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FULL BENCH—Appeals against decision of Industrial Magistrate—

2017 WAIRC 00828

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 172 OF 2014 GIVEN ON 1 MARCH 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2017 WAIRC 00828
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL
HEARD	:	MONDAY, 21 AUGUST 2017
DELIVERED	:	TUESDAY, 19 SEPTEMBER 2017
FILE NO.	:	FBA 6 OF 2017
BETWEEN	:	MARTIN FEDEC Appellant AND THE MINISTER FOR CORRECTIVE SERVICES Respondent

ON APPEAL FROM:		
Jurisdiction	:	**Western Australian Industrial Magistrate's Court**
Coram	:	**Industrial Magistrate M Flynn**
Citation	:	**[2017] WAIRC 00109; (2017) 97 WAIG 273**
File No.	:	**M 172 of 2014**

Catchwords	:	Industrial Law (WA) - Appeal against decision of Industrial Magistrate's Court - Construction of industrial agreement - Principles considered - Industrial Magistrate dismissed claim for payment of pro-rata long service leave - Employee had resigned in acceptance of the terms of settlement of a claim for workers' compensation - Meaning of words employment 'ended by employer' considered
Legislation	:	*Industrial Relations Act 1979* (WA) s 84(2) *Industrial Relations Act 1988* (Cth) s 170CB, sch 10, sch 11 *Prisons Act 1981* (WA) s 6(5) *Public Sector Management Act 1994* (WA) s 3, pt 3, s 39 *Workers' Compensation and Injury Management Act 1981* (WA) s 182O
Result	:	Appeal dismissed

Representation:

Counsel:		
Appellant	:	Mr A J Stewart (of counsel)
Respondent	:	Mr J M Carroll (of counsel)
Solicitors:		
Appellant	:	Chapmans Barristers & Solicitors
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

ABB Engineering Construction Pty Ltd v Doumit (Print N6999, 9 December 1999)

Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372

City of Wanneroo v Holmes [1989] FCA 369; (1989) 30 IR 362

Comcare v Martin [2016] HCA 43

Director General, Department of Education v United Voice WA [2013] WASCA 287; (2013) 94 WAIG 1

Durham v Western Australian Government Railways Commission (1995) 75 WAIG 3163

George A Bond & Co Ltd (in liq) v McKenzie [1929] AR (NSW) 498

Mohazab v Dick Smith Electronics Pty Ltd (No 2) (1995) 62 IR 200

O'Meara v Stanley Works Pty Ltd [2006] AIRC 496

Re Harrison; Ex parte Hames [2015] WASC 247

Rheinberger v Huxley Marketing Pty Ltd (1996) 67 IR 154

Swan Yacht Club (Inc) v Bramwell (1997) 78 WAIG 579

The Attorney General v Western Australian Prison Officers' Union of Workers (1995) 75 WAIG 3166

Tranchita v Wavemaster International Pty Ltd (1999) 79 WAIG 1886

Reasons for Decision

SMITH AP AND SCOTT CC:

Introduction

1 This appeal is instituted under s 84(2) of the *Industrial Relations Act 1979* (WA) (the IR Act). Martin Fedec (the appellant) appeals against a decision of the Industrial Magistrate's Court in M 172 of 2014 dismissing his claim for pro-rata long service leave.

2 The appellant was employed by The Minister for Corrective Services (the respondent) as a nurse at Bandyup Women's Prison from on or about 1 February 2012 until 24 March 2014. The *Department of Corrective Services - Registered Nurses (ANF) Industrial Agreement 2010*, AG 28 of 2011 (the Industrial Agreement) applied to his employment as terms and conditions.

3 The appellant claimed that he was entitled on the termination of his employment to pro-rata long service leave pursuant to cl 29(11)(a)(iii) of the Industrial Agreement. Clause 29(11)(a)(iii) provides that if the employment of an employee ends, the employee is entitled to pro-rata long service leave if the employee has completed a total of not less than 12 months' continuous service and his/her employment has been ended by his/her employer on account of incapacity due to old age, ill health or the result of an accident. The circumstances upon which the appellant claims that he is entitled to payment of pro-rata long service leave pursuant to this clause are pleaded in the originating claim as follows:

   (a) The appellant sustained a work-related injury on 11 July 2011. As a result of the injury, he lodged a workers' compensation claim. As part of the settlement of the workers' compensation claim, the appellant resigned from his position at the Department of Corrective Services effective 24 March 2014.

   (b) It was agreed between the appellant and his employer, as per his written resignation, that the appellant would be paid all monies outstanding for his accrued time in lieu and annual leave in the next pay cycle following his resignation.

4 Whilst the appellant also made a claim in the Industrial Magistrate's Court for payment of time off in lieu, which claim was also dismissed, this appeal does not seek to challenge the dismissal of that claim.

5 At the hearing at first instance, the appellant gave his evidence-in-chief by way of a witness statement (exhibit 1). In his witness statement, he stated the relevant circumstances which led to his resignation from his employment with the respondent were:

   10. On 24 March 2014, during discussions to resolve a dispute related to my Workers' Compensation Claim, it was agreed amongst the parties to discuss settlement of my Workers' Compensation Claim.

   11. In these discussions, the Department made it clear that for any settlement, they would require me to resign from my employment.

12. Despite the Department's insistence I resign, I was not advised of the reason they wanted my resignation. However, it was clear that the Department would refuse to settle the Workers' Compensation Claim unless my resignation was forthcoming.

13. I wanted to remain in my employment with the Department. I only agreed to discuss settling the Workers' Compensation Claim with the intention of returning to work, not resigning.

14. On 24 March, the Department required me to write and sign a note confirming that I resign given the settlement of my Workers' Compensation Claim …

15. On 30 March 2014, I wrote a letter to the Department resigning from my employment …

6 The note referred to in his witness statement was attached to his statement. In the note the appellant stated:

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

7 In accordance with the terms of the settlement agreement, the appellant gave notice of his resignation in a typewritten document signed and dated by him on 30 March 2014. In that document, he stated:

> I hereby give notice of resignation from my employment with the Department of Corrective Services effective 24 March 2014, but subject to receiving the settlement monies. Please forward my outstanding entitlements to the above address. As well as monies outstanding for time of [sic] in lieu and my annual leave entitlements to be paid on the next pay cycle.

8 Whilst the appellant was cross-examined about other matters arising in his witness statement, the appellant was not cross-examined about the circumstances that led to his resignation. Nor was he asked any questions about the written note which records his agreement to resign from his employment or the notice of resignation he gave in accordance with the terms of the settlement agreement.

Relevant provisions of the Industrial Agreement

9 Clause 10(6) of the Industrial Agreement provides for the giving of notice to terminate employment by an employee. Clause 10(6) provides:

> Notice of termination by an employee
>
> (a) The contract of employment for employees classified at Registered Nurse Level 1, unless otherwise mutually agreed by the employee and the Employer, will be terminable by the employee giving the Employer two weeks notice of termination.
>
> (b) The contract of employment for Registered Nurses classified in Levels 2 and above, unless mutually agreed by the employee and the Employer, will be terminable by the employee giving the Employer four weeks notice of the termination.
>
> (c) In lieu of giving the required notice, the employee may forfeit to the Employer the equivalent number of weeks wages as to the number of weeks notice required by subclause (6)(a) or (6)(b) of this clause.

10 The relevant subclauses of cl 29 of the Industrial Agreement which provide for an entitlement to long service leave or payment of pro-rata long service leave are as follows:

> (1) Long Service Leave Entitlement
>
> Subject to the conditions of this clause all employees will become entitled to 13 weeks long service leave:
>
> (a) after a period of ten (10) years continuous service.
>
> (b) after each further period of seven (7) years continuous service.
>
> …
>
> (11) Pro Rata Long Service Leave
>
> (a) If the employment of an employee ends before he/she has completed the first further qualifying periods in accordance with subclause (1) of this clause, payment in lieu of long service proportionate to his/her length of service will not be made unless the employee:
>
> (i) has completed a total of at least three (3) years continuous service and his/her employment has been ended by his/her Employer for reasons other than serious misconduct; or
>
> (ii) is not less than 55 years of age and resigns but only if the employee has completed a total of not less than twelve (12) months continuous service prior to the day from which the resignation has effect; or
>
> (iii) has completed a total of not less than twelve (12) months continuous service and his/her employment has been ended by his/her Employer on account of incapacity due to old age, ill health or the result of an accident; or

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

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

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

(12) Notwithstanding the provisions of subclauses (11)(a)(i) and (11)(a)(iii) of this clause, an employee whose position has become redundant and when refuses an offer by the Employer of reasonable alternative employment or who refuses to accept transfer in accordance with the terms of his/her employment will not be entitled to payment in lieu of long service leave proportionate to his/her length of service.

(13) For the purpose of subclause (11)(a)(iii) of this clause, a medical referee will, if there is disagreement between the employee's doctor and the Employer's doctor as to the employee's incapacity, be selected from an appropriate panel of doctors by agreement between the Employer and employee.

11 At the hearing before the Industrial Magistrate and in this appeal, the appellant submits that his entitlement to payment of pro-rata long service leave arises under cl 29(11)(a)(iii) for payment of long service leave as he was employed continuously for a period of over 12 months and the fact that the respondent required him to resign as a condition of settlement of his workers' compensation was as a matter of law an act by the employer ending his employment on account of ill health or accident. The respondent does not dispute that the appellant has completed at least 12 months' continuous service, but says that it was not the respondent who ended his employment, it was the appellant by the tender of his resignation. Alternatively, the respondent argues the appellant's employment terminated by mutual agreement.

Industrial Magistrate's reasons for decision

12 After considering the arguments put by the parties, the Industrial Magistrate found that the circumstances of the effect of the settlement of the workers' compensation claim as put by the respondent was correct. His reasons for reaching that conclusion were as follows [18]:

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

(b) Mr Fedec relies upon a decision of the Industrial Relations Court of Australia … The evidence adduced by Mr Fedec on the circumstances of his resignation on 24 March 2014 do not reveal any conduct of the respondent that would suggest to me that Mr Fedec's will was overborne in any sense that was comparable to the position of the employee in ***Mohazab***. On 24 March 2014, Mr Fedec had a choice. He could accept or refuse the offer made to him in settlement of his Workers' Compensation Claim. He had the opportunity to take advice from his solicitor. If he refused the offer, he would remain an employee. He accepted the offer and, pursuant to the terms of settlement, he resigned.

