation from the design conditions allowed for in AS 1228-2006.

7 On the above basis, WorkSafe considered the Units were a safety risk and it was therefore necessary to deregister the designs under Reg 4.7(2) of the Regulations. ECI now challenges the decision of WorkSafe by way of an application for review to the Tribunal under s 61A of the *Occupational Safety and Health Act 1984* (WA). Whilst the application for review was outside of the time prescribed for a referral to the Tribunal under s 61A(2) of the Act, WorkSafe did not oppose an extension of time sought by ECI and the Tribunal granted it.

Grounds of review

8 The grounds of the application to review are set out at schedule B to the application which is in the following terms:

Schedule B

Application for review

1. The Applicant seeks review of the Decision of the Commissioner for the following reasons. Reliance is made on the affidavits of Wolfgang Mika and Syed Shah.

Internal inspection access opening requirements

2. The requirement for internal inspection access openings pursuant to Clause 3.9.5.2(c) of Australian Standard 1228-2006 Pressure Equipment - Boilers is no longer the only means of visually inspecting the internal components of the Units. Historically, physical sighting of the internal parts through openings in boilers was the only means of internal inspection.
3. The use of remote cameras to inspect the Units is a simple method of achieving the same outcome as installing visual inspection openings in the Units.

Non-destructive testing (NDT)

4. The concern that WorkSafe had concerning the 'butt' welds arose due to a clerical error. The evidence established that Shearform Pty Ltd, conducted the correct 'butt' welds in accordance with the design drawing requirements, but made a clerical error and documented these welds as 'fillet' welds.

Low Water Level Cut Off

5. The concern expressed by WorkSafe that the nominated low water level cut-off arrangements do not meet nominated design standard AS1228-2006 can be resolved by amending the low water level cut-off settings on-site.

Design Verification

6. The Units have been the subject of two designs, which were registered as numbers WAP22731 and WAP23564. The more recent design acknowledges the presence of a pressure relief valve on the exhaust gas side of the Units. As a result, the 'as manufactured' drawings were amended and the design verified accordingly.

AS3678-250 Steel Plates

7. The concern expressed by WorkSafe concerning the steel plates arises from a misunderstanding by WorkSafe as to the definition of 'boiler' contained in Regulation 4.1 of the *Occupational Safety and Health Regulations* 1996 **(OSH Regulations).** Only the part of the Unit that produces steam can be defined as a boiler. The gas side chambers at each end of the Units, which receive and expel exhaust gasses, cannot be said to be boilers.
8. Regulation 4.1 of the OSH Regulations defines a 'boiler' as a *'vessel or an arrangement of* vessels *and their interconnecting parts in which steam or other vapour is generated'*. The gas side chambers at each end of the Units do not generate steam or any other vapour.
9. Relying upon the proper assessment of the boiler components, the gas-side chambers comply with the relevant Australian Standard.
10. The Units can be operated safely and do not pose a safety risk.

Conclusion

11. With the use of universally available testing equipment and minor adjustments on-site, the Units comply with the relevant Australian Standard and accordingly the decision by the Commissioner dated 5 September 2016 cancelling registration of the two Units should be rescinded.

9 The Units are waste heat recovery units and are designed to recover heat from exhaust gas generated by a natural gas powered engine. The general description of the operating principle of the Units appears in the Operations and Maintenance Manual (annexure 13.16 witness statement of Mr Rajah p 1283) in the following terms:

The WHRU is designed to recover heat from the exhaust gas stream from the natural gas powered reciprocating engine This heat recovery is achieved by passing the hot exhaust gases through a series of internal tubes, which conduct heat to the surrounding water the WHRU. This heat transfer cools the exhaust gases and heats the water. The cooled gases are discharged to atmosphere via the exhaust ducting downstream of the WHRU. The heated water boils to steam and the steam is drawn off the top of the unit and piped away for use. The level of water is automatically controlled in the WHRU over a normal operating range by the addition of water using the feedwater pumps. The water and steam are contained within the WHRU in a vessel bounded by the shell, the two tube sheets and the tubes. These parts form the pressure envelope.

Control of the amount of heat provided to the WHRU is achieved with the bypass damper. This damper serves to re-direct part of the exhaust gases directly from the inlet of the WHRU to the outlet, thereby reducing the proportion of the hot gases that pass through the heat transfer tubes within the WHRU vessel. The position of this bypass damper is automatically set by the control system (by others) to match the quantity of steam being produced to the demand.

The WHRU also reduces engine exhaust noise.

10 A copy of a diagram of the Units, taken from the Bureau Veritas Technical Note Boiler Parts – Clarification (annexure WJM1A to the affidavit of Mr Mika 16 February 2017) is annexure 1 to these reasons.

11 The design temperature for the exhaust gas side of the Units (grey shaded areas on annexure 1) is to a maximum temperature of 475°C and to a maximum pressure of 37kPa regulated by a pressure relief valve. The steam side of the Units (blue shaded areas on annexure 1) in which are located tubes through which exhaust gases pass, has a design temperature maximum of 250°C. The maximum design pressure of the steam side of the Units is 1034kPa. A safety valve is also fitted to regulate this pressure.

12 Each Unit has a removable end cover intended to provide maintenance access to the tube sheets and the internal services of the gas path. However, as the Tribunal observed from an on-site inspection of the Units at Fiona Stanley Hospital, access to the end covers and their removal, has some difficulties associated with it. The Units have not been operating at Fiona Stanley Hospital since their initial commissioning, because of the present dispute.

Regulatory scheme

13 It is convenient at this point to set out the statutory scheme under which the present application for review is brought. Section 61A of the OSH Act is in the following terms:

> **61A. Review of Commissioner's decisions under regulations**
>
> (1) In this section —
>
> ***reviewable decision*** means —
>
> (a) a decision made under the regulations by the Commissioner himself or herself; and
>
> (b) a determination of the Commissioner on the review, under the regulations, of a decision made under the regulations by a person other than the Commissioner, whether or not the decision was made by that person as a delegate of the Commissioner,
>
> but does not include a decision made by a person acting as a delegate of the Commissioner.
>
> (2) A person who is not satisfied with a reviewable decision may, within 14 days of receiving notice of the decision, refer the decision to the Tribunal for review.
>
> (3) On reference of a decision under subsection (2), the Tribunal is to inquire into the circumstances relevant to the decision and may —
>
> (a) affirm the decision; or
>
> (b) set aside the decision; or
>
> (c) substitute for the decision any decision that the Tribunal considers the Commissioner should have made in the first instance.
>
> (4) Pending the decision on a reference under this section, the operation of the reviewable decision is to continue, subject to any decision to the contrary made by the Tribunal.

14 The relevant provisions of the Regulations in relation to plant are prescribed by Part 4.

15 Specifically, the registration of plant design and items of plant is prescribed by Division 2 of Part 4. By Reg 4.2 any person who manufactures, imports or supplies plant of a kind set out in Schedule 4.1, must ensure that the design of the plant has been registered by WorkSafe and that the plant has been manufactured in accordance with the registered design. Regulations 4.3 to 4.6 set out the process for application for registration of plant design and the requirements imposed. By Reg 4.7 WorkSafe may register the relevant plant design with or without modifications, or refuse registration. In this case the decision from which the review is brought, is a decision to deregister plant design rather than a decision to deregister an individual item of plant. Accordingly, WorkSafe relies on Reg 4.7, the power to approve and register plant design, read with the relevant provisions of the *Interpretation Act 1984* (WA) to revoke such approval or registration. No issue is taken with this by ECI and I consider that WorkSafe had the statutory power to act as it did.

16 Additionally, Schedule 4.3 of the Regulations specifies Standards relating to the design and other requirements in relation to certain plant. The Schedule sets out various Australian Standards and items of plant. One of those Standards is AS/NZS 1200 in relation to pressure equipment (known as the SAA Boiler Code). The specification of plant set out in Schedule 4.1, and the relevant Australian Standards, are referred to in Division 2 of Part 4 of the Regulations. Compliance with the Standards set out in Schedule 4.3 is required to be verified for the purposes of plant design registration.

17 Specifically, Cl 2.1 of AS/NZS 1200:2000 dealing with basic requirements and recommendations for pressure equipment, expressly incorporates by reference, other Standards that are required to be complied with in relation to the construction and

use of pressure equipment. Those further Standards, set out in Table 2.1 and Appendix G of AS/NZS 1200:2000, refer to Standards relevant to these proceedings, including AS 1228-2006 in relation to boilers, and AS 1210-2010 in relation to pressure vessels generally. It is in this way, through the cascading operation of the relevant Standards, when read with Schedule 4.1, that they obtain legal force and effect under the OSH Act and the OSH Regulations.

18 Accordingly, the only way in which a person may depart from the requirements of the relevant Standards as set out in Schedule 4.3, to the extent that they apply, is to seek an exemption from WorkSafe under either Reg 2.12 or 2.13. Such an exemption may be granted with or without conditions. As noted, exemptions are sought in this case. Although supported by WorkSafe, the Tribunal, given the terms of s 61A of the OSH Act, will need to be satisfied that they should be granted.

The evidence

19 The basis for WorkSafe's decision to deregister the plant design for the Units and their plant registrations, was referred to in the witness statement of Mr McCulloch, the WorkSafe Commissioner. Mr McCulloch explained the process of plant and design registration, as undertaken by the Business Services Directorate of WorkSafe. It is only in complex cases, that the engineering expertise from the Health Hazards and Plant Safety Directorate is sought, prior to registration of plant and design.

20 Whilst not stated by Mr McCulloch, it is to be inferred in this case that no issues of complexity were identified, as the concerns of WorkSafe were not raised until sometime after the registration of the design and plant. It is also the case in this matter, somewhat unusually, that the plant design registrations were not lodged for registration until some two years or thereabouts, after the manufacture of the Units. Thus, in this case, the design registrations as lodged, should have been on an "as manufactured" basis.

21 Mr McCulloch referred to meetings he had with the director of the Health Hazards and Plant Safety Directorate and with Mr Rajah, the Plant and Engineering Manager for WorkSafe. In June 2016, Mr McCulloch directed Mr Rajah to prepare a report on the Units at Fiona Stanley Hospital, because of some safety concerns identified. A copy of Mr Rajah's report with its annexures, was LM 1 to Mr McCulloch's witness statement. Having considered the content of Mr Rajah's report, and in reliance on his engineering expertise, Mr McCulloch reached the view that both the plant design and plant registrations themselves should be revoked on the grounds of non-compliance with the Regulations and relevant Standards, and on general safety considerations.

22 The background to the current dispute is set out in the witness statement of Mr Rajah who was also called by WorkSafe as an expert witness. Mr Rajah has had 27 years' experience with WorkSafe and holds a Bachelor of Science in Engineering and a Postgraduate Diploma in Environmental Impact Assessment. Mr Rajah has very extensive experience in relation to high risk plant design assessment and review and inspection. Mr Rajah is a Chartered Professional Engineer and a member of relevant professional bodies.

23 In about August 2014 Mr Rajah had cause to request a senior WorkSafe inspector, Mr Rennie, to visit the Fiona Stanley Hospital to undertake a High Risk Work Licence requirement assessment for the Units. Following Mr Rennie's inspection of the Units at the hospital, further concerns were raised in relation to the design and manufacture of the Units, leading to a full audit being prepared by Mr Rennie dated 20 November 2014. The upshot of the audit undertaken by Mr Rennie was his recommendation that the Units be deregistered on safety grounds. After Mr Rennie's recommendation, WorkSafe requested the manager of the hospital, Serco Asia Pacific, to undertake an independent assessment and review of the safety of the Units. Mr Martin Ford of WSP Parsons Brinckerhoff was duly commissioned to undertake the assessment and a preliminary report was provided to WorkSafe which was dated 1 March 2016. The report was annexure R5 to Mr Rajah's witness statement.

24 Mr Rajah referred to the original design registration WAP22731 for the Units which specified a maximum inlet gas temperature of 250°C. This was subsequently the subject of an alteration to the design registration under Reg 4.12 of the Regulations, lodged in September 2015. The additional design detail in relation to the alteration specified a change to the maximum inlet gas temperature to 475°C and a reduction in the "tube side" design pressure to 37kPa.

25 The design amendment was accompanied by a letter dated 21 August 2015 from HRL Technology Pty Ltd on behalf of ECI, and provided calculations for the revised design conditions in relation to the gas inlet temperature and pressure. A copy of this letter with attached calculations was annexure R6.1 to Mr Rajah's witness statement. Further, BV provided a design verification for the alteration attached at annexure R6. HRL noted in its letter of 21 August 2015 in relation to the revised design conditions that:

> It must be mentioned here that because the revised internal design pressure for these components is below 50kPa the compliance of the design to AS1210-2010 Pressure vessels code is not applicable. This may be similar for the revised design to AS 1228-2006 Pressure equipment – Boilers. However, it was decided that the design for the above components for the revised design conditions be performed as good practice.
>
> The drum ends are manufactured from AS3678-250 carbon steel plate for which higher temperature design strength properties are not available. AS1210 – provides data up to temperature of 350°C, consequently the design strength was extrapolated for the design temperature of 475°C and factored down in accordance with AS1228.
>
> The components were found to comply with the strength requirements of AS 1228-2006 Pressure equipment – Boilers, for the design strength used. Calculations are attached.

26 Mr Rajah's evidence was that he was concerned that HRL did not also consider the external pressure of 1034kPa acting on the boiler plain tubes. Mr Rajah took the view that HRL "did not adopt a holistic approach as required under Reg 4.12." Furthermore, Mr Rajah's evidence was that he did not consider HRL's extrapolation of the parameters from AS 1228-2006 to support the use of AS/NZS 3678-250 steel plates for temperatures of up to 475°C, to be prudent engineering practice. As noted by Mr Rajah, given there were design alterations made and registered in relation to the Units, the Units themselves needed to be the subject of re-registrations. However, these matters were put on hold pending the resolution of the issues raised by Mr Ford in the PB report.

27 Specifically, the Tribunal notes that from the PB report, issues were identified for resolution. Of relevance for present purposes, is the item appearing at pp 10 - 11 of annexure R5 to Mr Rajah's witness statement. That concerns the design temperature for the Units in accordance with the design registration amendment referred to immediately above. Mr Ford notes three issues in relation to what he described as the "uncooled shell extensions". Those three issues were:

(a) potentially high secondary stressors at the shell to tubeplate weld;

(b) the use of AS 3678 Grade 250 Plate at temperatures above that permitted by AS 1228-2006; and

(c) the acceptability of the design for coincident maximum gas temperature and a gas side pressure of 0.7MPa.

28 As to (a), Mr Ford said in his report "We maintain (sic) recommendation to ensure that the shell to tubeplate weld is inspected on a regular basis. Should be included in the vessel operating regime/maintenance strategy." As to (b), the matter most apposite in relation to the narrowed matters in contention before the Tribunal, Mr Ford said **"Shell extensions are not strictly 'pressure parts'"**. As to (c) Mr Ford said "The revised vessel design conditions have been reviewed and confirmed as appropriate by the system designer. Specifically – the gas side is protected by explosion vents designed to limit pressure to 37kPaG. (closed)" (My emphasis).

29 The Tribunal will return to the views expressed by Mr Ford in relation to (b) concerning the design temperature and the observations of HRL referred to above, when considering the expert evidence.

30 After the conferral of Mr Rajah and Mr Mika as the parties' expert witnesses, it is now accepted that the matters identified in the reasons for the revocation of the design registration, apart from the steel plate issue, can now be resolved by exemption from compliance with the Regulations, subject to ratification of the agreed position by the Tribunal. However, in relation to the use of AS/NZS 3678-250 steel, Mr Rajah maintained his view that for the gas side chambers of the Units to be exposed to operating temperatures in excess of 250°C, constituted a significant deviation from the design conditions allowed for in AS 1228-2006. Additionally, Mr Rajah expressed concern that the tube plate would also be exposed to exhaust gases at high temperature, which contributes to his view that there are significant safety concerns in relation to the current design and operational parameters for the Units.

31 Mr Rajah also expressed the view, whilst ultimately a matter of statutory construction, that the gas side chambers which constitute the heat source and gas discharge devices are integral to the operation of the boilers, and therefore the Units fall within the definition of a "boiler" for the purposes of Reg 4.1 of the Regulations. That this is so, is emphasised in Mr Rajah's view, because without the gas inlet chamber, the Units could not operate as a boiler.

32 Mr Rennie has been the Senior Inspector (Pressure Equipment) at WorkSafe since 2002 and has been employed by WorkSafe since 1987. Mr Rennie holds qualifications in engineering (marine) and a Certificate of Competency as a First Class Engineer. During his employment with WorkSafe, Mr Rennie has been engaged in a range of work including high risk plant design assessment, review, fabrication, commissioning and inspection in situ of plant including pressure equipment, in relation to compliance audits and issuing Certificates of Inspection.

33 As noted by Mr Rajah, Mr Rennie initially had contact with the Units in August 2014, which prompted him to question compliance with the Regulations. He undertook a desk audit following receipt of materials in relation to the Units from Serco, and concluded there were significant deficiencies in the document provided to him. It was from this audit that Mr Rennie formed his recommendation to Mr Rajah that the Units be deregistered on safety grounds. One of the major concerns held by Mr Rennie related to the tube plate to shell welds following a review of site weld tests conducted by Australian Welding Academy Pty Ltd (Weld-Rite) on 20 November 2015. Following receipt of further material from Weld-Rite, Mr Rennie formed the view that the welds performed on the Units were fillet welds and not butt welds, as required by the appropriate Standard.

34 The findings of the desk audit undertaken by Mr Rennie were annexures IR1 to IR4 of his witness statement. Mr Rennie expressed concerns in the reports that the design verification process was flawed in material respects, and his conclusions in the audits supported his recommendation that the Units be deregistered. Mr Rennie maintained that the gas side chambers to the Units must be regarded as "boiler settings" and thus form a part of the boiler design, which is required to comply with AS 1228-2006 and the definition of "boiler" in Reg 4.1 of the Regulations.

35 Mr Mika is the Principal Integrity Engineer at BV. Mr Mika holds a Bachelor of Mechanical Engineering and has over 20 years' experience in risk based assessment, plant failure investigation, integrity assessment and performance improvement. Mr Mika has filed four affidavits in these proceedings. What follows is necessarily an overview of Mr Mika's evidence.