(c) At issue is the meaning of the words 'by his/her Employer' in the phrase 'his employment has been ended by his/her Employer on account of incapacity due to old age, ill health or the result of an accident' in cl 29(11)(a)(iii). The words require an assessment of the causal connection between, on the one hand, the end of the Mr Fedec's employment relationship, and on the other hand, the conduct of the respondent. In one sense it is true to say that 'but for' the injury to Mr Fedec on 11 July 2011, there would not have been the Workers' Compensation Claim and 'but for' the position taken by the respondent during negotiations of the claim on 24 March 2014, Mr Fedec would not have resigned. However, it has been recognised that a 'but for' test of causation is inadequate as a comprehensive test of causation (e.g. ***Travel Compensation Fund v Tambree T/As R Tambree and Associates*** [2005] HCA 69 [25]). The better view is to examine the text and context of cl 29(11)(a)(iii) to determine the appropriate causal connection: ***Comcare v Martin*** [2016] HCA 43 [42] - [49] (French CJ, Bell, Gageler, Keane and Nettle JJ). My view is that there are a number of indications in the text and context of cl 29 that suggest the ending of employment following an employee's resignation is not encompassed by cl 29(11)(a)(iii). The ordinary meaning of the text 'by his/her Employer' suggests that the *employer* must have *initiated* a factual step necessary to end the employment relationship. A resignation is *initiated* by an *employee.* This ordinary meaning is reinforced by the content of the other subclauses of cl 29(11)(a) revealing a distinction between employee initiated terminations (pro-rata long service leave available to an employee who is aged 55 who 'resigns': cl 29(a)(ii) [sic]) and employer initiated terminations (pro-rata long service leave available to an employee of 3+ years whose employment ended 'by his/her Employer': cl 29(a)(i) [sic]). The context of cl 29(11)(a)(iii) includes the statutory power of the respondent to terminate employment on the grounds of ill health: s 39 of the *Public*

Sector Management Act 1994 (WA) ('a public service officer called on to retire by an employing authority on the grounds of ill health shall forthwith retire').

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

13 The learned Industrial Magistrate also found that if contrary to his conclusion the appellant's employment was ended by the respondent, it was his view that the appellant's employment was ended on account of his ill health. His Honour rejected the argument put by the respondent that there was a relevant distinction between ending employment 'on account of the settlement of the Workers Compensation Claim' and ending employment 'on account of ill health'. In particular, his Honour found there was evidence of the appellant suffering ill health in the form of 'left-sided low-back pain' as set out in a letter from Dr Brian Galton-Fenzi to RiskCover on 28 November 2013 and evidence given by the appellant that his injury has never abated.

Grounds of appeal

14 The appellant filed a notice of appeal to the Full Bench on the last day prescribed for the filing of an appeal against a decision of the Industrial Magistrate's Court. The notice of appeal was filed on 22 March 2017. It contained one ground of appeal. On 29 March 2017, the appellant made an application to amend the ground of appeal to particularise the ground and outline the relief sought.

15 The ground of appeal as particularised states that the learned Magistrate erred in law, fact, or both, in concluding that the appellant's employment was not ended by the respondent for the purposes of cl 29(11)(a)(iii) of the Industrial Agreement given:

(a) that at [12] of his reasons, the Learned Magistrate found:

i. that the Appellant's position in the negotiations to settle his workers' compensation claim was that he was not willing to resign; and

ii. that the Respondent's position in the negotiations to settle the Appellant's workers' compensation claim was that it required his resignation.

(b) at [18](c) of his reasons, the Learned Magistrate found that '*[i]n one sense it is true to say that "but for" the injury to the [Appellant] on 11 July 2011, there would not have been the Workers' Compensation Claim and "but for" the position taken by the [R]espondent during negotiations of the claim on 24 March 2014, [the Appellant] would not have resigned*'.

The submissions on appeal

16 The appellant points out that the evidence considered by the Industrial Magistrate's Court demonstrates that on 24 March 2014, an agreement was reached to resolve the appellant's workers' compensation claim by way of a lump sum settlement. However, in order to agree to the settlement, the respondent placed a requirement or demand upon the appellant that he resign from his employment. It is argued that the weight of evidence before the Court ought to have led the Industrial Magistrate to conclude that the respondent ended the appellant's employment by forcing the appellant to choose between resigning from his employment, or being denied a choice to accept a lump sum settlement of his workers' compensation claim. That demand upon the appellant, it is said, should be characterised as a demand initiated by the respondent to bring the appellant's employment to an end, or face hardship and uncertainty in finalising the claim. Consequently, it is argued that notwithstanding the appellant agreed to the terms of settlement, his employment was ended by the employer as his resignation was initiated by the employer, as the appellant would not have resigned his employment and only did so upon the request of the respondent to enter into an agreement to settle his workers' compensation claim.

17 Thus, the appellant says he is entitled to the benefit of cl 29(11)(a)(iii) of the Industrial Agreement for the reasons that:

(a) the resignation from employment was initiated at the respondent's request and was a mandatory requirement; and

(b) the ending of the employment contract was directly related to his injury and on account of incapacity due to the result of an accident and/or ill health.

18 At first instance and on appeal, the appellant relies upon the observations made by the Industrial Relations Court of Australia in ***Mohazab v Dick Smith Electronics Pty Ltd (No 2)*** (1995) 62 IR 200 about what was meant by the phase 'termination at the initiative of the employer' in s 170CB of the *Industrial Relations Act 1988* (Cth), the Convention concerning Termination of Employment at the Initiative of the Employer and the Recommendation concerning Termination of Employment at the Initiative of the Employer set out in sch 10 and sch 11 of the *Industrial Relations Act 1988*. An argument is put on behalf of the appellant that the words 'ended by his/her Employer' in cl 29(11)(a)(iii) of the Industrial Agreement have effect or should be construed to have effect the same as the words 'termination at the initiative of the employer' were construed in ***Mohazab*** and applied by the Full Bench of the Australian Industrial Relations Commission in ***O'Meara v Stanley Works Pty Ltd*** [2006] AIRC 496.

19 In ***Mohazab***, the Court said (205 - 206):

> Consistent with the ordinary meaning of the expression in the Convention, a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship. We proceed on the basis that the termination of the employment relationship is what is comprehended by the expression 'termination of employment': *Siagian v Sanel* (1994) 1 IRCR 1 at 19; 54 IR 185 at 201. In many, if not most, situations the act of the employer that terminates the employment

> relationship is not only the act that puts in train the process leading to its termination but is, in substance, the entire process.
>
> …
>
> [I]t is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer but plainly an important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship.

20 The appellant relies upon the following points that were made in ***O'Meara*** [23]:

(a) There must be some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end.

(b) It is not simply a question of whether the act of the employer resulted directly or indirectly in bringing the employment relationship to an end.

(c) In determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such a nature that resignation was the probable result or that the employee had no effective or real choice but to resign.

Interpreting an industrial agreement - general principles of interpretation

21 The approach that is to be applied when interpreting an industrial agreement is well established. This is:

(a) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.

(b) The task of construction of an industrial agreement is to be approached in a way that allows for a generous construction: ***City of Wanneroo v Holmes*** [1989] FCA 369; (1989) 30 IR 362.

(c) Industrial agreements are made for industries in light of the customs and working conditions of each industry and must not be interpreted in a vacuum divorced from industrial realities: ***George A Bond & Co Ltd (in liq) v McKenzie*** [1929] AR (NSW) 498; ***City of Wanneroo v Holmes*** (378 - 379) (French J).

22 The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement. In ***Re Harrison; Ex parte Hames*** [2015] WASC 247, Beech J said [50] - [51]:

> The general principles relevant to the proper construction of instruments are well-known. In summary:
>
> (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
>
> (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
>
> (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
>
> (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
>
> (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
>
> (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); ***Kidd v The State of Western Australia*** [2014] WASC 99 [122]; ***Red Hill Iron Ltd v API Management Pty Ltd*** [2012] WASC 323 [106] - [112]; ***Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd*** [2014] WASCA 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).
>
> These general principles apply in the construction of an industrial agreement (***Director General, Department of Education v United Voice WA*** [2013] WASCA 287 [18] - [20] (Pullin J, Le Miere J agreeing), [83] (Buss J)). The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed (***Amcor Ltd v Construction, Forestry, Mining & Energy Union*** [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ and McHugh J); ***Director General v United Voice*** [81]; see also ***Amcor v CFMEU*** 66 (Kirby J), 129 - 130 (Callinan J)).

23 To these principles, the following observations made by Pullin J in ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2013) 94 WAIG 1 [18] - [19] should be added:

> The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and

object of the transaction: ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 [40]; ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 [22].

Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337, 352; ***McCourt v Cranston*** [2012] WASCA 60 [23].

Proper construction of cl 29(11)(a)(iii) of the Industrial Agreement

24 It is not contended that the operative words in cl 29(11)(a)(iii) are ambiguous or uncertain.

25 Clause 29(1) provides for an entitlement to long service leave which is an entitlement to take long service leave which only accrues after a period of 10 years' continuous service.

26 Clause 29(11)(a) expressly sets out circumstances which, if met, create an entitlement to pro-rata long service leave, not as an entitlement to take leave, but as an entitlement to payment in lieu. The opening operative words in cl 29(11)(a) by the use of the words 'will not be made unless the employee' only create an entitlement to payment where the preconditions set out in cl 29(11)(a)(i), (ii), (iii), (iv), (v) or (vi) are met. Of importance, each of the circumstances set out in those subparagraphs create an entitlement in certain specified circumstances upon the termination of an employee/employer relationship, that is upon cessation of the contract of employment.

27 Also of importance is that:

(a) Clause 29(11)(a)(ii), (iv) and (vi) apply when an employee terminates the employment relationship by resigning. These provisions did not apply to the appellant as the circumstances of the termination of his employment are not capable of fulfilling the preconditions prescribed in those subclauses.

(b) Clause 29(11)(a)(v) has no application to the facts of this matter as that provision only applies where the employee has died, after serving 12 months' continuous service and leaves dependants.

(c) Clause 29(11)(a)(i) and (iii) apply where the employee's employment has been 'ended' by his or her employer. Clause 29(11)(a)(i) has no application to the appellant's circumstances as one of the preconditions to be met by an employee is at least three years' continuous service of employment with the employer.