36 In his initial affidavit filed in the application made to the Tribunal, Mr Mika responded to the grounds advanced by WorkSafe in its letter of 5 September 2016, setting out the reasons for the deregistration of the Unit designs. Whilst several of the issues for determination have fallen away, as the Tribunal will be required to form a view as to whether the exemptions as now supported by WorkSafe should be granted, it is necessary to traverse the evidence in relation to what now can be regarded loosely, as the supplementary issues. As to the first question of adequate inspection access of the Units, Mr Mika refers to the requirement of AS 1228-2006 at Cl 3.9.5.2(c) which requires that the Units have one small inspection opening in order that the internal parts of the Units can be visually inspected.

37 Mr Mika noted that at the time of the introduction of the relevant Standard, alternative means of internal inspection of items of plant such as the Units, were not available. Such alternative means now include remote camera technology. Mr Mika also referred to the significant cost to ECI if inspection openings are to be retroactively installed into the Units, and estimates approximately $25,000 in rectification costs in this regard. Mr Mika expressed the view that the use of remote camera technology for the purposes of internal inspection of the Units would be quite adequate. It is consistent with current practice in relation to internal inspection of other boilers and pressure equipment, with such camera technology being readily available.

38 I accept that evidence as referring to an alternative approach which accords with eminent common sense.

39 The next point relates to the non-destructive testing of the Units in relation to the weld maps supplied and assessed by WorkSafe, specifically whether the welds used on the Units were fillet welds or butt welds, as required by AS 1228-2006. In referring to the relevant weld maps and non-destructive testing reports in relation to the Units, Mr Mika formed the view from these materials, and following discussions with Shearform Pty Ltd, the company who fabricated the Units, that the correct butt welds were performed in accordance with AS 1228-2006. However, the documentary records in relation to the welding procedures reflected an error and that error was not corrected in subsequent non-destructive testing on site.

40 Having regard to the evidence and the relevant Standards, the proposed course by the parties that ECI arrange for ultrasonic testing on the welds between the tube plates and shell of the Units, is also sensible. Such testing must confirm that the welds are full penetration butt welds in accordance with AS 1228-2006. It may not be necessary to undertake testing in respect of every relevant weld on the Units. The parties should confer in relation to agreeing upon a sample of ultrasonic testing, as it would seem to follow that if one test on the relevant welds on each of the Units reveals that they are in fact full penetration butt welds, it would be almost inevitable that the other relevant welds are also of the same kind. In my view, a WorkSafe inspector should be present during the testing process.

41 In relation to the low water level cut-off which relates to the cut-off settings on the Units' water level indication and control equipment, Mr Mika's evidence was that this can be overcome by an adjustment of the low water level cut-off settings. Mr Mika further testified that such adjustments may be made by the facility operators on-site and would be simple and inexpensive to undertake. I agree. The parties have not indicated that an exemption request would be required in relation to this issue, but having regard to the materials before the Tribunal, if one were required, it should be made and granted.

42 Whilst Mr Mika referred to the design verification issue referred to in the WorkSafe letter, Mr Mika testified that following ECI's enquiries with the manufacturer of the Units, Shearform, he has been advised that the Units were constructed in accordance with the drawings used for the design verification undertaken by BV, and therefore represent the "as built" configuration of the Units. However, as the proceedings unfolded, this appeared to no longer be an issue requiring determination by the Tribunal.

43 On the question of the use of AS/NZS 3678-250 steel plates in the fabrication of the Units, Mr Mika, throughout his testimony, made some key points. The first was that WorkSafe had adopted an incorrect approach to the definition of a "boiler" for the purposes of Reg 4.1 of the Regulations. Mr Mika's view was that the "boiler proper" is constituted by the central chamber of the Units which defines the pressure boundary and which contains both the water and the steam as generated. That is, in his view, it is the central pressure chamber which constitutes the boiler proper, and which does not include the gas side chambers at each end of the Units. As the gas side chambers to the Units do not contain water or steam, Mr Mika expressed the initial view that they could not be defined as a boiler or part of a boiler, for the purposes of Reg 4.1.

44 Accordingly, if that is so, then the use of AS/NZS 3678-250 steel in the fabrication of the gas side chambers, involves no contravention of AS 1228-2006. In any event, irrespective of this contention, given the subsequent design amendment to the Units, reducing the maximum exhaust gas pressure from 700kPa to 37kPa, the gas side chambers to the Units could no longer be regarded as "pressure vessels" in the terms of AS 1210-2010. An independent review of the exhaust gas system confirmed the maximum design pressure to be 37kPa.

45 Accordingly, it was Mr Mika's professional opinion, that the Units as constructed, and as the subject of the design amendment, can be safely operated and pose no risk.

46 In further affidavit evidence, Mr Mika expanded and clarified a number of issues raised in the proceedings before the Tribunal, and as set out in the application. It was an overarching theme of Mr Mika's testimony, that in his professional opinion based on all the material he has been provided by the fabricator of the Units, they have been designed and constructed to comply with the intention of each relevant Australian Standard. Where any departure is identified, such departure is justified by sound engineering practice and poses no risk to the safe operation of the Units.

47 Through adoption of the concurrent evidence approach, the issues in dispute have been very substantially narrowed. The parties now agree that the key issue for determination by the Tribunal, is whether the gas side chambers to the Units can be properly characterised as "pressure parts", as defined in AS 4942-2001, for the purposes of AS 1228-2006. The provisions of AS 4942-2001 contain a glossary of terms relevant to pressure equipment generally, including boilers. Along with other Standards relevant to pressure equipment, AS 4942-2001 is clearly intended to be read as part of the scheme of Standards in relation to such equipment.

48 The issue that flows from this is whether the steel used for the construction of the gas side chambers, which is compliant with AS/NZS 3678-250, breaches the requirements of AS 1228-2006, in relation to the construction and operation of "boilers".

Consideration

Approach to the review

49 In accordance with s 61A(3) of the OSH Act, the Tribunal is required to "inquire into the circumstances relevant to the decision" of WorkSafe. This involves, analogously with reviews of improvement and prohibition notices, the Tribunal assessing whether, in view of the material before it, WorkSafe was justified in making the decision it did. This requires the Tribunal to investigate for itself the circumstances giving rise to the decision and the validity of the conclusions reached: *Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare* (1992) 74 WAIG 2; *The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd* [2007] WAIRC 01273; (2007) 88 WAIG 22.

Principles of interpretation

50 The general approach to the construction of statutes, legislative instruments and other documents that may have legislative or regulatory effect, and contracts, is to construe the instrument as a whole. In *Project Blue Sky Inc v Australian Broadcasting*

Authority [1998] HCA 28; (1998) 194 CLR 355, in the joint judgment of McHugh, Gummow, Kirby and Hayne JJ at par 69-70 and 78, it was said as follows:

> 69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In *Commissioner for Railways (NSW) v Agalianos*[47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed[48].
>
> 70. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[49]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions[50]. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other"[51]. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> …
>
> 78. However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[56] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation*, Mr Francis Bennion points out[57]:
>
> > "The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with." (footnotes omitted)

51 Furthermore, as referred to by counsel for WorkSafe, it is open to the Tribunal to be assisted by the evidence of experts in relation to the meaning and effect of technical words and phrases within a specialist body of knowledge. In this respect, reference was made to the decision of the Full Court of the Supreme Court of Western Australia in *Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231, per Parker J (Malcolm CJ and Anderson J agreeing) at pars 100 to 107.

52 I adopt these general approaches to the interpretation of the OSH Act, the Regulations, and the terms of the relevant Standards, brought into the statutory regime in the manner outlined above.

Meaning of "boiler"

53 Both Mr Mika and Mr Rajah agreed after conferring, that a "holistic" approach to the definition of "boiler" should be adopted. In Reg 4.1 - Terms used, "boiler" is defined as follows:

> ***boiler*** means a vessel or an arrangement of vessels and their interconnecting parts in which steam or other vapour is generated or in which water or other liquid is heated at a pressure above that of the atmosphere by the application of fire, the products of combustion, electrical power or by similar high temperature means and —
>
> (a) includes superheaters, reheaters, economisers, boiler piping, supports, mounting valves, gauges, fittings, controls, the boiler setting and other equipment directly associated with the boiler;
>
> (b) does not include a fully flooded or pressurised system where water or other liquid is heated to a temperature lower than the normal atmospheric boiling temperature of the liquid;

54 The general measure of atmospheric pressure, expressed as "ambient" or "standard" atmospheric pressure, is measured at 100 kPa (See McNaught A.D. and Wilkinson A. *IUPAC Compendium of Chemical Technology* 2nd Edition Oxford 1997).

55 AS 1228-2006 is the principal Australian Standard specifically applicable to pressure equipment designated as boilers. As agreed by the experts, and being specific, the general Standard in relation to pressure vessels, AS 1210-2010, did not strictly apply. This is because the definition of "pressure vessel" excludes a boiler in both Reg 4.1 of the Regulations and in AS 1210-2010. To avoid confusion, it should be one or the other. The purpose and scope of AS 1228-2006 is set out in s 1.1 and is to provide for materials, design, construction, inspection and operation requirements for boilers as defined in AS/NZS 1200:2000. For these purposes, a "boiler" in Appendix E – Definitions in AS/NZS 1200:2000 is as follows:

> **E2.2 Boiler –** a vessel or an arrangement of vessels and interconnecting parts, wherein steam or other vapour is generated, or water or other liquid is heated at a pressure above that of the atmosphere by the application of fire, the products of combustion, electrical power, or similar high temperature means. It also includes superheaters, reheaters, economizers, boiler piping, supports, mountings, valves, gauges, fittings, controls, the boiler setting and directly

associated equipment. It does not include a fully flooded or pressurized system where water or other liquid is heated to a temperature lower than the normal atmospheric boiling temperature of the liquid.

56 Plainly, as with the definition of boiler in Reg 4.1, the gas side chambers are not parts of the Units "where steam or other vapour is generated, or water or other liquid is heated at pressure above that of the atmosphere by the application of fire, the products of combustion, electrical power, or similar high temperature means." In my opinion, this first part of the definition above and in Reg 4.1, is clearly intended to capture the "boiler proper". By that I mean the contained part(s) of the boiler within the drum or main shell which, by application of high temperature and pressure, steam or vapour is generated or water or other liquid is heated. This is clear from the ordinary and natural meaning of the words used. If this were not so, it would be unnecessary to include the extended meanings in the next sentence of the above definition, and the extended, inclusive meaning, in Reg 4.1.

57 Following the discussion between Mr Mika and Mr Rajah, Mr Mika now accepts that the gas side chambers can be regarded as part of the extended definition of a boiler, as being a part of the "boiler setting". A "boiler setting" is referred to in s 3.13 of AS 1228-2006. Whilst this does not define a "boiler setting" it is expressed in the following terms:

> **3.13 BOILER SETTINGS**
>
> The setting of each boiler shall comply with AS 3892.
>
> Casing construction shall be applied for those parts of the boiler combustion chamber and gas passes which are not completely protected by finned tubes, tangent tubes, or by equivalent tube construction.
>
> Each such combustion setting shall be designed to withstand the maximum positive or negative pressures which it may be subjected to in operation but in no case less than 2 kPa, and, where required, shall be stiffened with buck-stays calculated in accordance with AS 3990.
>
> NOTE: In the design of the casing, consideration should be given to the negative furnace pressures or the combination of casing strength. The boiler/draught controls should be such as to limit the excursions to values which the casing can withstand.

58 It was common ground also that in the last 30 or 40 years, the design and technology used in boilers has changed markedly. A necessary consequence of this fact is whether the regulatory regime for the safe design, fabrication and operation of boilers has kept pace with these changes. It is this very issue which is thrown up by this case. I say that because it was acknowledged by Mr Rajah that the application of the Regulations to boilers of 30 or 40 years ago, was much more straightforward. Necessarily too, as a regulator, WorkSafe has adopted a consistent and conservative view of the application of the Regulations and has been constrained by their terms, in their current form, despite the changes to boiler technology and design, which has occurred over several decades. In this case, the Units are of a different and more recent design, intended to recycle and use exhaust gases that would otherwise be vented to the atmosphere. Accordingly, in this case, WorkSafe looks to the Tribunal to interpret the relevant provisions of the Standards and the Regulations, that are applicable, both for this case, and for similar cases in the future.

Meaning of "pressure parts"

59 Turning to the central question to be answered. It is to be accepted, based on Mr Mika's evidence, that the design pressure of 37kPa for the gas side chambers is very low. Mr Mika likened the flow of exhaust gases from the engine through the inlet into the gas side chambers and out through the outlet, as loosely analogous to the exhaust pipe of a car. The design pressure is well below standard or ambient atmospheric temperature. As noted earlier, the definitions set out in AS 4942-2001 extend to AS 1228-2006. In AS 4942-2001, "pressure parts" is defined to mean:

> "The pressure retaining parts of pressure equipment, e.g. boiler drums, vessels, headers and pipes"

60 AS/NZS 1200:2000 is the "parent" Standard for pressure equipment. In the preface to AS/NZS 1200:2000, the objective of the Standard, as set out on p 3 is to:

(i) clarify overall requirements for pressure equipment used in Australia and New Zealand;

(ii) identify sound economic means of helping to satisfy safety, contract, trade and other relevant laws;

(iii) provide a standard system which recognizes local and international good practices, is mutually acceptable to Australia and New Zealand and is compatible with recognized world Standards; and

(iv) not override regulations or legislation.

61 As the parent Standard, AS/NZS 1200:2000 incorporates by reference, a number of other Standards, set out in Table 2.1 on p 10. Most relevant for present purposes, is that applicable to the construction and design of boilers and pressure vessels in AS 1228-2006 and AS 1210-2010 respectively. I note in passing, that Table 2.1 in relation to "Boilers – General", refers to ASME BPV-1 the boiler and vessel code applicable in the United States, and which is referenced extensively throughout the Australian Standards documents concerning boilers and pressure vessels. A copy of the most recent ASME Code was annexure WJM2A to the affidavit of Mr Mika dated 16 February 2017. I will return to this later in these reasons.

62 In its scope, AS/NZS 1200:2000 provides at s 1.3 as follows:

> **1.3 APPLICATION** This Standard is intended to apply to the **pressure equipment** specified in Appendix A. However, where appropriate and by agreement between the parties concerned, this Standard and its referenced Standards may also be used for all or part of the pressure equipment in Paragraph A3 or for other equipment or plant **under pressure.**
>
> Equipment with hazard level E to AS 4343 may be covered by **one or more** of the following methods:
>
> (a) Standards referenced in this Standard.
>
> (b) Other applicable Standards.
>
> (c) **Sound engineering practice which achieves a comparable level of safety.**
>
> (My emphasis)

63 AS 4343-2005 has as its scope, to determine the hazard level of various kinds of pressure equipment to which AS/NZS 1200:2000 has application. By s 2.2.2 and Table 1, the "hazard level" for pressure equipment is described as "the potential for harm arising from deficiencies in the design, manufacture and use of pressure equipment and related to the consequences of equipment failure". Factors are then identified, a very important one, emphasised in the foreword to AS 4343-2005, is the combined effect of pressure and volume. Table 1 then sets out the hazard levels of types of equipment, including boilers. "Pressure" for the purposes of AS 4343-2005, is design pressure and not working pressure. The lowest level of design pressure for the purposes of hazard level assessment, is set at 50kPa. This exceeds the design pressure of the gas side chambers of the Units. At s 2.1.2, hazard level examples are set out, with level A (high hazard) for large vessels with very high design pressure, to the lowest level E, (negligible hazard) for all those described as "negligible – hazard pressure equipment not classified in hazard levels A, B, C and D".

64 As sealed units, that is the "pressure envelope" proper is sealed by tube plates at either end, the gas side chambers are described by ECI as having category E level of hazard, with a design pressure maximum of 37kPa. This hazard level was not in contest in these proceedings. While the definition of "pressure vessel" in Reg 4.1 of the Regulations does not specify any design pressure, even if one was to look to AS 1210-2010 as a guide, as will be seen below, it has a lower level design pressure, below which the Standard does not apply. Any such "pressure vessel", not caught by a Standard, is to be designed in accordance with "sound engineering practice which achieves a comparable level of safety": AS/NZS 1200:2000 s 1.3(c), set out above.

65 Relevantly also for present purposes, is s 2.3 of AS/NZS 1200:2000. It provides as follows:

> **2.3 MIXING STANDARDS** Pressure equipment shall comply with the full requirements of a Standard, except when the equipment **or parts of the equipment** comply with the more appropriate requirements of other pressure equipment Standards provided -
>
> (a) such Standards comply with an agreed alternative or equivalent and are applicable to the particular pressure equipment;
>
> (b) the relevant requirements of the Standards apply to the parts concerned;
>
> (c) at the interfaces between the parts with different Standards, the parts comply with both Standards as appropriate;
>
> (d) the design data, drawings and manufacturer's data report clearly identify and record departures from the principal Standard;
>
> (e) the equipment marking includes the two main Standards used;
>
> (f) the overall equipment complies with Clause 2.1; and
>
> (g) the parties concerned, including the design verification and fabrication inspection bodies, agree.
>
> NOTES:
>
> 1 **Typical examples are the use of pressure vessel or piping Standards for some parts of boilers, the use of other Standards for materials, components, qualification and test methods, use of piping Standards for some pressure vessels (e.g. piping strainers), and different documentation markings.**
>
> 2 Some Standards already permit alternative referenced Standards.
>
> (My emphasis)

66 In this case, the approach adopted by ECI, as set out in Mr Mika's evidence, is essentially an example of this, where different Standards were applied to some parts of the "boiler". I see no inherent difficulty in this.

67 In AS 1228-2006, in relation to the steel plate issue, the crucial part of the Standard is in s 2 – Materials and Design Strengths. By s 2.1.1 – General, it is provided that "materials used in the construction of pressure parts of boilers shall comply with the appropriate specifications or requirements listed in Table 2.1 or Clauses 2.1.5, 2.1.6 and 2.1.7 and shall be identified in accordance with Clause 2.1.2". By s 2.1.6 – Use of structural or similar quality steels, structural steel not referred to in Table 2.1, may be used for "pressure parts" if a number of conditions are met, one of which is the design temperature is not greater than 250°C.