28 Clause 10(6) requires that notice is to be given by an employee to terminate the contract of employment. Whilst the word 'resign' is not used in cl 10(6), plainly for an employee to 'resign' within the meaning of cl 29(11)(a) requires an employee to give notice as provided for in cl 10(6). Pursuant to cl 10(6)(a), a registered nurse level 1 is required to give two weeks' notice of termination and cl 10(6)(b) requires a registered nurse level 2 and above to give four weeks' notice of termination. However, the express terms of cl 10(6)(a) and (b), by the use of the words 'unless otherwise mutually agreed', authorise the entering into an agreement between the employer and employee to shorten or waive the specified period of notice.

29 We agree that the words 'ended by his/her Employer' in cl 29(11)(a)(iii) require as one of the preconditions to a benefit accruing under the clause the termination of employment of the employee by, or at the initiative of, the employer. However, in circumstances where there has been a 'resignation' of the employee there must arise in substance on the facts a dismissal. This construction emerges from a construction of the whole of cl 29(11)(a) which provides for an entitlement to pro-rata long service leave in certain circumstances. Except in cl 29(11)(a)(v) where an employee dies leaving dependants, the termination must arise by a unilateral act of an employer in cl 29(11)(a)(i) or cl 29(11)(a)(iii) or by an employee (by resignation) in cl 29(11)(a)(ii), cl 29(11)(a)(iv) and cl 29(11)(a)(vi).

30 A court or a tribunal is able to look beyond a resignation to ascertain whether, on grounds of improper conduct, a resignation should be voided and regarded as a constructive dismissal: ***The Attorney General v Western Australian Prison Officers' Union of Workers*** (1995) 75 WAIG 3166, 3169 (Rowland J) (Anderson J agreeing) (***Prison Officers'***). Such a case would include where an employer gives an employee an option of resigning or being dismissed or where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign: ***Auckland Shop Employees Union v Woolworths (NZ) Ltd*** [1985] 2 NZLR 372, 374 (Cooke J); applied in ***Prison Officers'*** (3169).

31 A termination by an employer will also arise where the employee does not fairly consent to the termination of employment: ***Swan Yacht Club (Inc) v Bramwell*** (1997) 78 WAIG 579, 584 (Sharkey P and Scott C); ***Tranchita v Wavemaster International Pty Ltd*** (1999) 79 WAIG 1886, 1893 (Sharkey P).

32 This approach is consistent with the observations made in ***O'Meara*** at [23] which is relied upon by the appellant. In ***O'Meara*** at [23], the Full Bench of the Australian Industrial Relations Commission also made it plain that it approved the explanation of the principles enunciated in ***Mohazab*** in ***Rheinberger v Huxley Marketing Pty Ltd*** (1996) 67 IR 154 and ***ABB Engineering Construction Pty Ltd v Doumit*** (Print N6999, 9 December 1999). In ***Rheinberger***, Moore J at (160) said, after referring to ***Mohazab***:

> [I]t is not sufficient to demonstrate that the employee did not voluntarily leave his or her employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect.

33 In ***Mohazab***, the court noted that in deciding whether a termination of employment was 'at the initiative of the employer', 'it is not only the act that puts in train the process leading to [the] termination but is, in substance, the entire process' (205). It also noted that it is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer (205).

34 There are many circumstances where a resignation is, in reality, a dismissal. However, it is not as simple as determining who initiated the end of the employment. It is also necessary to look at the process that followed to see if, in truth, a resignation was voluntary or the end of the employment was genuinely a mutual decision. There may be circumstances where the employer initiates a termination, but it eventuates that it ultimately occurs by genuine agreement. There may be circumstances where the employee initiates the termination, such as seeking to be made redundant and receives a redundancy payment but in truth it was the employer who brought the employment to an end because circumstances changed after the initiation of the negotiations by the employee.

35 In ***O'Meara*** at [23], the third of the points made by the Full Bench of the Australian Industrial Relations Commission was that 'in determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such a nature that resignation was the probable result or that the [employee] had no effective or real choice but to resign'. It is not simply an analysis of the employer's conduct that is required, but of the process and the events leading to the termination.

36 In ***ABB Engineering***, the Full Bench of the Australian Industrial Relations Commission said (8):

> Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer.

37 In any event, the test the appellant needed to meet in this matter was not who *initiated* the termination but whether the employment was 'ended by [the] employer'. We do not see them as analogous because in the latter case, it does not matter who initiated the termination. However, we recognise that in each case, it is necessary to undertake an objective assessment of the circumstances.

38 Whilst cl 29(11)(a)(iii) may be capable of applying to circumstances other than where an employer has dismissed an employee, from the observations made in ***Auckland Shop Employees Union*** and ***ABB Engineering***, it is clear that for a resignation to constitute a termination of employment, or put another way to constitute the ending of employment by the employer, the finding must be made that an employee has not fairly or genuinely consented to resign.

39 In his reasons for decision at [12], the learned Industrial Magistrate noted that '[o]n the 24 March 2014 Mr Fedec and his solicitor attended a conference in connection with the Workers' Compensation Claim. Negotiations commenced with a view to settlement of that claim … The negotiations ended upon the parties reaching an agreement to settle of the Workers' Compensation Claim. The agreement provided, inter alia, for payment of a lump sum to Mr Fedec and for Mr Fedec to resign with effect from 24 March 2014'.

40 We also note that the documents filed in the Industrial Magistrate's Court demonstrate that the agreement to settle the Workers' Compensation claim and for the appellant to resign was reached in a conciliation conference conducted by WorkCover. The Certificate of Outcome issued under s 182O of the *Workers' Compensation and Injury Management Act 1981* (WA) records that '[t]he parties reached an agreement to redeem this claim', and that '[t]he agreement included a resignation effective from 24 March 2014 subject to the payment of the settlement monies'.

41 During the negotiations for the settlement, the appellant was represented by a lawyer.

42 The circumstances of the resignation of the appellant, in our opinion, are similar to the circumstances considered by the Industrial Appeal Court in ***Durham v Western Australian Government Railways Commission*** (1995) 75 WAIG 3163. The decision in ***Durham*** was delivered on the same day as ***Prison Officers'***, albeit, the Court was, in part, differently constituted. ***Durham*** was a matter that was referred to the Commission as a claim of unfair dismissal. Mr Durham had suffered an injury at work which rendered him medically unfit to work as a train driver. Following negotiations between his solicitor and the State Government Insurance Commission (SGIC), who acted for his employer, and a driver of a car who caused the accident in which Mr Durham was injured, Mr Durham through his solicitors reached agreement to settle a common law claim in damages, including past payments for loss of workers' compensation. Mr Durham had been informed by Westrail prior to entering into the agreement that his employment would be terminated. Consequently, his solicitors sought to negotiate an increase to the settlement sum to take account of future loss of earnings, which increased offer was rejected, but settlement was reached on the original offer put by the SGIC. A resignation was not, however, a condition of settlement, but termination of the employment was found by the Full Bench to be a condition. After the agreement was reached, Mr Durham was told by Westrail that his employment had been terminated when he accepted the settlement. At first instance and on appeal to the Full Bench of the Commission, it was found the termination of Mr Durham's contract was not consensual and the contract was unilaterally terminated because Mr Durham accepted the offer of settlement of his claim. However, Mr Durham's claim failed as the dismissal was found not to be unfair. Mr Durham was unsuccessful in his appeal to the Industrial Appeal Court. Justice Rowland, with whom Parker J agreed, found that the facts as found and not challenged could not lead to a finding of unilateral termination by the employer in circumstances where there were no threats or duress.

43 In this matter, the contents of the note handwritten by the appellant on 24 March 2014, together with the facts of the discussions he had to resolve his workers' compensation claim as set out by him in his witness statement, is evidence of an agreement between him and his employer to mutually terminate his contract of employment by the appellant giving notice to resign effective from 24 March 2014. Such mutual agreement is authorised by cl 10(6) of the Industrial Agreement.

44 While the learned Industrial Magistrate noted at [12] of his reasons that the appellant's position in the negotiations was that he was not willing to resign, and the respondent's position in the negotiations was that it required his resignation, his Honour also recorded that ultimately the parties reached agreement. That agreement resulted in the respondent paying the appellant the settlement sum and he resigned. The appellant had a choice, and it was a real choice. He could retain his employment but not settle his workers' compensation claim. He made an informed choice on advice.

45 In that sense, he negotiated a resolution that required a compromise on his part. This is not unusual in negotiations. In fact, it is the norm in attempting to resolve a dispute, that parties compromise. It does not mean that they are entirely happy with the outcome, but they weigh up the alternatives and make a choice. The appellant was not without options.

46 In these circumstances, it is difficult to conclude that the appellant's resignation was other than part of a settlement he entered into for his own benefit. He may not have wished to resign, but he had a choice, one he exercised, apparently on advice. In that sense, the employment was not ended by the employer but was by mutual agreement.

47 Whilst the appellant may not have been content to resign, it appears clear, as the learned Industrial Magistrate found, that he:

(a) did so freely; and

(b) accepted the offer and, pursuant to the terms of settlement, he resigned.

48 A mutual agreement reached between the appellant and the respondent, pursuant to the terms of a settlement agreement of a workers' compensation claim, whereby a term of that agreement was that the employment of the appellant was to be terminated, cannot be construed as 'employment ended by his or her employer' within the meaning of cl 29(11)(a)(iii) of the Industrial Agreement. In these circumstances, the facts before the learned Industrial Magistrate established that the employment of the appellant was ended by mutual agreement which was effected by a resignation by him.

49 In this matter, the acceptance of the terms of the settlement by the appellant, including the condition that he resign effective from the date of the settlement, was clearly consensual and cannot be characterised as an agreement that was involuntary. The appellant achieved part of his purpose and the respondent achieved part of its purpose. Merely because the employer's purpose included a settlement sum in exchange for the resignation does not mean that the employment was ended by the employer.

50 In these circumstances, it could not be found that the appellant's employment was ended by his employer within the meaning of cl 29(11)(a)(iii) of the Industrial Agreement.

51 Whilst the ending of the appellant's employment can be said to be directly related to his injury and on account of incapacity due to an accident or ill health, it does not follow that the appellant has established that his employment ended by his employer on account of incapacity due to old age, ill health or accident within the meaning of cl 29(11)(a)(iii). The particular of ground (b) of the appeal claims that 'at [18](c) of his reasons, the Learned Magistrate found that "[i]n one sense it is true to say that 'but for' the injury to the [Appellant] on 11 July 2011, there would not have been the Workers' Compensation Claim and 'but for' the position taken by the [R]espondent during negotiations of the claim on 24 March 2014, [the Appellant] would not have resigned".' However, in setting out this quote, the appellant has not proceeded to complete the learned Magistrate's comment. His Honour went on to note that '[h]owever, it has been recognised that a "but for" test of causation is inadequate as a comprehensive test of causation', and his Honour refers to a High Court authority. He went on to conclude that '[t]he better view is to examine the text and context of cl 29(11)(a)(iii) to determine the appropriate causal connection: ***Comcare v Martin*** [2016] HCA 43 [42] – [49] (French CJ, Bell, Gageler, Keane and Nettle JJ).' Therefore, this particular of the ground of appeal is misconceived.

52 Whilst we agree with the observation made by the learned Industrial Magistrate in [18](d) of his reasons for decision that the text and context of cl 29(11)(a)(iii) of the Industrial Agreement by the use of the words 'by his/her employer' suggests that the termination of employment must be initiated by the employer, whereas a resignation is initiated by the employee, we do not agree the context of cl 29(11)(a)(iii) includes the statutory power to terminate pursuant to s 39 of the *Public Sector Management Act 1994* (WA) (the PSM Act). Section 39 of the PSM Act provides:

(1) A public service officer may retire, or an employing authority may call on a public service officer to retire, from the Public Service on the grounds of ill health.

(2) A public service officer who is called on to retire from the Public Service under subsection (1) shall forthwith so retire.

53 A public service officer as defined in s 3 of the PSM Act is an executive officer, permanent officer or term officer employed in the Public Service under pt 3 of the PSM Act. The appellant was not employed under pt 3 of the PSM Act. He was engaged as an employee by the respondent as the Minister responsible for the administration of the *Prisons Act 1981* (WA), under s 6(5) of the *Prisons Act* and pursuant to cl 4 of the Industrial Agreement. Consequently, s 39 of the PSM Act has no application to cl 29(11)(a)(iii) of the Industrial Agreement. However, this error of law is not, in our opinion, material.

54 For these reasons, we are of the opinion that the appeal should be dismissed.

55 We do not, however, agree that an order should be made to award costs to the respondent, as we do not agree that the appeal has been frivolously or vexatiously instituted. Whilst the appellant's argument has not succeeded, given that the event that triggered the appellant's resignation was related to his injury, the appellant's argument cannot be said to be so obviously untenable or so fundamentally flawed so as to be frivolous.

EMMANUEL C:

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

2017 WAIRC 00829

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARTIN FEDEC
	APPELLANT
	-and-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 19 SEPTEMBER 2017
FILE NO.	FBA 6 OF 2017
CITATION NO.	2017 WAIRC 00829

Result	Appeal dismissed
Appearances	
Appellant	Mr A M Stewart (of counsel)
Respondent	Mr J M Carroll (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 21 August 2017, and having heard Mr A M Stewart (of counsel) on behalf of the appellant and Mr J M Carroll (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 19 September 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.]

INDUSTRIAL MAGISTRATE—Claims before—

2017 WAIRC 00834

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2017 WAIRC 00834
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	THURSDAY, 29 JUNE 2017
DELIVERED	**:**	FRIDAY, 22 SEPTEMBER 2017
FILE NO.	**:**	M 95 OF 2016
BETWEEN	**:**	JODIE CHERYL PANNELL
		CLAIMANT
		AND
		DR WILLIAM DAVID PANNELL
		RESPONDENT

CatchWords	**:**	Application by respondent for summary judgment – Whether there is a real issue of fact or law to be tried – Release and discharge given to a party in family law proceedings – Claim under *Minimum Conditions of Employment Act 1993* (WA) and *Long Service Leave Act 1958* (WA) against same party
Legislation	**:**	*Minimum Conditions of Employment Act 1993* (WA) *Long Service Leave Act 1958* (WA) Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)
Case(s) referred to in reasons	**:**	***SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd*** [2011] WASCA 138 ***Gadens Lawyers v Beba Enterprises Pty Ltd*** [2012] VSC 519 ***Scaffidi v Perpetual Trustees Victoria Ltd*** [2011] WASCA 159 ***Butler v Saint John of God Healthcare Inc*** [2008] WSCA 174 ***Shire of Toodyay v Merrick*** [2016] WASC 29 ***Richard James Quinlivan v Austral Ships Pty Ltd*** [2003] WAIRComm 9633 ***United Voice v Minister for Health*** [2012] WAIRComm 319 ***Casella v Hewitt*** [2008] WASCA 13 ***SAS Global Forrestdale Pty Ltd v Towton Investments Pty Ltd*** [2010] WASC 167 ***Eighty Second Agenda Pty Ltd v Hamburg*** [2015] FCA 11136 ***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7 ***Grant v John Grant and Sons Pty Ltd*** [1954] HCA 23 ***Barnes v Forty Two International Pty Ltd*** [2014] FCAFC 152 ***Ridgepoint Corporation Pty Ltd v Perth Airport Pty Ltd*** [2014] WASCA 235 ***Dean v Cumberland Newspaper Group*** [2003] FMCA 561
Result	**:**	Summary judgment for the respondent
Representation:		
Claimant	**:**	Mr D. Howlett (counsel) instructed by Croftbridge
Respondent	**:**	Mr T. Carmady (counsel) instructed by William + Hughes

REASONS FOR DECISION

Introduction

1 The claimant in this case, Ms Jodie Pannell ('Jodie') married Mr Daniel Pannell ('Daniel') on 8 January 1994. Commencing in 1993, Jodie and Daniel worked in a winery business operated from 14545 Vasse Highway, Pemberton ('the Pemberton Property'). The owner of the Pemberton Property was Daniel's father, Dr William Pannell ('Bill'), the respondent in this case. Bill is married to Sandra Pannell ('Sandra'). Jodie and Daniel lived together at the Pemberton Property from the mid 1990's until, on 24 November 2012, Jodie moved out of that property. By this date her relationship with Daniel had ended. In this case, there is a dispute about the identity of Jodie's employer while she worked in the winery business. Jodie alleges that her employer was Bill. He says that, commencing in 2000, Jodie was employed by a partnership of two partners: himself and Picardy Pty Ltd ('the Company').

2 This case was commenced by Jodie filing an originating claim on 8 July 2016 in which she makes a claim for $76,170.05 arising from her employment by Bill in the winery business between 1 November 1996 and 10 February 2013 ('the Employment Law Proceedings'). The claim is for unpaid annual leave of $62,602.84 as provided under the *Minimum Conditions of Employment Act 1993* (WA) ('MCE Act') and for unpaid long service leave of $13,567.21 as provided for under the *Long Service Leave Act 1958* (WA) ('LSL Act'). Jodie also seeks orders for the imposition of penalties for contravention of those statutes. Bill defends the Employment Law Proceedings on several alternative grounds. One of those grounds, that Jodie signed a settlement deed in September 2013 releasing Bill from claims including claims that she now brings in the Employment Law Proceedings, is the basis for Bill's application for summary judgment.

3 The principles to be applied in determining this application for summary judgment are not in dispute. The Industrial Magistrates Court has jurisdiction to determine proceedings upon an application of a party for summary judgment. It is an implied power of the court (***Richard James Quinlivan v Austral Ships Pty Ltd*** [2003] WAIRComm 9633 [31]) or it is an incident of the specific powers conferred on the court by regulation 5 of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA) to make orders for the efficient, economical and expeditious dealing with cases: ***United Voice v Minister for Health*** [2012] WAIRComm 319 [20] – [22] (Smith AP); [100] (Kenner C). It is for Bill to persuade the court that there is no issue to be tried. Although there is an evidentiary burden on Jodie to show a valid claim, the overall legal burden is upon Bill. His application for summary judgement will not be granted unless I am satisfied that this case is 'one of the clearest of cases, when there is (such) a high degree of certainty about the ultimate outcome of the proceedings if it went to trial, that summary judgment (dismissing the case) ought properly be granted': ***SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd*** [2011] WASCA 138 [20]. If the 'ultimate outcome' of the case may be effected by unresolved questions of fact

or difficult questions of law or any other factor including the filling of the current 'evidential vacuum' then the application will be dismissed: ***SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd*** at [20] – [25]. The power to order summary judgment must be exercised with great care: ***Casella v Hewitt*** [2008] WASCA 13 [36] (McLure JA).

4 The principles to be applied when interpreting a settlement deed are also not in dispute. The effect of the deed is to be determined by what a reasonable bystander would have understood the deed to mean. This will require consideration of the language used by the parties in the deed against the background of the dispute which the parties were endeavouring to resolve: ***Eighty Second Agenda Pty Ltd v Hamburg*** [2015] FCA 11136, [43] (Middleton J). The general words of any release must be viewed in the context of 'the state of knowledge of the parties concerning the existence, character and extent of the liability in question and the actual intention of the releaser' to determine whether it would be unconscientious to allow those general words to be relied upon by Bill: ***Butler v Saint John of God Healthcare Inc*** [2008] WASCA 174 [3] – [6] (Buss JA), [30] – [32] (Newnes AJA) (McLure JA agreed with both Buss JA & Newnes AJA); ***Ridgepoint Corporation Pty Ltd v Perth Airport Pty Ltd*** [2014] WASCA 235 [55] (McLure P, Newnes & Murphy JJA agreeing); ***Shire of Toodyay v Merrick*** [2016] WASC 29.