68 Correspondingly, in Table 2.2.1, dealing with design strength values, the reference to AS/NZS 3678-250 steel (the grade used in the shell of the Units) is listed as having no design strength values beyond 250°C. Therefore, all other things being equal, taking Table 2.2.1 and the notations at the foot of the table, read with s 2.1.6, leads to the conclusion that AS/NZS 3678-250 steel should not be used for pressure parts (as defined), exposed to a design temperature greater than 350°C, in circumstances where AS 1228-2006 applies. Thus, the position as adopted by WorkSafe in these proceedings.

69 As already noted, Mr Mika has now accepted in his evidence that the gas side chambers, adopting a holistic view of a boiler, can now be regarded as part of the "boiler setting" in the extended definition of boiler in Reg 4.1. The effect of this, along with the inclusion of the definition of "pressure equipment" in Reg 4.1, is to require the relevant plant as specified in Schedule 4.1 (and as defined in Reg 4.1) to have design and plant registration in place. The reason for this is obvious. The items of plant covered by Part 4 of the Regulations may be hazardous and may carry a risk of injury to persons, in the design, manufacture, installation and use of such plant.

70 I am satisfied on the evidence that ECI's concession in relation to the gas side chambers as being part of the "boiler setting" for the purposes of the general definition of boiler in Reg 4.1 of the Regulations, is properly made. However, simply because the gas side chambers of the Units may be included in the scope of the extended definition of a boiler under the Regulations, does not provide the answer to the issue to be determined in this case. This is because the ultimate question to be determined is whether, accepting that the Units are covered by the terms of Part 4 of the Regulations, the design and manufacture of the Units was in accordance with the relevant Australian Standards, as specified in Sch 4.3. This is picked up principally by the obligation on a design verifier to certify under Reg 4.3(2), that the plant design complies with the relevant Australian Standard as set out in Sch 4.3.

71 It is accepted by WorkSafe that the gas side chambers are not "interconnecting parts" for the purposes of the definition of a boiler. As noted above, it is also plainly the case and it was not contended to the contrary, that the gas side chambers are not components in which steam or other vapour is generated. That is, in my view, it must be concluded that the gas side chambers are not part of the sealed "pressure envelope", or the "boiler proper", in which the steam or vapour is generated in the Units, arising from the exhaust gases in the tubes heating the water to boiling point, from which steam is extracted through the steam outlet, as shown in the Unit diagram in annexure 1 to these reasons.

72 As to what is or is not a "pressure part", in the proceedings, and in response to questions from the Tribunal, Mr Rennie expressed the view that it could conceivably apply to any part or component which contains any level of pressure at all, at or beyond atmospheric pressure. Mr Rennie expressed the view that the fluorescent tube above the Bench in the court room which I sat, could be described as a vessel containing pressure. If so, and if applicable to a boiler, then applying this logic, it would be so characterised as a "pressure part".

73 As with any interpretive process, the provisions of the Standards the subject of consideration in these proceedings, need to be considered consistent with their scope, purposes and context. One part or parts of a Standard cannot be viewed in isolation from the whole. There are many Australian Standards relevant to pressure equipment generally, most, if not all of them, are contained in the materials before the Tribunal. I have examined all of them. In my view, they should be construed consistently as part of an overall scheme for the design, manufacture, operation and maintenance of pressure equipment.

74 I have set out s 1.3 of AS/NZS 1200:2000 above. From the first paragraph, it is clear in my view that the "parent" Standard for pressure vessels in Australia, is principally concerned with the design and operation etc of "equipment or plant **under pressure**". Additionally, Appendix A of AS/NZS 1200:2000 lists the "pressure equipment covered" in the Standard, and, in addition to boilers, pressure vessels and pressure piping, contains a list of "equipment or plant **under pressure** not specifically covered". There follows a list of equipment and plant all of which in common parlance, would be understood to operate at very considerable pressure, certainly considerably greater than at or just above atmospheric pressure. (My emphasis)

75 It is also clear from the terms of AS 4343-2005 itself and at pp 7 to 9, that the Standards in relation to pressure vessels, and specifically AS 1210-2010, are designed to keep the risk of hazards as low as reasonably practicable, with the aim of a very low probability of failure.

76 Returning then to AS 4942-2001 and the definition of "pressure part". This definition, as with the definitions in the Standard, are intended to apply across the range of Standards in relation to pressure equipment generally, including boilers. These general definitions however, consistent with usual interpretive principles, would be subject to any specific definition in another Standard. In accordance with the scheme to which I have referred, I do not consider that "pressure part" means any part of a boiler or pressure vessel, that has any level of pressure, at for example, atmospheric pressure. The examples given in the definition itself, such as "boiler drums", "vessels", are clear indications that the definition refers to a part under substantial pressure, whether it be in the water/steam envelope or in some other part of a boiler or pressure vessel. Other parts given in the definition include "headers" and "pipes". A "header" is also defined in AS 4942-2001 to mean "a pressure part whose principal purpose is to collect fluid from, or distribute fluid to, arrays of tubes or pipes directly connected to it". The header of a boiler will most often operate under very substantial pressure.

77 Additionally, the definitions in AS 1228-2006 itself at s 1.3, refer to types of boilers, "design pressure", "drum", "header", "tubular pressure part", "integral piping", "tube" and other elements or key components of boilers, that plainly operate under substantial pressure. The reference to "calculation pressure" for all pressure parts in s 1.3.2 of AS 1228-2006, in item (a), refers to "design pressure increased…corresponding to the most severe conditions of operation". In item (b), reference is made to calculations for "boiler pressure components" (a new term) based on measurements "at the steam outlet…corresponding to the most severe conditions of operation". When read as a whole, these definitions tend to support the proposition that the principal focus and tenor of the Standard is directed to the high pressure components of boilers, in terms of their safe design, manufacture, maintenance and use.

78 Furthermore, a "vessel" is not defined in either the Regulations or the Standards. The most common reference in the Standards is to "pressure vessel". In these circumstances, the ordinary definition may assist. In the Shorter Oxford English Dictionary "Vessel" is defined to mean "2. A receptacle for a liquid or other substance, often one of circular section and made of some durable material…" Similarly, the Macquarie Dictionary defines a "vessel" as "2. a hollow or concave article, as a cup, bowl, pot, pitcher, vase, bottle etc., for holding liquid or other contents…" Are the gas side chambers, vessels ordinarily understood? They do not hold or retain any gas or liquid. They constitute chambers or passages through which heated exhaust gases enter and exit the Units. I very much doubt that they are vessels in the ordinary sense of the word. They are obviously not headers or pipes.

79 In my view, when considered in the context of the totality of the pressure vessel Standards and not in isolation, and the various definitions to which I have referred, the gas side chambers of the Units, which are accepted to fall below the minimum or negligible hazard level for design pressure as specified in AS 1210-2010, even using this Standard as a form of guide, should not be construed as "pressure parts" for the purposes of AS 4942-2001 and AS 1228-2006. I note also that whilst not in any way determinative, this conclusion appears consistent with the views expressed by Mr Ford of PB, in his independent assessment of the issues in dispute between the parties, as annexed to Mr Rajah's witness statement at R5 p 10.

80 I therefore do not consider that the terms of s 2.1.1 or 2.1.6 of AS 1228-2006 have application to the gas side chambers of the Units, in accordance with the altered design. I consider that construed in its total context, the terms of AS 1228-2006 in relation to "pressure parts", is intended to capture the "boiler proper", i.e. the water/steam envelope and those other parts of a boiler designed to retain a significant pressure, certainly substantially greater than 37kPa, the maximum design pressure for the gas side chambers of the Units.

Sound engineering practice

81 Having reached this conclusion, it is next necessary for the Tribunal to consider the approach to adopt to the design process, based upon the materials and evidence before it. The HRL report (annexure R6.1 to Mr Rajah's witness statement) concluded that with the design alteration to the gas side chambers, the terms of AS 1210-2010 were not applicable. This was not challenged on the evidence, even if AS 1210-2010 could be viewed as a guide. However, HRL then considered the appropriate approach to adopt based on "good engineering practice", in assessing the use of AS/NZS 3678-250 steel plates, by adopting the design rules for pressure equipment. HRL then performed their calculations accordingly, as set out in its report. Using an extrapolation technique, HRL considered the design strength to be adequate.

82 The HRL report design strength calculations were the subject of further review and analysis by Mr Mika in February 2017, and recorded in a further technical note, a copy of which was annexure WJM3A to Mr Mika's affidavit of 16 February 2017. The technical note, whilst not expressing it as such, was presumably prepared in response to observations made by Mr Rajah at par 29 of his witness statement of 9 January 2017, where he expressed the view that the HRL calculations were not prudent engineering practice, because of the use of extrapolation of data and not the use of linear interpolation.

83 Mr Mika in his technical note, examined the HRL methodology and also considered other sources of data in relation to the design strength of structural steel at temperatures in excess of 350°C. Specifically, reference is made to AS 4100-1998 for structural design and the use of structural steel at high temperatures, in excess of 800°C. Mr Mika notes that the qualification to AS 4100-1998, is that it may not adequately deal with the heating of structural steel for extended periods of time, and further notes the possibility of "creep", which may be defined as the "slow and continuous deformation of a metal at high temperatures". Given that the gas side chambers would, under normal operating conditions, operate at high temperatures for extended periods of time, it was necessary to examine this by comparing similar grades of steel under creep conditions, as data was not available for AS/NZS 3678-250 structural steel, as such tests are not required for this grade of steel.

84 Mr Mika noted HRL's extensive experience (50 plus years) in the design, integrity assessment and life assessment of boilers for use in steam generation both in Australia and overseas. He further noted their access to test data, both published and proprietary, from their own work. Mr Mika undertook further analysis of the design data and the conclusions reached by HRL, based on a report prepared by the Electric Power Research Institute in March 2007, on the use of carbon steels at elevated temperatures. Mr Mika calculated design strength curves for the EPRI, HRL and normalised them to the AS 4100-1998 data, in diagram form. Mr Mika concluded from this analysis, that the HRL curve was below the AS 4100-1998 curve, without creep and the EPRI curve, with creep. He concluded from this analysis, that the HRL approach and conclusions were both conservative and consistent with reasonable and prudent practice.

85 The Tribunal also notes that the PB report at pp 15-16 discussed the issue of the maximum design temperature for the boiler shell. In considering the shell extensions, which constitute the gas side chambers, reference is made by PB to the issue of possible differential expansion between the uncooled shell extensions and the cooled shell and tube plates. In recognition of this, it was recommended by PB that there be an enhanced inspection regime introduced to monitor this issue. The Tribunal considers this recommendation to be prudent. It is suggested that the parties confer in relation to an enhanced inspection regime.

86 Having considered the evidence and material before it carefully, the Tribunal's conclusion is that the design alteration in relation to the gas side chambers of the Units, is consistent with "sound engineering practice which achieves a comparable level of safety", for the purposes of s 1.3 of AS/NZS 1200:2000. Mr Mika emphatically stated in his evidence before the Tribunal that in adopting the revised design approach, the Units were safe. The Tribunal is satisfied that the design alteration, while accepting the criticism advanced by WorkSafe in relation to the BV design verification process, is in overall terms, compliant with Schedule 4.3 of the Regulations, and is plant for the purposes of Part 4 of the Regulations which is safe in terms of the requirements of ss 5 and 23 of the OSH Act.

87 Having considered the above issues, it is now necessary for the Tribunal to comment on the various exemption requests.

Exemptions

88 In addition to the evidence led before the Tribunal, materials in relation to the various exemption requests made by ECI were set out at annexures R7.1 to R7. 4 of Mr Rajah's witness statement. Additionally, was the exemption request made by Brookfield Multiplex FSH Contractor Pty Ltd at annexure R7.5.

89 As to the issue of the inspection openings not being compliant with s 3.9.5 of AS 1228-2006, for the reasons identified above, an exemption under Reg 2.13 should be granted. It would clearly be impracticable to now require compliance, in circumstances where readily available and commonly used alternative remote inspection technology will achieve the same result. In any event, it appears that the use of remote viewing systems may even be more effective than a visual inspection of the Units alone.

90 The next matter of the non-destructive testing of the welds on the shells of the Units, has also been commented on by the Tribunal on the evidence. Subject to the agreed position of the parties, and the process for the ultrasonic testing of the welds to take place, this exemption should be granted.

91 A further issue arises in relation to the boiler tube thickness. This was not a matter raised in the WorkSafe letter of 5 September 2016, setting out the reasons for the decision to deregister the plant designs for the Units. It was however, raised as a matter of concern by Mr Rajah on his evidence before the Tribunal. It was also the subject of some discussion by the experts in the concurrent evidence session. Sections 3.7.1 and 3.7.2 of AS 1228-2006 prescribe the minimum nominal thickness of tubes and pipes of boilers subject to internal and external pressure.

92 In his evidence, Mr Rajah noted that based on AS 1228-2006, the tube thickness should be 2.81mm and not 2.41mm, as is the design thickness of the tubes. This is despite BV endorsing both the original and older design as being in accordance with Table 3.7.1 of AS 1228-2006, which Mr Mika conceded in his evidence, was not correct. Mr Mika addressed this matter in his evidence. He accepted the design thickness of the tubes of 2.41mm does not comply with the requirements of AS 1228-2006.

93 In responding to this issue, Mr Mika testified that a comparable standard to use to assess the appropriateness of the tube thickness is the ASME Code 2013, referred to above. This is a comparable standard to AS 1228-2006 which applies in the United States and prescribes rules for the construction of boilers. The relevant provision of the ASME Code is PG – 28.3 – Maximum Allowable External Working Pressure for Cylindrical Components. Part PG of the ASME Code applies to "power boilers and high pressure, high-temperature water boilers and to parts and appurtenances thereto…"

94 The ASME Code is extensively referred to in both AS 1228-2006 and AS 1210-2010 and is cited as an alternative acceptable Standard for compliance in appropriate cases. That the ASME Code is specifically referred to in the Preface on p 2 of AS 1228-2006 in relation to design strength values in Table 2.2.1 and that those values have been "revised and updated to fall into line with the latest editions of the AS (e.g. AS 1548), BS and ASME material specifications and standards …" is a very clear indication of the standing of the ASME Code and its predecessors. There was no serious suggestion to the contrary advanced by WorkSafe.

95 Mr Mika's technical note in relation to the tube thickness issue is at annexure WJM3AA to his affidavit of 27 February 2017. The technical note contains a careful and detailed calculation of design thickness of components under pressure, based on PG - 28.3 of the ASME Code. Mr Mika concluded that on both the boiler side and the gas side, the thickness of the tubes in the Units would fall well within the margin for design thickness of cylindrical components under pressure. There was no challenge to this evidence and the Tribunal accepts it.

96 The final matter upon which comment is needed, relates to the exemption request in relation to the omission of two rows of unwelded plain tubes at each end of the Units, in accordance with AS 2593-2004. The basis for the exemption request was set out in the ECI application for exemption dated 5 April 2016, contained at annexure R7.4 to Mr Rajah's witness statement. ECI maintained that compliance with this requirement was both unnecessary and impractical. The supporting material sets out the reasons why ECI maintained that the two rows of plain tubes were unnecessary. First, the Units do not contain furnace tubes. Second, the apparent but unstated intention of AS 2593-2004, is to provide a form of protection to the furnace tube in the case of an excursion, resulting in the overheating of the furnace tube area. Third, the exemption refers to controls in two respects, they being the specification of the operating envelope of the Units and the use of insulation material on the gas side of the tube sheets. This shields the areas of the tube sheets above the operating water level from contact with the flue gas.

97 ECI also referred to the operation of the control system to provide isolation of the heat source from the boiler, if the situation arose where either the water or gas side of the Units exceeded its operational parameters. In this respect, annexed to the same application for exemption by Brookfield Multiplex, at annexure R7.5, is a report prepared by RCR Energy Service, verifying the settings on the Unit controls for alarms, trips and for pressure relief.

98 Having considered this material, and there being no opposition expressed by WorkSafe to the exemption request, the Tribunal considers it should be granted also.

Restriction on design use

99 The Tribunal should finally note that it was advanced as a concession by ECI, that should the Tribunal find that the application to review be upheld, then it agrees that the design for the Units be confined to the two installed at Fiona Stanley Hospital. The design will not be able to be used for the manufacture of further waste heat units, in Western Australia or elsewhere.

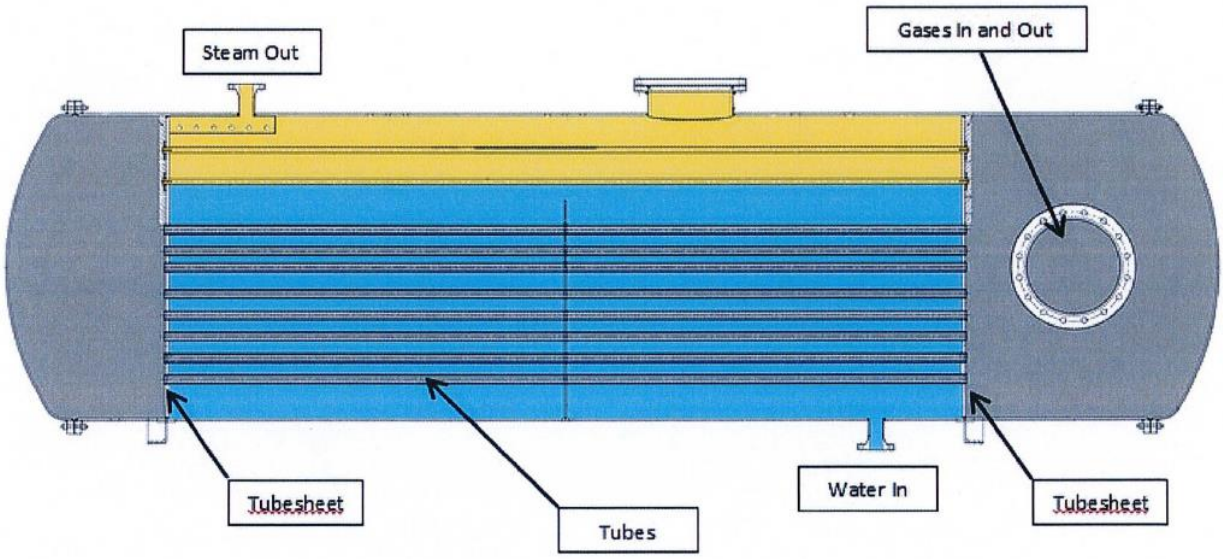
Conclusions

100 In this matter, the Tribunal has concluded that the Units fall within the extended definition of a "boiler" for the purposes of Reg 4.1 of the Regulations, as part of the boiler setting. Having regard for the terms of the relevant Australian Standards, the Tribunal has concluded that the altered design for the Units, in relation to the gas side chambers, meets the requirements of those Standards for the purposes of registration under Part 4 of the Regulations, as being based on sound engineering practice that achieves a comparable level of safety. The design, as altered, in accordance with the concession made by ECI, is limited to the Units at Fiona Stanley Hospital in Perth, and may not be used for any other fabrication. The parties have also been requested to confer as to an enhanced regime of inspection for the Unit shells, in accordance with the recommendation made in the PB report of 13 May 2015.

101 Consistent with the position as agreed between the parties, the Tribunal has also considered the various exemption requests made by ECI. The Tribunal has determined that these requests should be granted by WorkSafe. Accordingly, for the foregoing reasons, the application to review is upheld. The parties are requested to confer within 14 days as to a draft order giving effect to these reasons for decision, consistent with s 61A(3) of the OSH Act and the scope of orders the legislature has empowered the Tribunal to make.

102 Finally, the Tribunal wishes to record its appreciation for the assistance provided by the experts, Mr Rajah and Mr Mika and counsel for the parties, in the course of the proceedings.

Annexure 1



2017 WAIRC 00694

REVIEW OF DECISION TO DEREGISTER PLANT DESIGN

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	EXHAUST CONTROL INDUSTRIES PTY LTD
	APPLICANT
	-v-
	LEX MCCULLOCH WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 3 AUGUST 2017
FILE NO/S	OSHT 5 OF 2016
CITATION NO.	2017 WAIRC 00694

Result	Order issued
Representation	
Applicant	Mr S Russell of counsel and with him Mr R Stephenson of counsel
Respondent	Ms T Hollaway of counsel

Order

HAVING heard Mr S Russell of counsel and with him Mr R Stephenson of counsel on behalf of the applicant and Ms T Hollaway of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984 hereby orders -

(1) THAT the referral by the applicant to review the decision of the respondent dated 5 September 2016 to de-register designs numbered WAP22731 and WAP23564 (the Designs) of the two waste heat recovery units designed by the applicant and installed at the Fiona Stanley Hospital (the Units) be and is hereby allowed and the decision is substituted in accordance with the following.

(2) THAT the Designs WAP22731 and WAP23564 are registered effective from the date of this order, subject to the following conditions and exemptions:

(a) that pursuant to reg 4.7(1)(b) of the *Occupational Safety and Health Regulations 1996* (WA), the design may not be used to manufacture any further units. The Units (as defined) are exempt from this condition.

(b) that pursuant to reg 4.7(1)(b) of the Regulations, both tubesheet-to-shell welds of the Units will be tested in accordance with Australian Standard AS4037 (i.e. four areas to be tested in total) to demonstrate the Units' compliance as Class 1 vessels under Australian Standard AS1228. This testing must be conducted in the presence of a WorkSafe Inspector and in accordance with the procedure set

out in reg 4.9 of the Regulations. A NATA endorsed Ultrasonic Weld Test Report is to be produced to show that the tested welds comply with AS4037 for Class 1 vessels pursuant to AS1228.

(c) that if the Units go into operation, the applicant provides to the operator of the Units a manual stipulating an increased inspection regime which provides for annual inspection in accordance with Australian Standard AS/NZS3788 and annual magnetic particle inspection of the Units in accordance with the Inspection Strategy as set out in Attachment A in the area recommended by the WSP Parsons Brinckerhoff Report dated 13 May 2015.

(d) that the Tribunal grants the following exemptions to the applicant pursuant to regs 2.12 and 2.13 of the Regulations:

(i) Exemption from reg 4.3(2)(c) concerning cl 3.9.5.2 of AS1228 relating to the omission of inspection openings adjacent to the tube plates within the Units (Exemption 1, as annexed). Exemption 1 is granted on the basis that remote camera technology is capable of being utilised to perform these inspections.

(ii) Exemption from reg 4.2(1)(c) concerning non-compliance with non-destructive testing requirements of the welds used to create the Units' shells, contained in cl 5.2 of AS1228 (Exemption 2, as annexed).

(iii) Exemption from reg 4.3(2)(c) concerning the omission of two rows of un-welded plain tubes at each end of the Units, in accordance with Table 1 of Australian Standard AS2593-2004 (Exemption 3, as annexed).

(iv) Exemption from reg 4.3(2)(c) concerning the requirements of cl 3.7.2 of AS1228 relating to the thickness of boiler tubes within the Units (Exemption 4, as annexed).

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

2017 WAIRC 00463

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHERINE SHAW
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
DATE	THURSDAY, 20 JULY 2017
FILE NO	PSA 2 OF 2016
CITATION NO.	2017 WAIRC 00463

Result	Name of respondent amended
Representation	
Applicant	Ms P Marcano (as agent)
Respondent	Ms R Sinton (as agent)

Order

WHEREAS this is an application under s 80E(2)(a) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 18 July 2017 and 19 July 2017 the parties sought to amend the name of the respondent;

AND HAVING heard from the parties, the Public Service Arbitrator is of the opinion that it is appropriate to amend the name of the respondent;

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

THAT the name of the respondent be amended to 'South Metropolitan Health Service'.

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

2017 WAIRC 00465

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHERINE SHAW
	APPLICANT
	-v-
	SOUTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
DATE	THURSDAY, 20 JULY 2017
FILE NO.	PSA 2 OF 2016
CITATION NO.	2017 WAIRC 00465

Result	Direction issued
Representation	
Applicant	Ms P Marcano (as agent)
Respondent	Ms R Sinton (as agent)

Direction

HAVING heard Ms P Marcano (as agent) on behalf of the applicant and Ms R Sinton (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT this matter be listed for hearing on 12 October 2017.
2. THAT the parties file a statement of agreed facts and bundle of agreed documents by 22 September 2017.
3. THAT the applicant file and serve a written statement of facts on which the applicant relies and witness statements by 2 October 2017.
4. THAT the respondent file and serve a written statement of facts on which the respondent relies and witness statements by 6 October 2017.

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

2017 WAIRC 00462

DISPUTE RE FIXED TERM CONTRACTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, HOUSING AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
DATE	TUESDAY, 18 JULY 2017
FILE NO.	PSACR 25 OF 2015
CITATION NO.	2017 WAIRC 00462

Result	Direction issued
Representation	
Applicant	Mr W Claydon (of counsel)
Respondent	Mr R Andretich (of counsel)

Direction

HAVING heard Mr W Claydon (of counsel) on behalf of the applicant and Mr R Andretich (of counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

THAT the applicant file and serve outlines of evidence for any witness for which affidavits have not already been filed by 27 July 2017.

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

2017 WAIRC 00717

DISPUTE RE FIXED TERM CONTRACTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, HOUSING AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 11 AUGUST 2017
FILE NO	PSACR 25 OF 2015
CITATION NO.	2017 WAIRC 00717

Result	Summons to witness set aside and application for the production of documents discontinued by leave
Representation	
Applicant	Mr H McGregor (as agent) and Ms J Moore (as agent)
Respondent	Mr R Andretich (of counsel)

Order

WHEREAS this is an application for a conference under s 44 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the matter was referred for hearing and determination on 21 June 2016;

AND WHEREAS the matter is listed for a three-day hearing beginning on 15 August 2017;

AND WHEREAS on 27 July 2017, on the applicant's application, the Registrar issued a summons to Roderick Schoneveld to give evidence and produce documents;

AND WHEREAS on 2 August 2017, the applicant filed an application for the production of documents;

AND WHEREAS at a conference on 8 August 2017, the applicant consented to the Public Service Arbitrator setting aside the summons to Roderick Schoneveld and the applicant sought leave to discontinue its application for the production of documents;

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

1. THAT the summons issued by the Registrar on 27 July 2017 to Roderick Schoneveld be, and by this order is, set aside.

2. THAT the applicant's application for the production of documents filed on 2 August 2017 be, and by this order is, discontinued by leave.

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

PUBLIC SERVICE APPEAL BOARD—

2016 WAIRC 00943

APPEAL AGAINST DISCIPLINARY ACTION AND THE DECISION TO TERMINATE EMPLOYMENT ON 23 SEPTEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD BROWN
	APPELLANT
	-v-
	EMPLOYING AUTHORITY OF THE DEPARTMENT OF CORRECTIVE SERVICES AND/OR TO THE COMMISSIONER OF THE DEPARTMENT OF CORRECTIVE SERVICES AND/OR TONY HASSALL DEPUTY COMMISSIONER DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS - CHAIRMAN
	MS BETHANY CONWAY - BOARD MEMBER
	MR DAMIEN SPIVEY - BOARD MEMBER
DATE	TUESDAY, 20 DECEMBER 2016
FILE NO	PSAB 22 OF 2016
CITATION NO.	2016 WAIRC 00943

Result	Order made
Representation	
Appellant	Mr D Howlett (of Counsel)
Respondent	Mr J Carroll (of Counsel)

Order

HAVING heard Mr D Howlett, of Counsel, for the appellant and Mr J Carroll, of Counsel, for the respondent on 20 December 2016 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 PSAB 22 of 2016 be changed to "Commissioner, Department of Corrective Services".

(Sgd.) D J MATTHEWS,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2017 WAIRC 00038

APPEAL AGAINST DISCIPLINARY ACTION AND THE DECISION TO TERMINATE EMPLOYMENT ON 23 SEPTEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD BROWN
	APPELLANT
	-v-
	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS – CHAIR
	MS B CONWAY – BOARD MEMBER
	MR D SPIVEY – BOARD MEMBER
DATE	WEDNESDAY, 25 JANUARY 2017
FILE NO.	PSAB 22 OF 2016
CITATION NO.	2017 WAIRC 00038

Result	Direction issued
Representation	
Appellant	Mr D Howlett, of counsel
Respondent	Mr J Carroll, of counsel, and with him Mr P Murdoch

Directions

HAVING heard Mr D Howlett, of counsel, for the appellant and Mr J Carroll, of counsel, and with him Mr P Murdoch, for the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby directs:

1. THAT the amended Notice of Appeal and the annexures RB 1 - RB 5 to the original Notice of Appeal filed 14 October 2016 stand as the substantive Notice of Appeal in this appeal.
2. THAT the amended Notice of Answer filed 11 January 2017 stand as the substantive Notice of Answer in this appeal.
3. THAT discovery be informal and occur by 21 February 2017.
4. THAT at the hearing the respondent's case shall be presented first and the appellant's case presented second.
5. THAT lists of witnesses be exchanged 14 days before the date set for the hearing.
6. THAT bundles of documents be exchanged 14 days before the date set for the hearing.
7. THAT the parties have liberty to apply.

(Sgd.) D J MATTHEWS,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2017 WAIRC 00284

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00284
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER D J MATTHEWS- CHAIRMAN MS B CONWAY - BOARD MEMBER MR D SPIVEY - BOARD MEMBER
HEARD	**:**	TUESDAY, 9 MAY 2017, WEDNESDAY, 10 MAY 2017, FRIDAY, 12 MAY 2017
DELIVERED	**:**	MONDAY, 22 MAY 2017
FILE NO.	**:**	PSAB 22 OF 2016
BETWEEN	**:**	RICHARD BROWN Appellant AND COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES Respondent

CatchWords	**:**	Application for recusal - Application brought on basis of reasonable apprehension of bias - Principles discussed and applied - Application dismissed - Application for referral of questions of law under section 27(1)(u) *Industrial Relations Act 1979* - Public Service Appeal Board capable of fairly and competently hearing and determining questions sought to be referred - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application for recusal dismissed; application for referral under section 27(1)(u) *Industrial Relations Act 1979* dismissed
Representation:		
Counsel:		
Appellant	**:**	Mr D Howlett
Respondent	**:**	Mr J Carroll
Solicitors:		
Appellant	**:**	Appius Lawyers
Respondent	**:**	State Solicitor's Office

Cases referred to in reasons:

Helow v Home Secretary [2008] 1 WLR 2416

Johnson v Johnson (2000) 201 CLR 488
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70
Livesey v New South Wales Bar Association (1983) 151 CLR 288
Mineralogy Pty Ltd v Sino Iron Pty Ltd and Ors [No 12] [2016] WASC 335
Powell v In De Braekt [2007] WASC 165
Re JRL; ex parte CJL (1986) 161 CLR 342
Vakauta v Kelly (1988) 13 NSWLR 502
Vakauta v Kelly (1989) 167 CLR 568

Reasons for Decision

1 Richard Brown's appeal against the respondent's decision to dismiss him from his employment came on for hearing before the Public Service Appeal Board on 9 May 2017.

2 During the evidence in chief of the respondent's second witness, and the second witness called in the proceedings, a recording of a telephone conversation between Mr Brown and that witness went into evidence.

3 Counsel for Mr Brown commenced cross-examination but after a short time the Public Service Appeal Board interrupted to inform the proceedings that it sought a transcript of the recording. The transcript was provided later that afternoon.

4 On 10 May 2017 the Public Service Appeal Board informed the proceedings that it had several concerns arising out of the recording and that it was considering exercising its power under section 27(1)(a)(iv) *Industrial Relations Act 1979* to dismiss the proceedings because of them.

5 The Public Service Appeal Board invited submissions from the parties and indicated that it was in the hands of counsel for Mr Brown as to the time needed to present any submissions he wished to make. In the end it was agreed that the submissions would be heard on 12 May 2017.

6 Before adjourning until 12 May 2017 the Public Service Appeal Board referred to some authorities explaining that they were authorities the parties may wish to address in their submissions.

7 On 12 May 2017 counsel for Mr Brown made a submission that several questions be referred by the Public Service Appeal Board to the Full Bench for hearing and determination pursuant to section 27(1)(u) *Industrial Relations Act 1979*.

8 One of the questions counsel sought to have referred was whether the Public Service Appeal Board should recuse itself or be replaced due to an apprehension of bias.

9 Counsel set out the grounds upon which it would rely in relation to bias if that matter were referred to the Full Bench.

10 The Public Service Appeal Board, after a brief adjournment to consider the application under section 27(1)(u) *Industrial Relations Act 1979*, informed the proceedings that its view was that the application for recusal ought to be dealt with, by it, before it considered making any orders or exercising any powers in the proceedings.

11 Counsel for Mr Brown was invited to make further submissions on the recusal application and counsel for the respondent made brief submissions in reply.

12 This is the Public Service Appeal Board's decision on the recusal application.

13 The following grounds were put forward by counsel for Mr Brown in support of the application:

(1) the possibility of dismissal under section 27(1)(a)(iv) *Industrial Relations Act 1979* had been raised by the Public Service Appeal Board on its own motion;

(2) in all but one of the cases to which the Public Service Appeal Board had referred the parties on 10 May 2017 the chairman of the Public Service Appeal Board as presently constituted had been counsel for one of the parties;

(3) the Public Service Appeal Board had referred the parties to an authority, *Powell v In De Braekt* [2007] WASC 165, which, so far as counsel for Mr Brown was aware, had not been cited in any other case decided by the Public Service Appeal Board (or the Western Australian Industrial Relations Commission);

(4) the submission at (3) above suggests the Public Service Appeal Board "went looking" for reasons to dismiss the appeal when no party had raised such an issue and the evidence was not even completed;

(5) the Public Service Appeal Board appeared to be acting as a party or a protagonist or a complainant in the matter which was inappropriate when it was the decision-maker;

(6) the Public Service Appeal Board had linked its provisional comments about its concerns relating to Mr Brown's respect for its processes with the appropriateness or otherwise of Mr Brown achieving an order that would result in his reinstatement and any other result would be significantly inferior to reinstatement;

(7) the Public Service Appeal Board had indicated it had no intention to allow Mr Brown to give evidence before determining the section 27(1)(a)(iv) *Industrial Relations Act 1979* matter; and

(8) the Public Service Appeal Board in its comments on 10 May 2017 had characterised Mr Brown's actions in the recorded conversation as being to get the witness to "change her story" when it could have more accurately and fairly characterised them as being to get the witness to "tell the truth."

14 Counsel for Mr Brown cited *Mineralogy Pty Ltd v Sino Iron Pty Ltd and Ors* [No 12] [2016] WASC 335 as setting out, at [10], the test for recusal for reasonably apprehended bias and that submission may be easily accepted.

15 The fair minded lay observer will have at least the following attributes:

(1) they will not be given to making snap judgements (see *Johnson v Johnson* (2000) 201 CLR 488 at 494);

(2) they will be reasonable (see *Johnson v Johnson* (2000) 201 CLR 488 at 493);

(3) they will know commonplace things and are neither complacent nor unduly sensitive or suspicious (see *Johnson v Johnson* (2000) 201 CLR 488 at 509; *Helow v Home Secretary* [2008] 1 WLR 2416 at 2418);

(4) they will have knowledge of all the circumstances of the case (see *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-4; *Re JRL; ex parte CJL* (1986) 161 CLR 342 at 355, 359, 368 and 371-2; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87-8 and 95);

(5) they will be relevantly informed (see *Johnson v Johnson* (2000) 201 CLR 488 at 493 citing *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527, adopted in *Vakauta v Kelly* (1989) 167 CLR 568 at 584-5; *Helow v Home Secretary* [2008] 1 WLR 2416 at 2418 and 2422).