5 The origin of the settlement deed is in proceedings in the Family Court of Western Australia. On 8 May 2013, Jodie commenced property proceedings in that court against Daniel, Bill and Sandra ('the Family Law Proceedings'). Jodie applied for orders that she be granted: unencumbered title to a unit in Nedlands by transfer from Daniel; a partial joint interest (with Daniel) in the Pemberton Property by transfer from Bill; and shares in the Company (jointly with Daniel) by transfer from Bill, Sandra and Daniel. The particulars of claim filed by Jodie in the Family Law Proceedings alleged that she had engaged in work at the Pemberton Property without being paid 'commercial wages' or 'long service leave, holiday pay or superannuation entitlements commensurate with the work performed' on the strength of a promise by Bill and Sandra that, if she did that work, she would be granted the property interests she claimed. The Family Law Proceedings ended when consent orders were made in September 2013 reflecting a 'deed of settlement and release' ('the Settlement Deed' or 'the SD') executed by Bill, Sandra, Daniel, Jodie and the Company. The Settlement Deed includes the following clause ('Jodie's Release Clause'):

> ***6.1 Release by Jodie***
>
> …
>
> *Jodie releases and discharges William, Sandra, Daniel, the Company and the Partnership from any claim, action, demand, suit or proceeding for damages, debt, restitution, equitable compensation, account, injunction, specific performance or other remedy that Jodie has, or might have but for this Deed, in respect of the claims made by Jodie in the Proceedings, arising out of her employment by the Partnership and her appointment as a director of the Company, whether arising at common law, in equity or under statute or otherwise.*

6 Jodie's claims against Bill in the Employment Law Proceedings, unarguably, arise under statute (i.e. the MCE Act and the LSL Act) and, unarguably, are claims that fall within the description of claims for an 'other remedy' being claims for payments and penalties as provided in those statutes. Bill's application for summary dismissal of Jodie's claim will not be granted unless I have the requisite degree of certainty that Jodie's claim against Bill in the Employment Law Proceedings is a claim that falls within either of the following descriptions (adopting the language of Jodie's Release Clause):

- In respect of claims made by Jodie in the Family Law Proceedings ('the Family Law Claim Issue'); or
- Arising out of her employment by a partnership comprised of Bill and the Company ('the Partnership Issue').

The resolution of the Family Law Claim Issue and the Partnership Issue requires an understanding of the background to the Settlement Deed (undertaken immediately below) before consideration of each of those issues.

Background to the Settlement Deed

7 The content of the Family Law Proceedings is evident from the following documents filed in those proceedings (and included in the material filed in this application for summary judgment): Jodie's Form 1 Initiating Application filed 8 May 2013 ('Form 1'); Jodie's affidavit of 6 May 2013 ('Jodie's FL Affidavit'); and Jodie's Particulars of Claim' filed 11 June 2013. It will also be necessary to refer to Jodie's evidence about the Family Law Proceedings, contained in her affidavit of 2 June 2017 and filed in this application ('Jodie's EL affidavit').

8 Jodie commenced receiving legal advice about family law matters in December 2012 and continued to be represented by the same firm throughout the Family Law Proceedings. The parties to the Family Law Proceedings were Jodie (as the applicant), Daniel (as the first respondent) and 'William and Sandra Pannell' (as the second respondent). Bill and Sandra are 'grouped' as a second respondent.

9 Interim orders sought against Daniel included orders for urgent access to funds for property settlement or interim spousal maintenance or interim child support departure and orders for disclosure. The disclosure requested included: financial records of the Company 'and the partnership known as Picardy and any other company, trust or partnership in which' Daniel had an interest; and 'the partnership agreement' in relation to the companies in which Daniel had an interest including Picardy Pty Ltd. The final orders sought against Daniel included orders for: the transfer of his interest in a unit in Nedlands to Jodie; spousal maintenance quantified following valuation evidence on the value of the Pemberton Property and the Company; and other orders relating to child support.

10 The interim orders sought against Bill and Sandra were orders for disclosure only. The disclosure requested included: financial records of the Company; communications with a bank regarding the Pemberton Property, the Company and the winery business. The final orders sought against Bill and Sandra concern the Pemberton Property and shares in the Company. Jodie sought final orders that: Bill and Sandra transfer to her and Daniel a 75% interest in the Pemberton Property or, in the alternative, a declaration that Bill and Sandra holds on trust for Daniel and her a 75% interest in the Pemberton Property; Bill and Sandra transfer to Daniel and her 375 shares in the Company, or in the alternative, a declaration that Bill and Sandra holds on trust for Daniel and her, 375 shares in the Company.

11 In support of her application for the final orders sought against Bill and Sandra, Jodie particularised representations made by Bill and Sandra to herself and Daniel promising an interest in the Pemberton Property and the winery business in exchange for moving to the Pemberton Property and working in the winery business. The representations and consequent conduct of Jodie and Daniel were said to found: a cause of action in estoppel; the creation of a constructive trust; and a cause of action in restitution. The conduct of Jodie and Daniel, said to be in reliance upon the representations, was particularised by Jodie. They moved to the Pemberton Property. They worked in the winery business. They were 'paid less than commercial wages for the work conducted' (Jodie's Particulars of Claim at paragraphs 38, 59 and 62). They were not 'paid long service leave, holiday pay or superannuation entitlements, commensurate with the work performed' (Jodie's Particulars of Claim at 38(h)). Jodie organised the employment and payment of staff of the winery business (Jodie's Particulars of Claim at 40(h)). Jodie's evidence in support of these particularised allegations is contained in Jodie's FL Affidavit (especially at paragraphs 41, 45 – 56 and 60). Jodie notes her agreement 'to work for a nominal salary' and to her earning a 'modest income' and states that on two occasions Bill and Sandra were presented with a calculation of 'proper wages that should have been earned compared to what was actually paid'.

12 The material filed by Jodie in the Family Law Proceeding does not identity the legal entity that is said to be her employer while working in the winery business. The material refers to various entities involved in the operation of the winery business. Jodie refers to the Company, including the circumstances leading to her own directorship and to the shareholding of Bill, Sandra and Daniel. She refers to a partnership between Bill ('as the owner of the Pemberton Property') and the Company ('as the owner of plant and other non-fixed assets') (see Jodie's FL Affidavit at 39). She produces financial statements of the Company and, separately, financial statements of a partnership of Bill and the Company. This material is consistent with Jodie having an awareness of the existence of and the conceptual distinction between the Company and a partnership comprising Bill and the Company. Jodie also refers to role of Bill, Sandra, Daniel and herself in the winery business. There are numerous references to 'Picardy' in material filed by Jodie in the Family Law Proceeding when describing the operation of the winery business. In some instances, the context of the reference makes the precise identity of 'Picardy' to be clear. For example, the reference to 'Picardy' in paragraph 7 of Jodie's FL Affidavit, in context, is a reference to the Pemberton Property. However, the context does not always reveal whether a reference to 'Picardy' is a reference to the Pemberton Property or to the Company or to a partnership name or to a business name or is being used as a convenient label for a known entity (e.g. Bill) or collection of entities (e.g. Bill and Sandra) or an unknown entity or collection of entities that are involved in the operation of the winery business. For example, in paragraph 14 of Jodie's FL Affidavit, she speaks of 'working full time with Picardy' from 1996 until 2013 and in paragraph 40 of Jodie's Particulars of Claim is a long list of what her 'work for Picardy included'. It is unclear from the context of these paragraphs whether the reference to Picardy is a reference to the Company or some other entity or is a convenient label for an unknown entity. A further relevant example of ambiguity appears in paragraph 17 of Jodie's FL Affidavit, where she speaks of declining to resign as a director of 'Picardy' which, in context, is a reference to the Company. In the following sentence, Jodie states that, 'I resigned from my employment from Picardy … in January 2013'. Again, it is unclear from the context whether she is speaking of having resigned as an employee of the Company or resigned as an employee of some other unidentified entity.

13 Jodie signed a Minute of Consent Orders and the Settlement Deed in September 2013. By clause 5 of the Settlement Deed the parties must take all steps necessary to procure the making of orders which are annexed to the Settlement Deed. The annexure is in an identical form to the minute of consent orders pronounced by the court on 23 September 2013. Jodie does not allege any oral or written communications around the time of signing that are relevant to the construction of the deed, see Jodie's EL Affidavit at paragraph 119.

14 The recitals of the minute of consent orders note that Daniel, Jodie, Bill and Sandra, having attended a mediation in July 2013 and 'reached an agreement in resolution of *all financial* matters' (my emphasis), have signed the Settlement Deed. The recitals also record that the parties intend that the Orders 'as far as practicable *end the financial relationships between them and avoid further proceedings between them* (my emphasis). The consent orders provide for Daniel to transfer his interest in a unit in Nedlands to Jodie. Daniel indemnifies Jodie for claims arising 'in any way in respect of Picardy Pty Ltd' and 'Picardy the partnership' due to 'Jodie having been an employee, director, office holder of the Company or the partnership'.

15 The recitals of the Settlement Deed include reference to: Bill and the Company carrying on the business of wine-making in partnership under the name of 'Picardy' and to Daniel and Jodie being 'in the process of resolving financial matters'.

16 The Settlement Deed provides for the transfer of a unit in Nedlands from Daniel to Jodie (Clauses 2,3,4,5) as contemplated by the consent orders. Clauses 6 and 7 of the SD contain respectively 'mutual releases' and a 'plea in bar'. These terms are discussed in the following paragraph. Clauses 8, 9, 10, 11, 12 and 13 concern respectively, confidentiality, costs, notices, governing law, variation and counterparts in unexceptional terms.

17 The parties to the deed 'release and discharge each other' (clause 6.1, 6.2, 6.3) and 'covenant not to claim, sue or take any action' against each other (clause 6.4, 6.5, 6.6) and acknowledge that each party may 'plead the deed in bar to any claim for proceedings for the other party' (clause 7). The distinction between a 'release and discharge', a 'covenant not to sue' and a 'plea in bar' is discussed by the Court of Appeal in ***Scaffidi v Perpetual Trustees Victoria Ltd*** [2011] WASCA 159 [14] – [25] (Newnes JA, Murphy JA and Mazza JA). For present purposes, it is sufficient to state that the distinction between those clauses is of no legal significance in the current proceedings where the 'release and discharge' is by deed under seal and where, if Jodie's claim was found to be a joint debt (as asserted by Bill and specifically denied by Jodie), the Deed of Release identifies each and every 'potential' joint debtor. In short there is no significance to the distinction between a release and discharge, covenant not to sue and a plea in bar that requires separate consideration of those concepts. Clause 7 provides that each party acknowledges that each other party is entitled to enforce the deed directly and plead the deed in bar to any claim by the other party in relation to matters released under clause 6; the Settlement Deed is a settlement by 'accord and satisfaction' (***Gadens Lawyers v Beba Enterprises Pty Ltd*** [2012] VSC 519 [35] (Emerton J)).