16 It is the Public Service Appeal Board's view that the fair minded lay observer would, having knowledge of the relevant circumstances, hold the following views, responding to the matters raised by counsel for Mr Brown:

(1) The Public Service Appeal Board has the power and obligation to regulate its own proceedings and to seek comment where it is concerned that conduct of a party had or might have had the capacity to undermine the integrity of those proceedings and that the Public Service Appeal Board seeking such comment does not depend upon a party raising the issue;

(2) The fact that one member of the Public Service Appeal Board appeared as counsel in decisions that may have relevance to the matter is neither here nor there. The decisions are either relevant or not and that cannot depend on the identity of counsel involved in making submissions to the decision maker in those cases;

(3)&(4) A case does not need to have been cited in a jurisdiction previously for it to have relevance and it is completely uncontroversial for decision makers to have knowledge of, or discover, cases that may have relevance to an issue before them and where this occurs it is only fair that they be brought to the attention of the parties;

(5) Nothing in the Public Service Appeal Board's conduct bears the fair characterisation of it having abandoned its role as decision maker and inappropriately entered the arena. The Public Service Appeal Board has merely raised a concern, expressed provisional views about a matter, given the parties the opportunity to make submissions and referred to some authorities that the parties may find relevant;

(6) The Public Service Appeal Board has set out how its concerns may sound in the proceedings so as to give the parties an opportunity to fully comment;

(7) While the Public Service Appeal Board has set out an approach that would mean Mr Brown may not need to give evidence, being that the most favourable version of events put for him, on instructions, be accepted, the Public Service Appeal Board is yet to hear submissions on the section 27(1)(a)(iv) *Industrial Relations Act 1979* application;

(8) Reliance on a choice of one set of words rather than another in the expression of provisional views, where the parties are to be given the opportunity to comment, except in an extreme and clear case indicating prejudgment, is a tenuous basis for an application for recusal and here the choice of words could not be said to be so extreme or clear. Indeed the words, on one fair interpretation, express the situation quite neutrally.

17 The application has been made because the Public Service Appeal Board has raised concerns about some evidence and some possible consequences of it, expressed in provisional language, and given the parties the opportunity to comment, referring them to some cases they may find of assistance in terms of relevance. It is the Public Service Appeal Board's view that a fair minded lay observer, properly informed, would have a hard time finding that this was in any way controversial let alone indicative of impartiality and prejudice.

18 The fair minded lay observer, properly informed, would appreciate that the possible consequences of the issue raised by the Public Service Appeal Board are serious, and unusual, but would understand also that the Public Service Appeal Board has merely, at this stage, raised the issue and is yet to hear submissions in relation to it and they would also appreciate that the raising of the issue, even with the possibility of those serious issues, is not controversial in itself.

19 The application that the Public Service Appeal Board recuse itself is dismissed.

20 That leaves the application under section 27(1)(u) *Industrial Relations Act 1979*. The parties have completed their submissions on that application and the Public Service Appeal Board had adjourned to decide it prior to informing the parties that it felt it could not decide it before ruling upon the application for recusal. Accordingly, it is convenient to deal with the application as part of these reasons.

21 That application too is dismissed.

22 The Public Service Appeal Board proceeds on the assumption that it has power to refer questions to the Full Bench under section 27(1)(u) *Industrial Relations Act 1979* (and expressly does not deal with the respondent's contention that it does not).

23 The Public Service Appeal Board has considered the first five questions counsel for Mr Brown seeks to have referred (the sixth question being that relating to recusal which, as explained, the Public Service Appeal Board felt it was incumbent upon it to decide itself).

24 The Public Service Appeal Board's view is that it is capable of fairly and competently hearing and determining the questions counsel for Mr Brown seeks to have referred to the Full Bench.

25 Also the questions relate to matters that go to the Public Service Appeal Board regulating its own processes and proceedings, and exercising its discretion in relation thereto, and is not convinced it is appropriate to have the Full Bench intervene in those matters.

26 The Public Service Appeal Board accepts, as counsel for Mr Brown says, that there is no appeal from its decisions to the Full Bench but notes that counsel for Mr Brown also says that what the referral seeks to "avoid or minimise" is the possibility of the Public Service Appeal Board falling into "jurisdictional error".

27 The Public Service Appeal Board is of the view that it is unlikely, if it falls into jurisdictional error, that Mr Brown will find himself without means to seek redress in relation to such an error.

28 The chairman's associate will now be in contact with the parties to programme the hearing by the Public Service Appeal Board of the submissions in relation to section 27(1)(a)(iv) *Industrial Relations Act 1979*.

2017 WAIRC 00714

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00714
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER D J MATTHEWS - CHAIRMAN MS B CONWAY - BOARD MEMBER MR D SPIVEY - BOARD MEMBER
HEARD	**:**	TUESDAY, 20 DECEMBER 2016, TUESDAY, 24 JANUARY 2017, TUESDAY, 9 MAY 2017, WEDNESDAY, 10 MAY 2017, FRIDAY, 12 MAY 2017, MONDAY, 22 MAY 2017, WEDNESDAY, 14 JUNE 2017
DELIVERED	**:**	WEDNESDAY, 9 AUGUST 2017
FILE NO.	**:**	PSAB 22 OF 2016
BETWEEN	**:**	RICHARD BROWN Appellant AND COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES Respondent

CatchWords	**:**	Industrial Law (WA) - Appeal against decision to terminate employment - Decision to terminate based on finding of misconduct - Appellant denies misconduct occurred - Recording of appellant making contact with respondent witness tendered as exhibit - Public Service Appeal Board raises concerns about the recording - Submissions made about the contact between appellant and respondent's witness - Contact found to be improper - Consequences of improper conduct considered - Appellant's improper conduct makes reinstatement to former role impossible
Legislation	**:**	*Industrial Relations Act 1979* *Young Offenders Act 1994*
Result	**:**	Appeal dismissed
Representation:		
Counsel:		
Appellant	**:**	Mr D Howlett
Respondent	**:**	Ms J Carroll
Solicitors:		
Appellant	**:**	Appius Lawyers
Respondent	**:**	State Solicitor's Office

Cases referred to in reasons:

Civil Service Association of Western Australia (Incorporated) v Director General, Ministry of Justice (2003) 94 WAIG 215

Director of Public Prosecutions (Cth) v Besim and Anor [2017] VSCA 165

Librizzi v Western Australia [2006] WASCA 237

Mary Elizabeth Re v The Inspector of Custodial Services (2013) 93 WAIG 1776

Powell v in de Braekt [2007] WASC 165

R v McLachlan [1998] 2 VR 55

Randall de Vos v Minit Australia Pty Ltd (2002) 82 WAIG 2195

Reasons for Decision

1 On 23 September 2016 the appellant was dismissed from his employment as a Youth Custodial Officer after the respondent had found the following allegation against him proven:

> "That on or about 20 September 2015, at Banksia Hill Detention Centre, you did not treat a young person in your care with respect or dignity when you swore at a Detainee D telling him to get into his cell while calling him a "cocksucker" and "little cunt" or words to that affect. You then apparently threatened him by saying words to the effect of, "I will smash your head in you little cunt."

(Notice of Appeal – Annexure RB 1)

2 On 14 October 2016 the appellant lodged a Notice of Appeal to the Public Service Appeal Board.

3 Directions hearings were held by the Public Service Appeal Board on 20 December 2016 and 24 January 2017. At those hearings it was agreed that the matter would proceed by way of a hearing de novo and the appellant made clear that his case

would be that he had not committed the misconduct alleged against him, or at least it could not be established to the requisite standard that he had.

4 The appellant argued at the directions hearing on 24 January 2017 that the respondent ought to present its case first and for the reasons given by the Public Service Appeal Board at the conclusion of the directions hearing on that date such an order was made.

5 The substantive hearing commenced on 9 May 2017.

6 The respondent opened and called as his first witness Peter Swidden Murdoch, his Principal Review Officer for Professional Conduct and Review. Mr Murdoch gave some brief evidence in chief and was then cross-examined by counsel for the appellant.

7 The cross-examination initially traversed, among other things, the whereabouts of D, the reasons why the respondent was not calling D as a witness, which other witnesses were to be called by the respondent, disclosure of documents to the appellant and that the appellant had been trained as a staff support officer and negotiator.

8 The cross-examination then moved onto issues related to D's character and, in particular, whether he had a reputation for making false complaints against Youth Custodial Officers.

9 An objection taken to the tender of a document during that part of the cross-examination led counsel for the respondent to make clear that the respondent was not relying upon anything produced by D as part of his case.

10 The cross-examination then explored an issue that was clearly of importance to the appellant, being whether another witness to be called, another Youth Custodial Officer and an apparent eye witness to relevant events, Leilani McCloy, had been threatened or pressured at any stage of the investigation of the allegation by the respondent. Counsel for the appellant explored with Mr Murdoch his knowledge of that matter and the consideration given to it in the decision-making in relation to the appellant.

11 Counsel for the appellant then had Mr Murdoch agree he was aware that another person present at the time of relevant events, not Ms McCloy, was of the opinion that the appellant had not misconducted himself in relation to D.

12 There was then this exchange:

> "If Ms McCloy felt threatened and forced to make statements against her will and feared for her job and had a mortgage, do you accept that they would be reasons why she may something - might say something different to what Mr Brown says? --- I - I can't say what's in Ms McCloy's mind. I - I can't answer that."
>
> (ts 21)

13 And a little later:

> "So if Ms felt - Ms McCloy felt threatened and forced to make a statement against her will and feared for her job and had a mortgage and was threatened to agree with something that was being put to her do you accept that those things would be a reason why she might make up a story and agree with what Mr D had said?---I - I can't say. I mean, she has the option to speak to the CCC if that was the case or the Public Sector Commission to make a public interest disclosure. There's a - a range of avenues where if she felt in those circumstances for that to be the case that she could air those and have them dealt with confidentially and appropriately."
>
> (ts 21)

14 Later counsel for the appellant cross-examined Mr Murdoch about whether he was aware that Ms McCloy had made a complaint about threats and bullying and in that line of questioning mentioned the names "Beard", "Kelly", "Davison" and "Kench".

15 Finally, counsel for the appellant asked some questions intimating that Ms McCloy had given an inaccurate account to the respondent and had been influenced in giving her account by Messrs Beard and Kelly.

16 It is clear from the cross-examination of Mr Murdoch that the reliability of Ms McCloy's previous statements was to be put in issue by the appellant and that, to the extent she had, in the past, said things adverse to the interests of the appellant, the question of whether she had done so as a result of threats, bullying and intimidation by officers of the respondent was to be explored with her.

17 It was also clear that the comment in the letter of dismissal that Ms McCloy had "no reason to make a false claim or in some way collude with D to make up a story" was going to be challenged and that whether Ms McCloy had such a reason was to be explored with her.

18 Ms McCloy was then called by the respondent.

19 Ms McCloy gave evidence that she had been a Youth Custodial Officer for around two and a half years.

20 Ms McCloy then gave evidence about what she had relevantly seen and heard on or about 20 September 2015.

21 Ms McCloy then gave evidence about how she had come to report the incident and about how she came to make a statement about it and whether she had been "pressured or coerced" to do so by officers of the respondent.

22 Ms McCloy's evidence in chief moved on to what she described as "bullying" of her by other staff after 20 September 2015.

23 There was then the following exchange:

> And has Mr Brown tried to make contact with you since he was dismissed from his employment?---Yes.
>
> Can you explain?---Ah, I've had a few text messages, ah, a few phone calls. Um, a lot of them I haven't answered cos I didn't have the number so I don't really know who it was. I don't answer numbers that I don't know.
>
> Did you ever speak to him?---Yeah, on two occasions I spoke to him. Two occasions.
>
> And was this in person or - - -?----No, just over the phone.
>
> Did you make any record of these conversations?---The first one, no. The second one, um, I recorded a part of the conversation, yes.

How did you record that?---On my housemate's phone.

Okay.

And explain why you recorded that conversation?---For my own - just personally I wanted to have a record of it and I felt uncomfortable during the phone call and I thought I might record it cos - just to recall what was said.

When you say uncomfortable, can you say why you felt uncomfortable?---Cos I felt like what he was saying was to try and get me to change what I had said.

And when you say change what you've said, what do you mean by that?---The statement.

The statement?---Of the incident on that day.

And who actually recorded this conversation?---My housemate did.

Okay.

And how did it come about that she recorded the conversation?---She was just in the house, um, she was sitting on the couch next to me and I had it on loudspeaker and she also was going, "No, this doesn't sound right" and didn't feel comfortable about where the conversation was going, and I was like - I just kind of whispered to her, "Can you record this?". And she said - well, she started recording it and then obviously she - I didn't want her having it on her phone so I recorded it off her phone onto my phone and then we deleted it off her phone.

(ts 34 – 35)

24 The recording was played and the disc of it became Exhibit 8 in the proceedings without objection. In particular no submission was, or has subsequently been made, that the evidence ought not be relied upon by the Public Service Appeal Board for any reason.

25 Ms McCloy then gave some brief evidence about the role of a Youth Custodial Officer and concluded by answering "No" to a question about whether she held any personal animosity or hostility toward the appellant.

26 The Chair of the Public Service Appeal Board then asked Ms McCloy what had been said in the first conversation between her and Mr Brown, her evidence having been that she had spoken to him twice and the recording was of the second conversation.

27 Ms McCloy said:

"Just basically along the same lines of him wanting to - wanting me to meet with his lawyer. I can't remember exactly what was said but it was about seeing his lawyer."

(ts 45)

28 Cross-examination then commenced. It did not proceed very far until the Public Service Appeal Board interrupted it and we reproduce in full:

CROSS-EXAMINATION BY MR HOWLETT:

HOWLETT, MR: Could the witness be shown exhibit 4, please?

MATTHEWS C: She probably still has it with her.

HOWLETT, MR: Do you have the map with you, Ms McCloy?---Yep.

Now, you - can you look at it with the two buildings to your left hand side?---Yeah.

The building to the right hand side is Wing A?---Yep.

The building on the left hand side at the lower part is Wing C - sorry, Wing B?---Yep.

And the one at the top is Wing C?---Yeah, that's correct.

Where was - you've drawn the picture there - where was Tanya Eddy at that time?---Um, either she was in the unit staff office or she wasn't in the unit cos she was - I didn't see her.

You didn't see her?---No, not during this incident.

Where is her office?---Next to Wing A where it says, "Staff office". Um - - -

So in effect if she was in her office she would be within metres of Mr D, Mr Collier and Mr Brown?---Yep, if she was in there yeah.

On 20 September 2015 - sorry, I withdraw that.

Do you recall that the incident with the spray bottle and Mr D occurred on 20 September 2015?---I can't remember the exact date. I know it was in - - -

On 20 September 2015 you were on probation, yes?---Yep.

And you had a mortgage?---Yes.

You didn't want to be a witness in this case, did you?---I didn't want to be involved.

Is that a no?---If I could of not been involved then I wouldn't have been.

Do you know that the Commissioner of your Department isn't going to give evidence?---Sorry?

Do you know that the Commissioner of your Department isn't going to give evidence?---No, I don't know what you mean.

And you spoke to - I think you've confirmed you did speak to Mr Stitt?---Yep.

And do you know that Mr Stitt is not going to give evidence?---Mm, okay. I didn't know.

You don't know?---No.

And you spoke to Mr Beard and Mr Kelly?---Yeah.

And you know that they're not going to give evidence?---No.

And did you know that Mr D wasn't going to give evidence?---He did give evidence.

No, in this hearing?---Oh, no.

You didn't want to be the star witness when Mr Brown spoke to you on 14 October last year, did you?---I just didn't want to be part of it.

It's a yes or no. You didn't want to be a star witness when he spoke to you in October last year, did you?---No.

29 At that point the Public Service Appeal Board communicated that it wanted Exhibit 8 to be transcribed before the matter proceeded further and counsel for the respondent said this could be done. A transcript was provided later on 9 May 2017 and the hearing continued on 10 May 2017 with a copy of the transcript, accepted to be accurate enough for use to be made of it, in the hands of the parties. A copy of it is attached as Schedule 1 to these reasons.

30 Upon resumption on 10 May 2017 the Chair of the Public Service Appeal Board communicated to the parties that the Public Service Appeal Board had concerns about the contents of the recorded conversation and the appellant's conduct in the recorded conversation. It is felt best to set out what the Chair said in full:

"Now, I speak for the Board here in saying we have some concerns about the contents of the telephone recording. Taking the most favourable view possible for the applicant, it is that he believed his version was the truthful one. He believed that Ms McCloy had given a version to investigators that hadn't captured the truth and he felt that that had occurred because of some coercion or pressure placed upon Ms McCloy. So that's the most favourable version I think we can take of the applicant's position.

Taking that, it seems to the members of the Board that it was questionable behaviour to contact a witness for the other side at all. Of course, there's no property in witnesses, but it's questionable to do so. It seems it happened at least twice on this occasion and that there had been an assumption on the part of the applicant that Ms McCloy didn't wish to speak to him, which emerges from the telephone recordings, so he called her again.

So whilst accepting there's no property in witnesses, it's a situation in which caution is best. And that caution having been abandoned by the applicant, we have some concerns about things that happened during the course of the recording - or the conversation which was recorded. And those are, to group them, is that the applicant, on one reading of the transcript, appears to give Ms McCloy advice about the consequences of her changing her story without any expertise to do so, telling her things such as that she wouldn't get in trouble - "110 per cent", she wouldn't get in trouble, that her changing her story would change everything, that no one will get in trouble, that it would stop the hearing, that it would squash the process.

On one version, moving to a second category, it would appear that the applicant misrepresented what the process was about, in that he said, on page 1:

"They've sacked me anyway now, so that is not going to change any time now."

And it was only after Ms McCloy called him on that statement that he said that he was, in fact, seeking to get his job back.

Another category is the - several references to Ms McCloy as the "Star witness", which we provisionally see as putting some pressure on her. We also see some clear pressure provisionally being applied to her by reference to the court process as a "Real ugly thing", that she - words to the effect that she'll feel excluded at the hearing because she's going to have to make a decision about who she sits with and, in some way, stick her colours to the mast at that point in time in a way that's obvious for everyone to see.

There is some pressure - or some inducements, moving to a new category - there are some inducements, it would seem, that were placed before her, such that she would be thought of as a wonderful person if she was to do what the applicant was suggesting that she do and that she would become the applicant's "Star person".

And there also seems to be the inducement that the applicant seems to suggest that the harassment she was suffering would stop if she did what was being suggested to her by the applicant, with him saying that it was within his power - or their power to change that situation."

(ts 50 – 51)

31 The Chair went on to say that the Board was giving "active consideration" to dismissing the appeal pursuant to its power to do so under section 27(1)(a)(iv) *Industrial Relations Act 1979*.

32 The Chair explained that the Public Service Appeal Board was concerned that the appellant was seeking relief from it when, potentially, the appellant had failed to have respect for its processes and was also concerned the appellant sought by way of remedy, and could only seek by way of remedy, a return to a position associated with the administration of justice when, potentially, he had shown disregard for the administration of justice.

33 The hearing was then adjourned until 12 May 2017 to allow the parties to obtain transcript and prepare submissions on the matters raised by the Public Service Appeal Board.

34 Before adjourning, and in answer to a suggestion from counsel for the appellant that evidence might be needed from the appellant before the section 27(1)(a)(iv) *Industrial Relations Act 1979* matter could be decided, the Chair said this:

"No, because I've proceeded on the basis - the most favourable basis possible, that Mr Brown believes he is telling the truth, that he believes Ms McCloy's version given to investigators is not the truth and all he was seeking to do was have Ms McCloy correct her version. That is not a finding by any means, but for the purposes of what I - or what the Board is talking about, we're prepared to proceed on the basis most favourable to the applicant."

(ts 52)

35 The hearing resumed on 12 May 2017 at which time counsel for the appellant made two applications which were dismissed by the Public Service Appeal Board for reasons published on 22 May 2017.

36 The hearing resumed on 14 June 2017 at which time submissions were made by counsel on the question of dismissal pursuant to section 27(1)(a)(iv) *Industrial Relations Act 1979*.

37 At the commencement of proceedings on 14 June 2017 counsel for the appellant tendered a document which contained screenshots from the appellant's phone showing call and text contact between the appellant and Ms McCloy. That document became Exhibit 9 in these proceedings. An aide-memoire was also handed up that was designed to put the contents of Exhibit 9 into chronological order.

38 Counsel for the appellant made the following submissions:

(1) The appellant denies he committed the act of misconduct that led to his dismissal;

(2) The appellant believes that Ms McCloy was the subject of coercion and pressure in the production of her statement to investigators and there is evidence to support that belief;

(3) The appellant did not initiate contact with Ms McCloy. Ms McCloy first contacted the appellant about a week after he had been suspended and well before he was dismissed. In that conversation Ms McCloy "effectively apologised for what she had done and she explained that she had done it under pressure". She was "in tears during that conversation";

(4) Ms McCloy told the respondent's investigators that she had been pressured by Mr Beard and Mr Kelly;

(5) At the time of the recorded conversation the appellant believed Ms McCloy had made a complaint about the conduct of Mr Beard and Mr Kelly and he had also been told by a Ms Knight, another of the respondent's employees, that Ms McCloy had complained to her about "bullying", "pressure" and "coercion". Accordingly, when the appellant made reference to those matters in the recorded conversation, "he was not inventing that or speculating";

(6) At the time of the recorded conversation the appellant could not "know" that Ms McCloy would be called as a witness if the matter proceeded to a hearing before the Public Service Appeal Board although clearly he "perceived she was or would be.";

(7) A witness to be called by the appellant, a departmental employee named Tanya Eddy, had been told by an employee of the respondent not to speak to counsel for the appellant or his instructor and was worried that she would get into trouble if she did;

(8) Given that the recorded conversation occurred around the same time as the Notice of Appeal was lodged it is likely Ms McCloy "did not even know about it at that time.";

(9) There is no reason to believe Ms McCloy did not wish to speak to the appellant and "the texts indicate that she would and did speak to him at her initiative";

(10) The texts and the recorded conversation show there was no animosity or pressure and Ms McCloy had confirmed she did not hold any personal animosity toward the appellant;

(11) The use in the recorded conversation of the phrase "star witness" did not put pressure on Ms McCloy and there is no evidence that she felt pressured by the appellant;

(12) The contents of the recorded conversation "arose from Ms McCloy continuing to ask [the appellant] questions";

(13) All that the appellant was seeking to achieve from contact with Ms McCloy was to have her contact his lawyer;

(14) The appellant's "ultimate intention and motive was for Ms McCloy to tell the truth" and "that motive was to be achieved by asking Ms McCloy to speak to his lawyer";

(15) Ms McCloy gave no indication in the recorded conversation that she felt pressured or uncomfortable "…and kept the conversation going for quite a long time, a lot longer than it would have taken to get the lawyer's number and then hang up";

(16) It is arguable that at the time of the recorded conversation the appellant "misunderstood the process and the law", it not being "easy law to understand for anyone without an understanding of public sector law in Western Australia.";

(17) The appellant did not mislead Ms McCloy in the recorded conversation;

(18) The appellant did not ask Ms McCloy to "change her story" (a term used by the Chair of the Public Service Appeal Board on 10 May 2017) and sought only to have her tell the truth;

(19) In relation to inducement, Ms McCloy, in a part of the conversation which was not captured by the recording, had told the appellant words to the effect that things at work were "shit and no-one was speaking to her" and the appellant's comments about this should be understood in that context and in light of his role as a "staff support person" who "likes to help people";

(20) In relation to the appellant's comments about sitting with Mr Kelly at the hearing the appellant "perceives that not many people in his former workplace like Mr Kelly as a result of the way Mr Kelly behaves" and Ms McCloy "knew what [the appellant] meant when he said that and her response does not indicate that she took it as a threat or intimidating or sinister or improper.";

(21) The appellant in the recorded conversation was trying to persuade Ms McCloy to talk to his lawyer and "generally to do the right thing" and it would be a "sad irony if someone who is trying to correct an impropriety which I say is his dismissal because of an incorrect report by Ms McCloy given under pressure, was themselves treated as acting improperly.";

(22) It would be inappropriate to treat the appellant's conduct in the recorded conversation as improper because he was, in it, pursuing his right to prove his case by having Ms McCloy tell the truth;

(23) Given that Ms McCloy actually appeared as a witness before the Public Service Appeal Board it is clear the recorded conversation did not interfere with the Public Service Appeal Board's processes and any issues arising out of it, and the issue of whether it affected her evidence, and if so how, may be explored with her;

(24) If improper conduct on the part of the appellant in the recorded conversation is found, dismissal of the appeal would be unfair punishment of the appellant;

(25) There was no intention to do the wrong thing and if the matter proceeds to its conclusion the Public Service Appeal Board "will be able to satisfy itself that the process has not been compromised in any way.";

(26) The "punishment" of the appeal being dismissed pursuant to section 27(1)(a)(iv) *Industrial Relations Act 1979* "will be extreme and…unprecedented for these reasons.";

(27) The appellant said several times in the recorded conversation that, in relation to relevant matters, "it is up to you" or "it is your choice.";

(28) The respondent evidently suffers poor conduct from its employees, such as that alleged against Mr Beard and Mr Kelly, so it is difficult to see how the appellant, who behaved less badly and to no palpable effect, could not work within its system;

(29) The standard of beyond reasonable doubt should be applied to any finding adverse to the appellant;

(30) The whole context of the recorded conversation changes, and in such a way as to remove all the Public Service Appeal Board's concerns, if it is understood that the appellant did not call Ms McCloy on any of the three occasions the appellant says he spoke with her, that Ms McCloy had told the appellant she had been pressured to say what she did "whilst in tears and effectively apologising to him", that the appellant had been told about pressure on Ms McCloy from another source and that Mr Kelly was, to the appellant's belief, not well liked;

(31) By reference to some cases, the power under section 27(1)(a)(iv) *Industrial Relations Act 1979* should not lightly be invoked and should be exercised with great caution being mindful that, as a rule, a person is entitled to insist upon the exercise of a jurisdiction properly invoked;

(32) In answer to a question from the Chair of the Public Service Appeal Board concerning whether the appellant had dealt appropriately with Ms McCloy if she were understood to be in a position of vulnerability, and whether this might impact on his return to a position of responsibility in relation to vulnerable persons, that Ms McCloy was not in a position of vulnerability or, if she was, it was not exploited by the appellant; and

(33) Evidence will be led, if the hearing proceeds, that the appellant was a very good Youth Custodial Officer with a ten-year unblemished record of service and there is "no suggestion at all that he has any disregard for vulnerable people whether they be inmates or other employees."

39 Counsel for the respondent made some submissions in reply.

40 Counsel for the respondent said:

> "The ultimate position of the respondent is that, even taking all of that at its highest, concessions made by counsel this morning demonstrate that Mr Brown did, in fact, conduct himself improperly to such an extent that it would be open for the Board to dismiss this matter; to control its own processes. And the concession that I refer to, which the respondent would say is quite properly made because it's quite clear from the recording, is that there's no doubt that Mr Brown was trying to persuade Ms McCloy to do - well, to speak to his lawyer and to do the right thing.
>
> Now, the authorities I'm about to take the Board to demonstrate quite clearly that it's - there is nothing wrong with a litigant trying to persuade a person to tell the truth if you expect them to be a witness or if they're likely to be a witness, as long as that's by reasoned argument. But if you do it by improper means, then that's when it becomes improper and in this case it's quite clear from the recording that the meetings were improper; both threats and inducements were used. It's clear from the recording and the highest it's been put by counsel this morning is that you need to read the whole context, however, the whole context demonstrates there was clearly inducements and clearly intimidation used in this process."
>
> (ts 98)

41 Counsel for the respondent referred the Public Service Appeal Board to case law which it was submitted established that in this matter the conduct was improper, even if the motive was not, because rather than trying to persuade Ms McCloy to tell the truth by reasoned argument the appellant had used "threats and inducement."

42 Counsel for the respondent made reference to various parts of the recorded conversation saying that the appellant had used fear, the promise of benefits, threats and inducements in those passages.

43 Counsel for the respondent submitted that "…in order for the public to have confidence in the integrity of the processes of the Public Service Appeal Board, it is necessary that the Public Service Appeal Board not come to the assistance of a party who seeks to undermine its processes…" (ts 103) and, for this reason, is entitled to dismiss the appeal.

44 Counsel for the respondent referred to cases within the Western Australian Industrial Relations Commission which had accepted that the Western Australian Industrial Relations Commission is entitled to apply the maxims of equity that "he who seeks equity must do equity" and "he who seeks equity must come with clean hands.". (see *Civil Service Association of Western Australia (Incorporated) v Director General, Ministry of Justice* (2003) 94 WAIG 215)

45 Counsel for the respondent submitted that reinstatement was the only remedy the Public Service Appeal Board could order and that there is no point in continuing the hearing because that remedy could not be ordered where, even if the appellant did not intend to employ improper means in the recorded conversation:

> "…what, on its face, he did do would demonstrate such a poor lack of judgment and insight into the proper administration of justice, such that it is axiomatic, that it is impracticable for Mr Brown to be reinstated into a position that requires such high standards of integrity and the position that is, itself, an important cog within the wheels of the State's regime of administering justice."
>
> (ts 104)

46 Counsel for the respondent concluded by addressing submissions made on behalf of the appellant.

47 Counsel for the appellant made brief submissions in reply.

48 I set out counsel's substantive submission in reply in full:

> "The first is that the submission that what Mr Brown did was not done by way of reasoned argument. We say that that really attributes to Mr Brown who, I think, has been acknowledged by the Board anyway, as he's not legally qualified, he's not trained, his text messages clearly show that he had only one real intention which was that Ms McCloy call and speak to his lawyer. And what he was faced with, when that phone call came through to him, was simply a response to the many questions that had been asked of him by Ms McCloy. And it really attributes to Mr Brown who really is an unqualified and untrained in this regard responding off the cuff to this phone call and questions that he hadn't anticipated, which arguably he shouldn't have answered but he did do, was that he wasn't trying by reasoned argument. It wasn't – it clearly wasn't his intention in the first place to have a reasoned argument with her. It was his intention to ask her to speak to his lawyer. So it just seems to me that on the facts of this case and the way in which they happened and the background to it, was not to come up with academic, if you like, legal standards, simply don't match up to the factual circumstances of this case. There's no issue of reasoned argument because he wasn't expecting or intending to have one. He just responded as he did."
>
> (ts 106)

Factual Findings and Consideration of Whether Conduct Improper

49 In our view the appellant behaved improperly in the recorded conversation and we find that to be so whether the correct standard of proof is on the balance of probabilities or beyond reasonable doubt.

50 The recorded conversation occurred at a time when the appeal had in all likelihood been filed (although perhaps only a matter of moments after it had been filed) but certainly after the appellant had signed the Notice of Appeal. Therefore, the proceedings before the Public Service Appeal Board had either commenced, or would imminently commence, at the time of the recorded conversation.

51 The recorded conversation followed a telephone call by Ms McCloy to the appellant but was in response to the appellant's unanswered call to Ms McCloy nine minutes before and the appellant's text message to Ms McCloy one minute before the recorded conversation. Ms McCloy did not initiate the contact at that time, the appellant did.

52 We accept that the appellant's main purpose in contacting Ms McCloy was to ask her to contact his lawyer and we accept also, for present purposes, that the appellant had the intention of having Ms McCloy tell the truth.

53 We also find that the appellant knew, or acted on the belief that, Ms McCloy would be a witness in the proceedings before the Public Service Appeal Board.

54 We hold, on the basis of compelling authorities to this effect, that in considering whether the appellant acted improperly it is not a complete defence to an allegation of impropriety that he was only trying to have Ms McCloy tell the truth. While it is legitimate to seek to persuade a witness to tell the truth by reasoned argument it is not legitimate to do so by intimidation or inducement. (see *Librizzi v Western Australia* [2006] WASCA 237; *R v McLachlan* [1998] 2 VR 55)

55 Accordingly, in circumstances where the appellant believed, as we accept he did, that Ms McCloy had given an untruthful account of his behaviour, and was possibly going to repeat that version in proceedings against him, various things could have properly happened.

56 The appellant could have attempted, by reasoned argument, to persuade Ms McCloy to change her version.

57 The appellant could have arranged for Ms McCloy and his lawyer to meet at which time his lawyer could have attempted the same.

58 Alternatively, and if an attempt to have Ms McCloy tell the truth by reasoned argument was not made or had failed, then the appellant had to leave it up to the Public Service Appeal Board to determine whether Ms McCloy was telling the truth or not.

59 Against the above factual and legal background we turn to consider and characterise what the appellant said in the recorded conversation.

60 Firstly we find that what the appellant said in the recorded conversation went well beyond reasoned argument and, in fact, that there was no attempt to persuade Ms McCloy to tell the truth by way of reasoned argument. Such a concession was made, and properly so, in the submission reproduced at [48] above.

61 We find that what the appellant did in the recorded conversation was use fear and intimidatory tactics and the promise of benefits to persuade Ms McCloy. The following are examples:

(1) **Mr Brown: Basically you are the star witness for the department. They have put you out there and they sent letters to my lawyers saying that we sacking Richard because we have a witness, and they named you in their letters saying this is our star witness and that is the reason why.**

This comment would, reasonably viewed, isolate, and thereby pressurise a person who was giving evidence. To intimate to a witness they have a singular importance as the "key" or "principal" witness can only add, and unfairly so, to the stress and pressure any witness in Ms McCloy's situation would be feeling.

(2) **Mr Brown: That's what I want done, and I mean obviously with that if you can, I mean I don't know what you're thinking but if you're happy to do that, that will help me a lot because it stops everything now. It slows all legal process down and then they can then send a letter back to the State Solicitor's Office that represents the department and say look, there is new evidence come to light. We've spoken to Leilani. Leilani has given this version of events that she didn't feel what was asked of her in the initial interview, it doesn't matter about the other statements. What was asked about that in the interview, you made comments that you felt bullied or coerced or something to that effect… in the early stages**

Ms McCloy: Umm

Mr Brown: That kind of thing, I don't know the exact words, but that kind of thing.

This is an offer of an inducement. That is, if Ms McCloy does something related to the proceedings the matter will end. Not only is it an inducement but it was one that the appellant could not even be certain would be met. The appellant could not reasonably promise that the proceedings would be "squashed" if Ms McCloy did something for him. That the appellant made it sound all so simple and that a carefree attitude may be taken to the proposed course by Ms McCloy is a form of pressure and inducement and is made worse for being so recklessly applied and offered. It shows that the appellant had concern only for what he wanted and little else.

(3) **Ms McCloy: What happens to John Beard and Sean, they will lose their…., I don't know what happens.**

Mr Brown: No, no, no they won't lose their job, it won't even go that far, that's what I'm saying. If you weren't happy to do that then it all gets squashed now.
Ms McCloy: How do you know that?
Mr Brown: Well I have spoken to the lawyer this morning and I have asked all of them this morning. And he said to me none of this would ever come back on you… because apart from the State Solicitor's Office and no one else would know. Because if won't go back to Banksia Hill in front of Sean Kelly or anyone like that …….. lawyer then it has gone way over his head and it has gone to the Commissioner's Office and they obviously don't deal with it because it is a legal matter. So they put it onto the State Solicitor's Office
Ms McCloy: So, Sean and, I'm just confused, so Sean and John won't even get questioned about this?
Mr Brown: No,
Ms McCloy: Are you sure?
Mr Brown: Unless you want them to be, or unless you want them to be

This is also an inducement, being if Ms McCloy changes her version of events that not only will the proceedings end but that there will be no negative repercussions for anyone. Again the inducement is worsened because the appellant is assuring Ms McCloy that an outcome will result when he was in no position to give such an assurance. The appellant is effectively misleading Ms McCloy, or at the very least being extremely reckless in the comforts he offers her.

(4) **Mr Brown: so it's basically I suppose from your point of view to help you out as well with regards to people thinking that you are doing the wrong by me**

This is, objectively, an attempt to persuade by intimidation and inducement. We accept that if "people" were thinking that Ms McCloy had done the wrong thing by the appellant, and were acting poorly toward Ms McCloy as a result, that this was not the doing of the appellant. However, inherent in the comment is that if Ms McCloy changes her version of event "people's" view of her will change and for the better.

That is an inducement. In the mind of a reasonable listener the comment would also serve as a reminder that, if Ms McCloy does not change her version of events, "people's" thinking is likely to remain the same, with deleterious results for Ms McCloy. That is intimidation.