Family Law Claim Issue

18 In the introduction to these reasons, I noted that Bill's application for summary dismissal of Jodie's claim will not be granted unless I have the requisite degree of certainty that her claims for unpaid annual leave under the MCE Act and unpaid long service leave under the LSL Act are, adopting the language of Jodie's Release Clause, 'in respect of claims and made by Jodie in the Family Law Proceedings'. For the reasons set out below, my view is that a reasonable bystander would understand the reference to 'the claims made by Jodie in the Family Law Proceedings' to include allegations by Jodie in the Family Law Proceedings of financial entitlements which are relevant to the orders sought by her in those proceedings. Jodie's allegations in the Family Law Proceedings of a forgone entitlement to 'paid long service leave, holiday pay or superannuation entitlements, commensurate with the work performed' was relevant to her claim for orders based upon estoppel or a constructive trust or restitution. The effect of Jodie's Release Clause is to release and discharge Bill from the same claims made in the Employment Law Proceedings.

19 The ordinary meaning of the word 'claims' in the phrase 'claims made by Jodie in the Family Law Proceedings' would include allegations of fact or law by Jodie in the Family Law Proceedings that were relevant to the orders sought by her in those proceedings. Jodie's allegation in the Family Law Proceedings of a forgone entitlement to long service leave and holiday pay is an allegation of both fact *and* law. It is an allegation of the existence of (unidentified) *legal* criteria for an entitlement to each of long service leave and holiday pay. It is also an allegation of *fact* i.e. that Jodie has satisfied that legal criteria.

20 An alternative construction, urged by Jodie's counsel, is to confine the word 'claims' in the phrase 'claims made by Jodie in the Family Law Proceedings' to causes of action alleged in those proceedings (i.e. estoppel, constructive trust and restitution) or to a remedy identified in the Family Law Proceedings. On this view, Jodie's Release Clause has no application to the claims made in the Employment Law Proceedings because she made no claim for payment of long service leave or for payment of holiday pay in the Family Law Proceedings. This construction ignores the use of the word 'claims' in contrast with the phrase 'claim, action, demand etc.' in the same sentence of Jodie's Release Clause. The contradistinction suggests that 'claims' is intended to be given a broader meaning than 'claim, action, demand' etc. A broader meaning would encompass allegations by Jodie of financial entitlements relevant to the orders sought in the Family Law Proceedings. The result is to release and discharge Bill, notwithstanding three further matters relied upon by Jodie. First, Jodie notes that mention is not made of the MCE Act or the LSL Act in the Family Law Proceedings. Secondly, Jodie observes that the Family Court of WA may not have had the power to make orders pursuant to the MCE Act or the LSL Act. Thirdly, Jodie states that she has never received any payment from Bill that is referrable to any entitlement under those statutes. The short answer to these points is that parties are free to settle a dispute on any terms that are agreed upon, including on terms that go beyond the ambit of the forum of their current dispute. For example, a deed of release by parties in workers' compensation proceedings may release a party from future claims under discrimination legislation: ***Dean v Cumberland Newspaper Group*** [2003] FMCA 561; see also ***Butler v Saint John of God Healthcare Inc*** [2008] WASCA 174. In the end, it is for the parties to determine the ambit of the settlement. In this case, Jodie's Release Clause reflects an intention to release and discharge Bill from claims that Jodie has subsequently made in the Employment Law Proceedings. Similarly, insofar as the MCE Act and LSL Act each have formal requirements for 'contracting out' and the Settlement Deed does not satisfy those requirements, there is nothing in those statutes to suggest that parties to a dispute are not free to settle the dispute by means of an agreement that does not comply with those formal requirements.

21 The construction argued by Jodie would also pay insufficient weight to the additional phrase 'in respect of' that appears in the clause, 'in respect of the claims made by Jodie in the Family Law Proceedings'. In ***Butler v Saint John of God Healthcare Inc*** [2008] WASCA 174, in the context of construction of a deed of settlement, the Court of Appeal considered the phrase 'in respect of' to be of 'wide connotation' and to 'have the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer' (Newnes AJA at [37], [38]). The 'wide connotation' is consistent with the parties' desire to end current litigation and avoid future litigation in a context where the current litigation had not reached the stage of clarifying the parties' positions on matters such as those discussed in paragraph 12 above.

22 Finally, the construction argued by Jodie also overlooks the objective of the parties to the Family Law Proceedings in executing the Settlement Deed in so far as the recitals to the deed and the Minute of Consent Orders make express reference to an unqualified desire of the parties to cease any *financial* connection. Jodie's allegation of work by her on the Pemberton Property for less than her full entitlements, in reliance upon certain promises made by Bill, revealed a *financial* connection between her and Bill. It loomed as a significant and complex issue in the Family Law Proceedings. The recitals are consistent with the parties having reached an agreement not to have to ever re-visit any aspect of that connection, including allegations relating to employment entitlements. The effect of the words of Jodie's Release Clause, as I construe their meaning, are consistent with the same objective.

23 In the introduction to these reasons I noted that general words of Jodie's Release Clause must be assessed in the context of 'the state of knowledge of the parties concerning the existence, character and extent of the liability in question and the actual intention of the releaser' to determine whether it would be unconscientious to allow those general words to be relied upon by Bill. Jodie's evidence was that it was not until early 2014 that she became aware that 'she should have been paid her accrued annual leave and long service leave when her employment ended' (Jodie's EL affidavit at paragraph 180). In light of the references to unpaid long service leave and holiday pay in Jodie's Particulars of Claim filed on 11 June 2013 (at paragraph 38(h)), I infer that it was not until early 2014 that Jodie became aware of her *precise* entitlements under the MCE Act and the LSL Act. In circumstances where Jodie was legally represented in the Family Law Proceedings and where unpaid long service leave and unpaid holiday pay were specifically adverted to in the Family Law Proceedings, my view is that it would not be unconscientious to construe Jodie's Release Clause in the manner set out above.

24 The content of the Minute of Consent Orders, particularly clause 8, tends to confirm the intention of the parties to cease any further claims against each other arising from all aspects of the winery business. Clause 8 provides that Jodie transfer and assign to Daniel all and any monies owed to her by the Company and by a partnership comprising Bill and the Company. On

its face, clause 8 is sufficiently broad to be construed as an assignment by Jodie to Daniel of monies owed to her by a partnership of Bill and the Company, including employment entitlements. It is not necessary to make a finding on whether the clause would operate to assign to Daniel monies owed to Jodie by Bill when he is not in partnership with the Company or to make a finding on the effectiveness of the purported assignment. It is sufficient for present purposes to refer to the existence of clause 8 as evidence of the intention of the parties to cease any further claims against each other in connection with the winery business.

The Partnership Issue

25 In the introduction to these reasons I noted that Bill's application for summary dismissal of Jodie's claim will not be granted unless I have the requisite degree of certainty that her claims in the Employment Law Proceedings, adopting the language of Jodie's Release Clause, arise out of her employment by a partnership comprised of Bill and the Company. Jodie's case in the Employment Law Proceedings is that she was at all relevant times employed by Bill and not by a partnership of Bill and the Company. Bill's case in the Employment Law Proceedings is that Jodie was employed by Bill until March 2000 and thereafter by a partnership of Bill and the Company. Jodie contends that the identity of her employer is an issue that is properly resolved at trial. I agree.

26 I have noted above that, in the Family Law Proceedings, Jodie did not identify the legal entity that is said to be her employer while working in the winery business. In his Submissions in Support of Respondent's Application for Summary Judgment, Bill draws attention to a number of documents suggesting a partnership of Bill and the Company was Jodie's employer and, further, suggesting that Jodie was aware of this fact, including: financial statements (23.7, 23.23), payslips (23.8), payroll advice (23.9), ATO records (23.10 – 23.12), documents filed in the Family Law Proceedings (23.13 – 23.14), communications by Jodie with various entities including Government Agencies (23.15 – 23.16, 23.22) and banks (23.17, 23.19, 23.20 – 23.21). Jodie's response is to deny the existence of any agreement concerning her employment by any partnership (Jodie's EL Affidavit at 129 – 132) and to explain documents suggesting her employment by a partnership of Bill and the Company on the basis that third parties created those documents and that she has not, expressly or by implication, ever accepted their content (e.g. Jodie's EL Affidavit at 186).

27 On any view, Bill's case involves proof of either an express oral employment agreement made in March 2000 (or thereafter) between Jodie and a partnership or proof of an agreement, by implication, from the conduct of Jodie and a partnership around March 2000 and thereafter. In the absence of a written contract of employment between Jodie and a partnership it is impossible for this court, on a summary judgment application, to make a finding on the identity of Jodie's employer without the benefit of evidence to fill the 'evidential vacuum' on significant events in March 2000. It may be accepted that post contractual conduct may be admissible to resolving questions as to identity of Jodie's employer. It may also be accepted that there is evidence of Jodie's awareness of the existence of a partnership between Bill and the Company (Jodie's FL Affidavit at paragraph 39). However, Jodie's knowledge of the existence of a partnership is not *compelling* evidence that the partnership is as her employer.

Conclusion

28 In the end result, Bill's application for summary dismissal of Jodie's claim will be granted because I am satisfied that there is such a high degree of certainty about the ultimate outcome of the proceedings if it went to trial that it is appropriate to summarily terminate the claim. There are no factual disputes or substantial questions of law involved in my conclusion that claims made by Jodie in the Family Law Proceedings which are the subject of Jodie's Release Clause include her claims made in the Employment Law Proceedings. However, I do not accept Bill's alternative argument for summary dismissal, that Jodie's employer, unarguably, was a partnership of himself and the Company. If the claim were not summarily dismissed, the identity of Jodie's employer would be an issue for trial.

M FLYNN
INDUSTRIAL MAGISTRATE

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2017 WAIRC 00805

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00805
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 10 JULY 2017
DELIVERED	**:**	FRIDAY, 15 SEPTEMBER 2017
FILE NO.	**:**	APPL 109 OF 2015
BETWEEN	**:**	SHANE MICHAEL FERGUSON Appellant AND THE COMMISSIONER OF POLICE Respondent

CatchWords	:	Industrial Law (WA) - Removal of police officer - Loss of confidence by Commissioner of Police - Impracticability for it to be taken that the appellant's removal from office is and has always been of no effect - Compensation for loss for costs of mitigation - Compensation for loss or injury caused by removal from office - No particular compensation for injury to police officers generally - question of injury as a result of a fall from garce, humiliation or reputational damage
Legislation	:	*Industrial Relations Act 1979 (WA)* - s 23A, s 23A(6) *Police Act 1892 (WA)* - s 33M, s 33Q(4), s 33U(2), s 33U(3), s 33U(4), s 33U(5), s 33U(6) *Police Force Regulations 1997 (WA)* - reg 92
Result	:	Compensation ordered
Representation:		
Counsel:		
Appellant	:	Ms K Vernon
Respondent	:	Mr N John
Solicitors:		
Appellant	:	Tindall Gask Bentley Lawyers
Respondent	:	State Solicitor's Office

Reasons for Decision

SCOTT CC

1 I have had the benefit of reading the draft reasons for decision of Matthews C. I respectfully agree with his reasons and conclusion that it is impracticable for it to be taken that Mr Ferguson's removal is and has always been of no effect.