(5) **Mr Brown: But that is entirely up to you Leilani, to be quite honest there is going to be a real ugly thing and it will go off to court**

This is intimidation and the offering of an inducement and is, in our view, an outrageous thing to say to a witness. Such a description of the contemplated proceedings before the Public Service Appeal Board could only intimidate and pressurise a witness. The inherent offer of a "real ugly thing" being avoided is a clear inducement. That the Public Service Appeal Board would allow the proceedings to be "ugly" shows a lack of respect for it unless, of course, the Appellant was talking about things that might happen at the proceedings, or related to the proceedings, that were unknown to, and out of the control, of the Public Service Appeal Board. If so the comment is all the worse for it.

(6) **Mr Brown: …it will go off to court, if it goes that far, it will go off to court and I will sit in court and they will call witnesses… and I'll have to go to court and myself and my wife will be there and then obviously you are going to get all the witnesses from Banksia. There's people that I want to call up for witnesses for my character reference, they will all be there and then it will be the department sat on the other side. Now the problem is for you and this is what is not going to help you, is you are going to turn up in court, because you will be summonsed to appear and then who do you sit with Leilani? Do you sit with Sean Kelly as a witness if it goes to court?**

This is also intimidation and the offering of an inducement and, again, completely outrageous. It is a clear attempt to isolate and intimidate Ms McCloy. The appellant says he will be present for proceedings, his wife will be there and his character witnesses will all be there. Ms McCloy on the other hand, the appellant says, will have a "problem" because she will have no one to "sit with", except maybe Sean Kelly who the appellant perceives to be unpopular. This is an outrageous attempt to paint a picture for Ms McCloy of the proceedings being a lonely and stressful situation for her (quite apart from the stress of actually giving evidence). The appellant is effectively telling Ms McCloy that she must pick a side and if she does not pick his side she will end up on the wrong side, a side lacking both quality and quantity. The appellant was quite wrong about how proceedings might be regulated by the Public Service Appeal Board to ensure that such pressure as he threatens is not brought to bear, and his cavalier attitude indicates a lack of respect for the Public Service Appeal Board, but in any event the comments are reprehensible.

(7) **Mr Brown: All I can think about Ms Leilani is that obviously this is the best outcome for me and its obviously will be a really good outcome for you because you will be my star person as opposed to Sean Kelly's star person and everyone will think you are wonderful then.**

This is a clear inducement to the effect that other employees will like Ms McCloy if she changes her version. Inherent in the statement is also a reminder of the pressure Ms McCloy will be under if she does not change her version. In that event Ms McCloy will suffer the effects of being "Sean Kelly's star person" with it having been in the appellant's mind that Sean Kelly is not liked by other staff.

(8) **Ms McCloy: Ok. So what if I do this and then it doesn't change anything.**

Mr Brown: Sorry

Ms McCloy: What if I do and it doesn't even change anything

Mr Brown: Trust me Leilani it will change everything.

This is an inducement and one aggravated by it being so recklessly made. The appellant could not possibly offer the assurance he did.

(9) **Mr Brown: All right well listen I'm sorry about everything else that's going on with work but I suppose I have been there for over 10 years I've got I know a lot of people there so I wasn't aware that this sort of stuff was happening. But listen if there's anything in particular that is happening there with anybody by all means speak to me and I'll do my best to make sure its resolved but I think what it is that everyone is trying to support me because I have known a lot of people there for a long time.**

Ms McCloy: Yeah I know.

Mr Brown: And because you are relatively new that they probably think that you are doing the wrong thing.

The distance between this statement and reasoned argument is vast. Ms McCloy is being reminded of the pressure she is under and told by the appellant that he can do something about it. He makes the point, none too subtly, that Ms McCloy is "new" and that people think she is doing "the wrong thing" and that "everyone supports him" because he has "known a lot of people there for a long time". The appellant is isolating Ms McCloy, or at least reminding her of her isolation, and telling her that he has a large group of loyal and long time backers who support him, over Ms McCloy, because she is thought by them to be doing the wrong thing by him.

The pressure being brought to bear is no less exquisite for being couched in sympathetic and comforting language.

(10) **Mr Brown: But um I can resolve all of that altogether we can resolve all of it or together we can resolve all of it and you'll end up being the star of the show, Leilani**

This is a clear inducement, with the appellant effectively saying "change your version to a truthful one and I will stop the negative conduct of others toward you." Further, "you will go from an outcast to part of the gang." This is an outrageous thing for a litigant to say to a witness against them.

62 The Public Service Appeal Board is prepared to accept that the appellant did not ring Ms McCloy, or take her return call, with a series of prepared points in mind which he intended to make to exert pressure upon and offer inducement to her. The recorded conversation developed in the way the transcript of it shows with the appellant speaking for large slabs but also answering questions asked of him by Ms McCloy.

63 The appellant had several opportunities to state his business, which was to request Ms McCloy to call his lawyer, and move on. We do not accept that the conversation was in any way driven by Ms McCloy but at the same time it was a conversation and not a "message" delivered by the appellant.

64 However, what did clearly occur is that the appellant acted in an opportunistic way. Being presented with the opportunity to talk at length, and prompted perhaps by things he was asked or told by Ms McCloy, the appellant took the several opportunities offered to exert pressure upon and to offer inducements to Ms McCloy as set out above.

65 We accept the appellant did not have an intention to pressure Ms McCloy when he called her, or took her return call, but he evidently developed such an intention and acted upon it during the course of the recorded conversation.

66 We accept that the appellant may very well not have known at any time that he was potentially "interfering with the administration of justice", as that term is known to the law, but we find that he had or developed the intention to cause Ms McCloy, by his conduct, to refrain from giving the evidence she intended to give and to do so for his own purposes. This is enough to make the conduct improper in the present context.

67 The conduct clearly had the capacity or tendency to frustrate the Public Service Appeal Board's processes. It could have led to the respondent not having an opportunity to have the matter decided by the Public Service Appeal Board, if it had felt obliged to cease its opposition because its key witness had recanted, or, had the matter proceeded, could have affected the evidence given by Ms McCloy and thus affected the Public Service Appeal Board's ability to do proper justice.

68 It is not required, of course, that the conduct actually had those effects. In this case it has not deprived the Public Service Appeal Board of the opportunity to hear and determine the matter and we are happy to assume that it has not affected Ms McCloy in a way that might undermine the Public Service Appeal Board's ability to do proper justice.

69 However, that the conduct had such potential or tendency is enough for it to be improper (see *Librizzi v Western Australia* (2006) 33 WAR 104 *and R v McLachlan* [1998] 2 VR 55) or, put more fully, it is enough if there is a real risk that justice will be interfered with or that there is a real and definite tendency to prejudice or embarrass proceedings or conduct has clear tendency to prejudice the due administration of justice (per Simmonds J in *Powell v in de Braekt* [2007] WASC 165).

70 What the appellant did, even if in a conversation that was initially intended only to have Ms McCloy talk to his lawyer and have her tell the truth, was apply improper pressure and offer inducements.

71 The appellant acted improperly and, to the extent and in the way that intention is relevant, with an improper intention.

72 We have no hesitation in finding that the appellant's conduct during the recorded conversation was improper, even taking into account all of the circumstances and the submissions made on his behalf relating to his original intent and that he was "…unqualified and untrained in this regard responding off the cuff to this phone call and questions that he hadn't anticipated...". (ts 106)

73 The appellant should have held himself and his distance from the witness much better than he did.

74 The Public Service Appeal Board is at pains to note that we have not considered whether the appellant is in contempt of these proceedings or whether he has perverted the course of justice or attempted to do either of these things. It would be completely inappropriate for the Public Service Appeal Board to do so.

75 Our reference to case law occurs only in the context of learning from those cases what kind of conduct may be described as improper in the current context.

76 We have found the appellant's conduct to have been improper for the reasons set out above. Now we turn to consider what consequences, if any, should flow at this time.

Consequences and Section 27(1)(a)(iv) *Industrial Relations Act 1979*

77 Counsel for the appellant says that dismissing the appeal at this stage, without the matter having been fully heard and all evidence having been led, would be too harsh and extreme. He makes the point that in other jurisdictions where such conduct is identified there may be a separate process related to it but the substantive hearing may proceed. That is, the person who so conducts themselves still gets their day in court on the substantive matter.

78 Counsel for the appellant also likens dismissal of the appeal at this stage to a punishment for the purposes of praying in aid law to the effect that a punishment might not be imposed if a court finds that improper conduct was not done with the intent of, and/or did not have the effect of, interfering with the administration of justice (such as in *Powell v in de Braekt* [2007] WASC 165).

79 Counsel for the appellant also says that it would be an odd result to punish the appellant in this way when others within the respondent's employ have acted badly in the course of the investigation into the matter.

80 Counsel for the appellant submits that it would be unfair for the Public Service Appeal Board to go to a case such as *Powell v in de Braekt* [2007] WASC 165 to inform itself on whether the appellant's conduct was improper but to then ignore the result in that case, which was, because of the court's finding about intention, to impose no punishment on the contemnor. He warns us against "cherry picking".

81 Counsel for the appellant reminds the Public Service Appeal Board that the power to dismiss under section 27(1)(a)(iv) *Industrial Relations Act 1979* is an exceptional one and should be exercised sparingly and with extreme caution. Counsel for the appellant reminds us that the appropriate start point is that the appellant is entitled to invoke our jurisdiction and should not lightly be deprived of its exercise.

82 We largely accept the submissions of counsel for the appellant in this regard, and the force behind them.

83 In particular, we accept:

(1) That it would be an exceptional result for improper conduct such as that we have found on the part of the appellant to deny him his day in court;

(2) That, although it would by no means be intended to "punish" the appellant, the appellant may view such an outcome as a punishment for the conduct and that, accordingly, it is relevant to consider the appellant's intention and the effect of his conduct. We take into account that the appellant did not ring Ms McCloy with an intention to pressure her and that, as he opportunistically did so in the conversation, he did not have knowledge that he may have been engaging in conduct that might interfere with the administration of justice. Having said that, it is also noteworthy that the conduct was committed by a party to proceedings and offered by him to a key witness against him, with the comments of Simmonds J at [112] of *Powell v in de Braekt* [2007] WASC 165 in mind;

(3) That the power under section 27(1)(a)(iv) *Industrial Relations Act 1979* should be sparingly exercised and that, prima facie, the appellant is entitled to invoke completely the Public Service Appeal Board's jurisdiction.

84 However, we do not accept the full effect of those submissions. We find that the submissions have insufficient regard for the context in which the improper conduct occurred.

85 The appellant was employed as a Youth Custodial Officer and seeks a return to that position. The Public Service Appeal Board, by way of outcome in this matter, has power only to dismiss the appeal or uphold it and return the appellant to the position he held at the time of his dismissal, if that is what the appellant seeks (*State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169 and *Mary Elizabeth Re v The Inspector of Custodial Services* (2013) 93 WAIG 1776 with the Public Service Appeal Board as presently constituted agreeing with the Public Service Appeal Board in that matter at [20] to [24].)

86 A Youth Custodial Officer is a position having great power and, with it, great responsibility.

87 We need go no further than refer to section 7, section 8 and section 11B(d) *Young Offenders Act 1994* to explain the unique responsibilities, and powers, of a Youth Custodial Officer.

88 Equal regard may be had to the job description form which became Exhibit 3 in these proceedings which states:

> "**Divisional Outcomes**
>
> …guidance of young people who have offended towards the adoption of law abiding lifestyles.;
>
> **Role of the Position**
>
> A Youth Custodial Officer is a person who:
>
> - Is responsible for the safety, security, care, wellbeing and developmental needs of young people in custody.
> - Works with young people in challenging situations, by diffusing and managing conflict.
> - Is required to provide a positive role model for young people"
>
> (Exhibit 3)

89 Children are vulnerable people and those deprived of their liberty particularly so. These vulnerable persons are under the day to day care of Youth Custodial Officers.

90 In our view the appellant's conduct, even taking the most favourable view of it, and of him, and even accepting the force of what the appellant's counsel has said on his behalf, has disqualified himself from receiving an order from the Public Service Appeal Board which would have the effect of returning him to that role.

91 The appellant should not have lost his way so quickly and so easily in the conversation. The appellant, being a Youth Custodial Officer involved in the administration of justice, should not have so easily and recklessly succumbed to the temptation to achieve a legitimate end through illegitimate means.

92 Given that the appellant seeks a return to a position within the justice system, that reckless disregard for proper behaviour in the context of impending proceedings of an arbitral nature may have very well been enough to have the Public Service Appeal Board exercise its power under section 27(1)(a)(iv) *Industrial Relations Act 1979*.

93 It is particularly relevant in the context of a case involving elements of the administration of justice that the appellant come to the Public Service Appeal Board with "clean hands".

94 However, in its proper context, the conduct goes further or has a more material characterisation than this.

95 The appellant was clearly dealing with a person in a vulnerable position. On the appellant's version, which we accept, Ms McCloy had made a statement to investigators which contained inaccuracies and which were the result of threats and coercion. This, in itself, showed Ms McCloy was vulnerable to pressure but also that circumstance in itself would have, as at the date of the phone call, had Ms McCloy feeling vulnerable as to her future.

96 The circumstances of vulnerability were only added to by Ms McCloy's evident concern about being bullied at work and by her evident confusion as to what might happen to her and others if she engaged with the appellant or his lawyer and took the course of action the appellant suggested.

97 In our view the appellant, whether intentionally or unthinkingly, attempted to exploit Ms McCloy's vulnerabilities. He offered her certainty in relation to the consequences of taking the action he wanted. He offered her an end to the bullying and he offered her hero status. He offered her avoidance of an unpleasant appearance before the Public Service Appeal Board. The appellant, whether intentionally or unthinkingly, zeroed in on Ms McCloy's vulnerabilities, and on occasions introduced other vulnerabilities and, with what he said to her about them, preyed on them and quite improperly so.

98 It is aggravated by the fact that the appellant was a Youth Custodial Officer of some ten years' experience, with a "camp" of supporters, and that Ms McCloy was "relatively new" to the positon. There was clearly a gulf in terms of seniority, experience and support at the workplace.

99 The Public Service Appeal Board gives full weight to the submissions that the appellant did not initiate contact with Ms McCloy with the aim of intimidating her or offering her inducements and was not mindful during the conversation that what he was saying might interfere with the administration of justice. We also have full regard for the submission that there is no evidence that what the appellant said has, in the end, interfered with the administration of justice.

100 We are prepared to view the conduct as opportunistic and unthinking and occurring in circumstances where the appellant was himself under a great deal of pressure having lost his job when, so far as he was concerned (and we accept for present purposes), he had done nothing wrong. We also accept that the appellant had given ten years of good service as a Youth Custodial Officer without there being any evidence before us that he had misconducted himself in the past. We accept the conduct in the recorded conversation was a "one off" and the context is fully appreciated.

101 However, what concerns the Public Service Appeal Board, and is ultimately determinative, is the serious nature of what the appellant said to Ms McCloy, with Ms McCloy being the main witness in the proceedings, and that the appellant so readily and recklessly took the opportunity to pressure her and offer inducements to her. A key to the effective administration of justice, and dealing with vulnerable people, is to hold yourself under pressure and maintain proper standards at all times. The appellant clearly should have known better than to act as he did.

102 Given the appellant seeks a return to a position involved in the administration of justice, and in a role that would see him exerting power over vulnerable persons, the Public Service Appeal Board has no hesitation in dismissing the appeal pursuant to section 27(1)(a)(iv) *Industrial Relations Act 1979* because of the appellant's conduct.

103 Although counsel for the appellant may be correct in saying that section 27(1)(a)(iv) *Industrial Relations Act 1979* has not arisen for consideration in similar circumstances we note that the range of circumstances in which it might be exercised is not limited other than by the words in the subparagraph, upon which no gloss ought to be put.

104 We note that the Public Service Appeal Board in *Mary Elizabeth Re v The Inspector of Custodial Services* (2013) 93 WAIG 1776 acted under section 27(1)(a)(iv) *Industrial Relations Act 1979* at a stage, prior to the completion of the hearing, when it became clear that the appellant would not succeed in achieving the remedy the Public Service Appeal Board could grant.

105 We note also that in *Randall de Vos v Minit Australia Pty Ltd* (2002) 82 WAIG 2195 the Western Australian Industrial Relations Commission in its general jurisdiction took such action when the applicant misbehaved during the course of proceedings in such a way that the Western Australian Industrial Relations Commission came to the conclusion, on its own motion, that it could not possibly grant the applicant a remedy.

106 We have full regard to section 26(1) *Industrial Relations Act 1979* and find that although the substantial merits of the case might be said to be, at this stage, not fully exposed, that equity and good conscience and regard for the interests of all persons, including not only the appellant but also the respondent and Ms McCloy, and the interests of the community in protecting the Public Service Appeal Board's processes from interference by way of improper conduct by an appellant, demands the result that the appeal be dismissed at this time.

107 After preparation of these reasons for decision in draft form the appellant referred the Public Service Appeal Board to the decision *Director of Public Prosecutions (Cth) v Besim and Anor* [2017] VSCA 165, which had been handed down subsequent to the hearing of this matter, and made written submissions in relation to its argued relevance. The respondent provided written submissions in response.

108 We have reviewed our reasons for decision taking the decision into account.

109 The appellant submitted that the conduct of the persons in that case was worse than that of the appellant, because of its intrinsic nature and because it was inarguable that they should have known better than to behave in the "appalling" way they did, and yet, despite severe criticism from the Court of Appeal of Victoria, they have retained positions of significant power and influence in the administration of justice.

110 It was argued that the appellant had behaved less badly and that it may not be assumed that he should have known better and yet he was facing a penalty whereas the persons in that case had not been penalised.

111 The case is, in our view, of limited relevance and largely for the reasons, with respect, given in the respondent's written submissions on it.

112 These are that the persons criticised in the case were not parties to the matter before the Court and the Court was not in any way empowered to make a decision which impacted directly on the positions they held (with the Public Service Appeal Board noting that the holding of the positions in that case was a matter of political appointment and not employment) and that the persons in that case admitted the impropriety of their conduct and apologised for it.

113 If anything the case indicates that the Public Service Appeal Board has been muted in its expression of its disapproval of the conduct of the appellant.

114 The Public Service Appeal Board has decided that it could not possibly return the appellant to a position within the justice system and this is especially so given that, if returned, he would have power over vulnerable people. Accordingly, the appeal is dismissed.

Schedule 1

Mr Brown: I'm not sure what was said in there because I was not there – that is that kind of stuff, that is really what he wants to hear and …… and your name will not get, and I asked them this this morning, I said look if this young lady comes and talks to you and says some stuff to you, his name is Yashar – he is a foreign gentleman. I said if I can ask Leilani to come and talk with you…….. I said this is not going to go back to anyway else, is it? And he said no, not at all. As long as you just take … and he will take an informal statement from you and he can send it off to the State Solicitor's Office and nobody at Banksia would even know what you have said or done. And then ……. haven't got anywhere to go with it, and then that will stop the hearing – do you know what I mean.

Ms McCloy: So, I am just so confused, like ….

Mr Brown: There is two ways Leilani of looking at it, the first way is um ….. when ….. you don't do anything yeh, and the process will continue and obviously my lawyers are going to call the department and then they are going to call all the witnesses and that will come from yourself, Wayne, myself Sean Kelly, John Beard and there are a few others in there. And everyone will get called to that hearing and …… and obviously the lawyers will iron out any differences that they find or come across. What I am saying to you is that can all get stopped before then if you are happy to talk to a lawyer.

Ms McCloy: Um,

Mr Brown: It's entirely up to you, I mean I'm not, I'm not trying to influence you one way or the other because they sacked me anyway now, so that is not going to change any time now. But what I am saying…… is that if we don't do anything now then he is going to go to court and you will get called up and then obviously it will progress from there with everybody else.

Ms McCloy: So, from the first

Mr Brown: Basically you are the star witness for the department. They have put you out there and they sent letters to my lawyers saying that we sacking Richard because we have a witness, and they named you in their letters saying this is our star witness and that is the reason why.

Ms McCloy: What is the goal, like obviously … are you trying to get your job back or what is this?

Mr Brown: Yeah, I am going to get my job back

Ms McCloy: Yeah, okay

Mr Brown: That's what I want done, and I mean obviously with that if you can, I mean I don't know what you're thinking but if you're happy to do that, that will help me a lot because it stops everything now. It slows all legal process down and then they can then send a letter back to the State Solicitor's Office that represents the department and say look, there is new evidence come to light. We've spoken to Leilani. Leilani has given this version of events that she didn't feel what was asked of her in the initial interview, it doesn't matter about the other statements. What was asked about that in the interview, you made comments that you felt bullied or coerced or something to that effect. … in the early stages

Ms McCloy: Umm

Mr Brown: That kind of thing, I don't know the exact words, but that kind of thing.

Ms McCloy: Um, what happens

Mr Brown: That will squash it

Ms McCloy: Yeah, but who goes on to an investigation from there

Mr Brown: Sorry

Ms McCloy: What happens to John Beard and Sean, they will lose their…., I don't know what happens.

Mr Brown: No, no, no they won't lose their job, it won't even go that far, that's what I'm saying. If you weren't happy to do that then it all gets squashed now.

Ms McCloy: How do you know that?

Mr Brown: Well I have spoken to the lawyer this morning and I have asked all of them this morning. And he said to me none of this would ever come back on you … because apart from the State Solicitor's Office and no one else would know. Because if won't go back to Banksia Hill in front of Sean Kelly or anyone like that …….. lawyer then it has gone way over his head and it has gone to the Commissioner's Office and they obviously don't deal with it because it is a legal matter. So they put it onto the State Solicitor's Office

Ms McCloy: So, Sean and, I'm just confused, so Sean and John won't even get questioned about this?

Mr Brown: No,

Ms McCloy: Are you sure?

Mr Brown: Unless you want them to be, or unless you want them to be.

Ms McCloy: I just don't get it. But that's the initial interview and it's like, it doesn't, the investigators was the second interview?

Mr Brown: Yeah

Ms McCloy: What, so that makes everything

Mr Brown: ……. I've got all the documents that you sent Sean Kelly an email

Ms McCloy: Yeah, the first

Mr Brown: Yeah, you had a chat with him in the office, him and John Beard. He'd left the office and I'm assuming you'd gone to a computer somewhere and then you've said that as per our conversation and you sent an email.

Ms McCloy: Hmm

Mr Brown: I've read all the emails, …… they all got the emails, and all that sort of stuff, so it's basically I suppose from your point of view to help you out as well with regards to people thinking that you are doing the wrong by me. Um you may want to speak to the lawyer, and say to the lawyer about how you felt at that time initially, when you very first spoke to Sean Kelly and John Beard. But that is entirely up to you Leilani, to be quite honest there is going to be a real ugly thing and it will go off to court, if it goes that far, it will go off to court and I will sit in court …and they will call witnesses… and I'll have to go to court and myself and my wife will be there and then obviously you are going to get all the witnesses from Banksia. There's people that I want to call up for witnesses for my character reference, they will all be there and then it will be the department sat on the other side. Now the problem is for you and this is what is not going to help you, is you are going to turn up in court, because you will be summonsed to appear and then who do you sit with Leilani? Do you sit with Sean Kelly as a witness if it goes to court?

Ms McCloy: Argh, this is awful.

Mr Brown: Do you know what I mean?

Ms McCloy: Yeah I know what you mean, it's just

Mr Brown: That's why I am trying to resolve all of that

Ms McCloy: So all they want to know is what they said to me in the first interview?

Mr Brown: Yeah

Ms McCloy: But then that's all well and good and then how do they know like there was only John Beard and me at the start and then both of them. So what are they going to say, they will have to call him up one day.

Mr Brown: No no because they have already given their account of what's happened.

Ms McCloy: And what did they have to say.

Mr Brown: What they are saying they didn't that……..um they had interviewed you. I don't know the exact words of what was said but something along the lines that you were spoken to at Banksia……all you can say is what I felt but that's your personal choice that's not you saying something is right or wrong it's just you expressing how you felt about the whole procedure at the time. Did you feel anxious about it did you feel that you were intimidated, did you feel like you were coerced into saying and agreeing …. I don't know.

Ms McCloy: Well I was fearing for my job at the time.

Mr Brown: Yeah yeah.

Ms McCloy: But I mean … ahhh

Mr Brown: All I can think about Ms Leilani is that obviously this is the best outcome for me and its obviously will be a really good outcome for you because you will be my star person as opposed to Sean Kelly's star person and everyone will think you are wonderful then. I don't know what else to say. That's in a nutshell I suppose.

Ms McCloy: Yeah. It's just been full on. Um can I call you back this afternoon or tomorrow?

Mr Brown: It's entirely up to you, but I have the lawyer's number here but if you want you can call his number or you can call me back whatever you want to do. All I am saying though because you said last time oh yeah I will give you a call back, you better call back so I just thought that you didn't want to do that.

Ms McCloy: I just thought I spoke to someone about it and they said I could get into a lot of trouble for speaking to you.

Mr Brown: No you can't I have spoken to a lawyer about this and that's not true because I still up against trouble speaking to you because your Department's witness as their saying so I mention that to the lawyer this morning and he said no not at all.

Ms McCloy: Oh

Mr Brown: At the end of the day you know it's your decision you're an adult and you can talk to who you want and although they've sacked me from work I am sacked …… but I've got 21 days to appeal the decision so that's the Appeal I'm going through now the legal process for that so I suppose technically we don't work together anymore because I've been sacked but there is a little bit there that I kind of still work for the department …….

Ms McCloy: Ok

Mr Brown: But I …can only 110% say that that you will not get into trouble with that.

Ms McCloy: And won't to Management afterwards.

Mr Brown: No if you can ask the lawyer that as well if you want to but because I said I asked him all these questions …… I said if I asked Leilana this she will probably think I am just saying it because I wanted to do something for me but I

said you know would she get into any trouble will I get in to any trouble he said no you won't get into any trouble Richard because you are only asking her to speak with us and you can legally do that I can do that and then if you speak to the lawyer that's in complete confidence. What you say to that lawyer it just stays with the lawyer, the only thing that he will do is that he will contact State Solicitor's Office and ay that he has spoken to you and this is your version of events but that you felt coerced or bullied or whatever John Beard said to you um and then all their going to say is thanks very much. There's obviously no point them pursuing it because now um you're not their star witness.

Ms McCloy: Ok. Um can I get his number.

Mr Brown: Yeah, yeah this is my mobile number yeah you can contact me on that.

Ms McCloy: The lawyers?

Mr Brown: Oh, the lawyer's number yep.

Ms McCloy: Yep

Mr Brown: Have you got a pen.

Ms McCloy: Yep

Mr Brown: Yep its xxxx

Ms McCloy: xxxx

Mr Brown: Yeah xx

Ms McCloy: xx

Mr Brown: xx

Ms McCloy: xx

Mr Brown: Yeah

Mr Brown: The gentleman I am dealing with his name is name Yashar. Ok…. if you give him your name and say reference Richard Brown um and then give him and a call …….on that.

Ms McCloy: Ok. So what if I do this and then it doesn't change anything.

Mr Brown: Sorry

Ms McCloy: What if I do and it doesn't even change anything.

Mr Brown: Trust me Leilani it will change everything.

Ms McCloy: Okay

Mr Brown: It will change everything

Ms McCloy: Ok. All right. I will keep in contact with you ok.

Mr Brown: Ok. Are you happy for me to pass your number across to the lawyer?

Ms McCloy: Um yeah you can.

Mr Brown: Is that ok?

Ms McCloy: Yeah that's fine.

Mr Brown: Ok

Ms McCloy: All right.

Mr Brown: All right well listen I'm sorry about everything else that's going on with work but I suppose I have been there for over 10 years I've got I know a lot of people there so I wasn't aware that this sort of stuff was happening. But listen if there's anything in particular that is happening there with anybody by all means speak to me and I'll do my best to make sure its resolved but I think what it is that everyone is trying to support me because I have known a lot of people there for a long time.

Ms McCloy: Yeah I know

Mr Brown: And because you are relatively new that they probably think that you are doing the wrong thing.

Ms McCloy: Yeah but they're not helping the situation and it's just making me get angry about it so

Mr Brown: Yeah

Ms McCloy: And

Mr Brown: But um I can resolve all of that altogether we can resolve all of it or together we can resolve all of it and you'll end up being the star of the show, Leilani.

Ms McCloy: Argh, alright

Mr Brown: If you want to be.

Ms McCloy: Ok. Alright I'll stay in touch with you.

Mr Brown: All right then thanks Leilani.

Ms McCloy: Ok. All right

Mr Brown: Seeya Bye

2017 WAIRC 00713

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD BROWN
	APPELLANT
	-v-
	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR D SPIVEY - BOARD MEMBER
DATE	WEDNESDAY, 9 AUGUST 2017
FILE NO	PSAB 22 OF 2016
CITATION NO.	2017 WAIRC 00713

Result	Appeal dismissed
Representation	
Appellant	Mr D Howlett of counsel
Respondent	Mr J Carroll, of counsel, and with him Mr P Murdoch

Order

HAVING heard Mr D Howlett, of counsel, for the appellant and Mr J Carroll, of counsel, and with him Mr P Murdoch, for the respondent;

AND HAVING given Reasons for Decision in which the Public Service Appeal Board determined to dismiss the appeal;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby order:

THE appeal be dismissed.

(Sgd.) D J MATTHEWS,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2017 WAIRC 00467

APPEAL AGAINST THE DECISION TO CEASE WORK RELATED SICK PAY ON 6 JUNE 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SIMON DOMINIC TRAYNOR
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR G SUTHERLAND - BOARD MEMBER
	MR N CINQUINA - BOARD MEMBER
DATE	THURSDAY, 20 JULY 2017
FILE NO	PSAB 10 OF 2017
CITATION NO.	2017 WAIRC 00467

Result	Discontinued by leave
Representation	
Appellant	In person
Respondent	Ms D Hopkinson

Order

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

(1) THAT the appeal be and is hereby discontinued by leave.

(2) THAT the hearing date of 7 August 2017 be and is hereby vacated.

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

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 73/2017	N/A	N/A	Emmanuel C	Request for mediation		Concluded
APPL 72/2017	N/A	N/A	Emmanuel C	Request for mediation		Concluded
APPL 69/2017	N/A	N/A	Matthews C	Request for mediation	28/07/2017	Concluded

OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Occupational Safety and Health Tribunal pursuant to s 51I of the *Occupational Safety and Health Act 1984* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
Alcoa of Australia Limited	Andrew Chaplyn State Mining Engineer Department of Mines and Petroleum	Kenner SC	APPL 64/2017		Review of Improvement Notice	Discontinued

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2017 WAIRC 00695

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	:	2017 WAIRC 00695
CORAM	:	COMMISSIONER D J MATTHEWS
	:	WEDNESDAY, 22 MARCH 2017
DELIVERED	:	FRIDAY, 4 AUGUST 2017
FILE NO.	:	RFT 20 OF 2016
BETWEEN	:	DASH NOMINEES (AUST) PTY LTD T/AS HAWKINS HAULAGE WA Applicant AND JUSTUS TRANSPORT PTY LTD Respondent

CatchWords	:	Claim for payment of amount due under an owner-driver contract - Claim allowed - Payment ordered
Legislation	:	*Industrial Relations Act 1979* *Owners-Drivers (Contracts and Disputes) Act 2007*
Result	:	Claim allowed; payment ordered
Representation:		
Applicant	:	Mr J Clarke and with him Mr J Collier as agents
Respondent	:	No appearance

Reasons for Decision
(Given extemporaneously at the conclusion of proceedings,
taken from the transcript as edited by the Commission)

1 On 29 November 2016, Dash Nominees (AUST) Pty Ltd trading as Hawkins Haulage WA filed a notice of referral to the Road Freight Transport Industry Tribunal.

2 The applicant claimed that it was an owner-driver within the meaning of that term in the *Owner-Drivers (Contracts and Disputes) Act 2007* and that it had a contract with the respondent in these proceedings, Justus Transport Pty Ltd.

3 The contract related to the haulage, by Hawkins Haulage WA, of a load comprising pipes from Perth to Wubin. The notice of referral claimed the contract provided that an amount of $1,100.00 would be paid for the provision of that service, that the service had been carried out and that, despite numerous attempts, the $1,100.00 had not been paid.

4 On 9 March 2017 there was a conciliation conference in this matter which was not attended by the respondent and the matter was set down for hearing. The respondent was given proper notice of the hearing occurring today and has not attended.

5 I have decided to proceed in the absence of the respondent pursuant to my power to do so under section 27 *Industrial Relations Act 1979* which is imported into the *Owner-Drivers (Contracts and Disputes) Act 2007* for the purposes of the Tribunal's functions.

6 At the hearing, Mr Clarke, agent for the applicant, helpfully ran through the relevant provisions of the *Owners-Drivers (Contracts and Disputes) Act 2007*, which founds the Tribunal's jurisdiction to decide this matter. I outline the relevant provisions below:

(1) section 40(a) *Owners-Drivers (Contracts and Disputes) Act 2007*. Mr Clarke said that the applicant is covered by section 40(a) or 40(b) *Owners-Drivers (Contracts and Disputes) Act 2007* and I accept that to be the case;

(2) section 37(1) and section 37(2) *Owners-Drivers (Contracts and Disputes) Act 2007* which defines "dispute" to include a payment dispute and defines what a "payment dispute" is and I am satisfied that what is brought before the Tribunal is a payment dispute under section 37 *Owners-Drivers (Contracts and Disputes) Act 2007*;

(3) section 38 *Owners-Drivers (Contracts and Disputes) Act 2007* which allows the Tribunal to hear and determine "disputes";

(4) section 47(1) *Owners-Drivers (Contracts and Disputes) Act 2007* which allows the Tribunal to hear and determine a "dispute" if certain things have occurred, and I accept that those things have occurred; and

(5) section 47(4)(a) *Owners-Drivers (Contracts and Disputes) Act 2007* which states that an order for the payment of a sum of money may be made by the Tribunal.

7 The applicant called Mrs Simone Lee Hawkins, who is the Accounts Manager of the applicant, to give evidence in relation to this matter. On the basis of that evidence, I am satisfied that the applicant is an owner-driver as defined by the *Owner-Drivers (Contracts and Disputes) Act 2007* and that the applicant entered into an owner-driver contract with Justus Transport Pty Ltd within the meaning of that term in section 5 of the *Owner-Drivers (Contracts and Disputes) Act 2007*.

8 I find on the basis of the evidence of Mrs Hawkins, which included Exhibit 1, a tax invoice relating to the service of the contract for haulage of a load of pipes from Perth to Wubin, that there was a contract, a verbal contract but a contract nonetheless, between the applicant and Justus Transport Pty Ltd for the haulage of a load of pipe to Wubin, payment for which would be $1,100.00 including GST to be paid within 14 days.

9 I accept, without reservation, the evidence of Mrs Hawkins that the service was provided and that despite repeated attempts by her, the amount of $1,100.00 has not been paid by the respondent to the applicant.

10 On the basis of exhibit 2 in these proceedings, a current company extract for Justus Transport Pty Ltd, I am satisfied that the respondent is indeed a corporation having the name Justus Transport Pty Ltd.

11 I will make an order that the respondent pay to the applicant the sum of $1,100.00.

2017 WAIRC 00183

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	DASH NOMINEES (AUST) PTY LTD T/AS HAWKINS HAULAGE WA
	APPLICANT
	-v-
	JUSTUS TRANSPORT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 28 MARCH 2017
FILE NO/S	RFT 20 OF 2016
CITATION NO.	2017 WAIRC 00183

Result	Order made
Representation	
Applicant	Mr J Clarke, as agent, and with him Mr J Collier, as agent
Respondent	No appearance

Order

HAVING heard Mr J Clarke, as agent, and with him Mr J Collier, as agent, on behalf of the applicant and, there being no appearance for the respondent, and

HAVING decided to hear and determine the matter in the absence of the respondent; and

HAVING given oral reasons for decision at the conclusion of the proceedings and having determined pursuant to section 35(1) *Industrial Relations Act 1979* to publish my reasons at a later time; and

HAVING decided that the applicant has not been paid an amount due from the respondent under an owner-driver contract;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Owner Driver (Contract and Disputes) Act 2007* hereby order:

THAT the respondent forthwith pays to the applicant the sum of $1,100.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
Aitchy's Transport Pty Ltd	Toll Transport Pty Ltd t/as Toll IPEC	Kenner SC	RFT 2/2017	07/06/2017	Dispute re alleged termination of contract	Discontinued