Compensation for loss or injury caused by the removal

Loss of income

2 I also agree with Matthews C that in the calculation of loss caused by the removal, the difference between Mr Ferguson's income as a police officer and his subsequent income constitutes a loss of $5,241.00, and I would award that amount.

Business establishment costs

3 The question is what constitutes the loss that Mr Ferguson has suffered by setting up his business?

4 He expended resources to establish that business and to earn an income. Where the funds came from to meet that expenditure, whether from savings, loans or other resources, does not matter.

5 Mr Ferguson's expenditure in setting up the business include firstly, accounting fees, advertising, bank fees, cleaning, telephone accounts, repairs and maintenance, and insurance. Secondly, he undertook training to update his skills to enable him to work. Thirdly, Mr Ferguson purchased a number of physical assets being a vehicle, Telstra testing equipment and safety equipment.

6 As to the first group of expenses, there is no suggestion that these costs were not reasonably incurred and the amounts themselves unreasonable.

7 As to the training costs, *Tucker v Westfield Design and Construction Pty Ltd* [1993] FCA 176; (1993) 46 FCR 20; 123 ALR 278 is authority for the proposition that the costs incurred in completing a university degree are reasonably incurred, and a university degree is not a capital asset. Therefore, Mr Ferguson's expenditure on training is reasonably incurred.

8 The third group is made up of the vehicle, the Telstra testing equipment and the safety equipment, at a cost of around $10,000. The original purchase price of the vehicle according to Mr Ferguson's affidavit of 12 July 2017, SMF-3, was $7,166; an AAA Tester at $3,246 and a TMG Lines Test and Fault at $1,545. This totals $11,957, and had a depreciated value of $10,163 at the end of the 2015 financial year.

9 Mr Ferguson used these assets for the operation of the business. However, from 2 May 2016, Mr Ferguson took up employment. He says he kept the business 'current as a business for tax purposes, until being de-registered on 30 June 2017' (Affidavit of Mr Ferguson, 30 June 2017 at [49]).

10 According to Mr Ferguson's affidavit of 12 July 2017, these items are to be 'assessed, sold or transferred on a case by case basis for the purposes of the 2016-2017 tax year.'

11 The authorities dealing with mitigation costs cover a wide range of circumstances and areas of law. The principle set out in *Fox v Wood* (1981) 148 CLR 438 relates to unrecovered costs for a worker to access workers' compensation to mitigate the loss she would suffer from being deprived of income. It is a personal injuries case. Ms Wood was injured in a motor vehicle accident by Fox. Brennan J found that Ms Wood was entitled to the transactional cost of accessing a workers' compensation scheme to 'mitigate the loss which [she] would otherwise suffer by being deprived of [her] earning capacity. By applying for and accepting regular workers' compensation payments, [she] can avoid in part or in whole loss which would otherwise have followed upon the cessation of [her] wages or salary' ((1981) 148 CLR 438, 447). Under the workers' compensation regime, Ms Wood was entitled to $9,222 gross of tax. However, she received the payments net of tax. Under the legislation, once she

received compensation from the tortfeasor (Fox), Ms Wood had to reimburse her employer the whole of the $9,222. Accessing the workers' compensation scheme to mitigate potential loss incurred the out of pocket sum representing the tax deducted from the payment of workers' compensation: $1,844.

12 In *Simonius Vischer & Co v Holt & Thompson* [1979] 2 NSWLR 322, Vischer was a Swiss wool buying firm, trading on the Sydney Greasy Wool Futures Exchange. Vischer's Australian officers exceeded their authority, trading at Vischer's risk for their own profit. This activity went undetected due to the negligence of Vischer's auditor, Holt. When the activity was uncovered, Vischer was left holding contracts for greasy wool futures and had to decide whether to hold the position or exit. It decided to mitigate its loss by matching 'buy' and 'sell' contracts, leaving it with a surplus of 'sell' contracts, betting that the market would fall. As events transpired, the market rose. Vischer's 'sell' contracts therefore fell in value. '[A]s a result of reasonable steps to mitigate their damage, [Vischer] suffered a further loss of money.' The loss of money was due to costs actually incurred rather than for the purchase of a capital asset.

13 In *Gwam Investments Pty Ltd and Others v Outback Health Screenings Pty Ltd* [2010] SASC 37; (2010) 106 SASR 167, Outback Health contracted Gwam to modify an Isuzu truck so that they could carry out drug and alcohol testing in remote mining sites. After Gwam made the modifications, the truck was too heavy to be driven on public roads. To mitigate its loss, Outback Health bought a bigger, better truck, a Hino. The court allowed Outback Health to claim for the cost of a more expensive vehicle as mitigation. Gray J was satisfied that the more expensive vehicle was reasonable in the circumstances. His Honour especially noted that Gwam had not discharged its burden on the evidence to satisfy the court that the expense was an 'unjustified betterment'. His Honour also noted (see [58]):

> Outback Health was engaged in an ongoing and apparently long-term business operation. It was problematic whether at any time of sale, the CMI-Hino would recoup to Outback Health, either by way of direct sale or through a trade-in, any greater value than the Isuzu NPS 300 truck.

14 White J was satisfied that the more expensive vehicle was a mitigation expense because the Isuzu was of no use to Outback Health's business.

15 In *Heytesbury Pty Ltd v Kelly* (Unreported, WASC, Library No. 970161, 15 April 1997), the plaintiff engaged Mr Kelly to sell a piece of jewellery for $3.5 million. The purported purchaser gave Mr Kelly personal cheques in exchange for the jewellery and took possession. The cheques bounced and the purchaser was nowhere to be found. Heytesbury incurred legal and other expenses to get the jewellery back. This involved legal action in foreign jurisdictions, and recovery of those costs was not possible. Ipp J discounted some of the expenses. There was some discount for fees of the Qatari lawyer being unreasonable.

16 Similarly in *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, the plaintiff incurred legal expenses in mitigating its loss. It was reasonable in the circumstances to do so, and the expenses themselves were reasonable.

17 In *Mann Judd (A Firm) v Paper Sales Australia (WA) Pty Ltd* (Unreported, WASCA, Library No 980565A, 26 September 1998) 8, Ipp J, with whom Wallwork and Steytler JJ agreed, noted the principle that:

> Expenses incurred in mitigating loss are recoverable if those expenses were reasonably incurred, and if the amounts themselves are reasonable.

18 This was also a case of incurring legal expenses in mitigation of damages. These cases are distinguishable from the present case in that none of them relates to loss caused by dismissal or removal together with the purchase of a capital asset in the circumstances that apply here. Only one of them relates to the purchase of a capital asset, and it is in respect of work done on a capital asset resulting in loss rather than for the purposes of setting up and operating a business where the compensation for loss arises from the dismissal or removal. The circumstances in this case relate to the purchase of fixed assets for use in a business which Mr Ferguson no longer utilises and which he intends to convert to cash or to transfer.

19 Mr Ferguson has purchased and now holds assets worth around $10,000 which he no longer utilises for mitigating his loss, and intends to realise that value by selling or transferring them. In this way, the expenditure on these items will be returned to Mr Ferguson and will not constitute a loss for him.

20 Further, by way of analogy, I conclude that it would not be reasonable for an employer to be required to compensate a dismissed employee for loss where that loss is said to have been incurred by the employee in purchasing a substantial capital item such as a vehicle or even land or a building to enable him or her to mitigate their loss, then retain the purchased item and the employer bear the cost as part of compensating for the loss. It is not a loss as such, as, instead of having the funds, the employee has their value in a saleable asset. This would not constitute reasonable expenditure to be compensated for as part of compensation for loss, particularly where the employee retains a valuable and convertible asset. In this case, not only does Mr Ferguson hold considerable assets, but he no longer utilises them to mitigate his loss and intends to obtain the value of them. In the circumstances, I would exclude from the calculation of $10,000 for the vehicle, Telstra testing equipment and safety equipment.

21 Given the quite different nature of these physical and convertible assets as compared with the cost of training or education, which does not produce a saleable or convertible asset, I would distinguish Mr Ferguson's situation regarding these assets from the circumstances applying in *Tucker*.

22 Therefore, in terms of the costs incurred in establishing the business, I would award $17,535.00.

Compensation for injury

23 The assessment of compensation for injury arising out of an unfair dismissal was dealt with by the Full Bench in *Richards v Nicoletti* [2016] WAIRC 00941. Acting President Smith, with whom I respectfully agreed, said:

36 Pursuant to s 23A(6) of the IR Act, the Commission is conferred with a discretion to make an award of compensation to an employee who has been harshly, oppressively or unfairly dismissed for loss or injury caused by the dismissal.

37 The leading statement of principles to be applied by the Commission when considering whether to make an award of compensation for injury is set out in the following passage of the joint judgment of Coleman CC and Smith C in ***Birnie*** wherein it was said [200]:

> It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299). The injury may be manifested by the detrimental impact on the physical or emotional wellbeing of the person whose services were terminated. However dismissals will impact to varying degrees on individuals and while the need for professional care may be evidence of that impact, this will not necessarily always be the case in order to establish the causal link between the termination of employment and the injury. While it is necessary to exercise a degree of caution to ensure that compensation is confined to reasonable limits (*Timms v Phillips Engineering Pty Ltd* (1997) 70 WAIG 1318 and *Burazin v Blacktown City Guardian Pty Ltd* 142 ALR 144) that is not to say that every claim for injury necessarily involves expert evidence of emotional trauma.
>
> 1 The circumstances in which the dismissal from employment has been effected may be sufficient to demonstrate the injury which is experienced. Situations where an employee is locked out of the workplace or is escorted from the premises, or the termination has been conducted in full view of other staff are examples of callous treatment justifying recognition for compensation for injury (*Lynham v Lataga Pty Ltd* (2001) 81 WAIG 986).
>
> 2 However, the Commission is not able to adjust the measure of compensation according to the opinion of the employer or employee or of the conduct of the respective parties (*Capewell v Cadbury Schweppes Australia Limited* (op cit)).

38 From these principles emerges a requirement to assess the gravity or scale of the injury. In particular, when considering whether to make an award of compensation for injury, the following matters should be considered:

(a) Whether the behaviour by or on behalf of an employer by the termination of employment has caused injury to the employee.

(b) If the behaviour in question has caused an injury, the gravity of the behaviour of the employer.

(c) The level of effect or impact of the behaviour on the employee and whether the effect or impact goes beyond a level of distress that is caused by almost all employer initiated terminations of employment.

39 This approach was implicitly approved of by the Full Bench in ***Anthony & Sons Pty Ltd v Fowler*** [2005] WAIRC 01744; (2005) 85 WAIG 1899. In ***Fowler v Anthony & Sons Pty Ltd*** [2004] WAIRC 13416; (2004) 84 WAIG 3855, at first instance, Mr Fowler was awarded $3,000 as compensation for injury caused by his dismissal. He had been employed as a skipper of Swan River cruise boats and had ascertained his employment had been terminated by his employer when he was told his name was removed from the roster. He later received a letter informing him that there was no requirement for his services as there had been a downturn in trade. Mr Fowler was horrified, mortified and depressed which caused him to visit a doctor. The manner of the termination by the employer was found to be callous, caused Mr Fowler injury and he had suffered feelings of shock within the legal meaning of that word [40].

40 On appeal the award was reduced to $2,000. President Sharkey, with whom Mayman C agreed, assessed the nature of the injury to Mr Fowler to be towards the lower end of the scale [68]. His Honour then observed [69] - [70]:

> Speaking for myself, I would add this. There is something to be said for an opinion that awards in this Commission of compensation for injury are too low, and particularly in cases where there is medical and legal evidence of injury, but not solely. It might be said that Full Benches of this Commission should consider, if the parties submit it, whether the awards should be increased. However, that is a matter which it is not necessary to consider on this occasion and can await any submissions which are made another day before there is any consideration of it.
>
> This award was not sufficiently judged as being at the lower end of the scale, which the injury was. I would reduce it therefore by one-third to reflect that it was at the lower end of the scale and award $2,000.00 not $3,000.00. The discretion, for those reasons, and in that respect alone, I am satisfied, is established to have been miscarried within the grounds laid down in *House v The King* [1936] 55 CLR 499 because the amount is manifestly outside what a fair exercise of discretion would be. The Full Bench is therefore entitled to substitute its decision for that of the Commissioner at first instance, on that point.

41 Commissioner Kenner also agreed the award of compensation to Mr Fowler should be reduced to $2,000 on grounds that the effect of the dismissal was at the lower end of the scale. At [80] Kenner C found:

> In this case, the evidence as to the effect on the respondent of the dismissal was brief. However, simply because the evidence was brief, does not mean that it may not support a finding of injury for the purposes of s 23A(6) of the Act. Where there is an allegation or claim of injury, then some caution should be exercised. Whilst not always necessary, it will be of assistance in assessing any such claim if there is independent oral or documentary evidence of the effect of a dismissal on an employee, by way of medical or other evidence to that effect. On the evidence at first instance, the injury found by the learned Commissioner was certainly at the lower end of the spectrum and would warrant a limited award of compensation. I agree that to this extent, the discretion of the Commission at first instance miscarried and it would be appropriate to reduce the award by 30% in this case, given the evidence and the findings made.

42 The approach of the Full Bench in ***Anthony & Sons Pty Ltd v Fowler*** was applied by the Full Bench in ***Bone Densitometry Australia Pty Ltd v Lenny*** [2005] WAIRC 02081; (2005) 85 WAIG 2981. In that matter, Sharkey P, with whom Scott and Mayman CC agreed, after applying the principles approved of in ***Birnie***, said [124] - [126]:

> 'Injury', as the Commissioner found, embraces the actual harm done to an employee by an unfair dismissal and 'comprehends all manner of wrongs' including being treated with callousness. The Commissioner correctly observed, too, that whilst injury may be manifested by the detrimental impact on the physical or emotional wellbeing (or, for that matter, the reputation) of an employee unfairly dismissed, dismissals will affect individuals to varying degrees and, I might add, not at all.
>
> The Commissioner observed, too, that, while the need for professional care may be evidence of this impact, this will not always be necessary to establish the causal link between the termination of employment and the injury. Not every claim for injury, as the Commissioner correctly observed, necessarily involves or should involve expert evidence of emotional trauma. (The Commissioner referred, too, to *Timms v Phillips Engineering Pty Ltd* (1998) 78 WAIG 4460 and *Burazin v Blacktown City Guardian Pty Ltd* (FC) (op cit).)
>
> The Commissioner went on to observe, too, and correctly, that the circumstances in which the dismissal from employment had been effected may be sufficient to cause the injury experienced. Examples were given of locking an employee out of the workplace or escorting an employee from premises in full view of staff, particularly, I might add, if this were unjustifiably done by a police officer or uniformed security officer (see the discussion of these matters in *Lynham v Lataga Pty Ltd* (FB) (op cit).)

43 His Honour in ***Bone Densitometry Australia Pty Ltd*** also applied the principle that an employer is bound to take an employee's reaction to a dismissal as it found him or her. He said [133]:

> Ms Lenny clearly did not suffer shock and humiliation because of her personality. She, first of all, suffered it as a result of, and caused by, the unfair dismissal and the surrounding treatment of her, effected by Professor Will. That was entirely clear. That she might have suffered greater injury than someone else would, or any injury, was not established at all. Even if it were, it is trite to observe that BDA, as the respondent, was bound to take Ms Lenny as it found her. There was also unshaken evidence and uncontradicted evidence of her being bullied and exploited by Professor Will in the past, which might reasonably be found, if it were necessary, which it was not, to have caused a greater susceptibility to hurt and humiliation when the dismissal did come.

44 Finally, his Honour found [136]:

> In this case, and the authorities which I have cited above are clear, one must look at the nature of the unfair dismissal and other evidence to determine whether the unfair dismissal caused any injury alleged to have been caused by it. One has to look at the alleged injurious act and assess the conduct in that light when it has been alleged to be injurious.

24 In that same matter, Kenner ASC said:

> 186 In assessing compensation for loss and/or injury, each case will turn on its own facts. The relevant principles for the assessment of compensation for loss and injury are well settled (see *Ramsay Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8; *Capewell*; *AWI*; *Lynam v Lataga Pty Ltd* (2001) 81 WAIG 986; *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849; 2862). The Full Bench recently summarised these principles in *Scicluna v William Paul Brookes t/as Bayview Motel Esperance WA* [2016] WAIRC 00862. Whilst there is no "tariff" or specified range from the cases, as to what may be seen as adequate compensation in any given case, it is at least possible to discern from them a continuum of conduct or behaviour and resultant injury in the case of a claim for loss on that basis. Importantly, the focus needs to be kept on the impact of the conduct on the employee, when considering any injury suffered as a causal effect of the unfair dismissal. For example, in *Lynam* at pars 49-64 the Full Bench found that the employee was locked out of the retail store of which he was a manager; was precluded from speaking to other staff; and the employer threatened to call the police if he returned; and there was evidence of the employee being placed under great stress and was grinding his teeth at night. In that case the Full Bench found that the employer engaged in a callous, oppressive and

humiliating course of conduct. An award for injury was made in the sum of $4,500 however the appellant was prepared to accept, and the Full Bench awarded, the lesser sum of $3,500.

187 In *Bogunovich*, Sharkey P found at pp 11-12 (Kenner C agreeing) that the appellant suffered mental distress, anxiety and loss of dignity and self-esteem. Compensation for injury in this case was assessed at $5,000. In *AWI*, the Full Bench upheld an award of compensation for injury of $5,000 by the Commission at first instance in circumstances where the employee was made redundant without prior notice, having been told the day prior that he had good career prospects and was shocked and distressed by the employer's conduct. Also in that case, the employee's shock and distress was made worse by the employer's refusal to subsequently discuss relevant matters in relation to the redundancy with the employee.

188 In the cases just cited, it is open to conclude that there have been substantial awards of compensation for injury evidenced by particularly poor conduct of the employer, resulting in an identifiable impact on the employee, established on the evidence.

25 I respectfully adopt the approach set out in *Richards* in dealing with the requirements for compensation for injury for a police officer unfairly removed from office.

26 Mr Ferguson filed an affidavit sworn on 30 June 2017 in anticipation of the hearing regarding remedy. From that affidavit, it is clear that a number of issues caused Mr Ferguson distress and mental health issues. They were:

1. that he was charged with criminal offences (Ferguson's affidavit [61]);
2. he was concerned about the future of his family and was having flashbacks about the night of the incident (Ferguson's affidavit [64]);
3. the stress his wife suffered as a consequence of her being approached by WA Police to have him give evidence in a case in which he was involved before his removal, but unrelated to his removal, and he was preparing for his trial (Ferguson's affidavit [68]);
4. being informed that following his acquittal, that the remaining charge was to be withdrawn and 'about what I had been through over the previous 20 months' (Ferguson's affidavit [76]); and
5. that the allegations were never proven in court yet the facts said to support the charges against him were relied upon by the Commissioner in removing him;
6. he felt betrayed because he had requested the Commissioner to delay his decision to remove him until after the criminal trial but was refused;
7. he was upset that he had sent emails to the Commissioner and he could not get past what had happened to him (Ferguson's affidavit [82]);
8. he became very angry and upset when he learned that two detectives had attended his and his wife's home, and had spoken to his wife about the emails he sent to the Commissioner.

27 Attached to Mr Ferguson's affidavit were two psychologists' reports. Mrs Villani's report of 2 November 2015 refers to Mr Ferguson reporting waking in the middle of the night and having flashbacks of the attack on him. This attack was part of the incident which resulted in the criminal charges against Mr Ferguson and ultimately in his removal. He reported on 12 February 2015 that his mood had deteriorated over the previous two weeks, and he attributed this to 'his legal issues, and a court hearing in that period, and remaining stood down at work'. The particular legal issues and court hearing are not identified, however, on 11 February 2015, the day before this report, Mr Ferguson was committed for trial. He was not removed until 27 February 2015, after the date on which Mrs Villani's notes said he had contacted her.

28 Mrs Villani also noted that Mr Ferguson reported suicidal ideation for a short period on the day prior to the court hearing.

29 Mrs Villani commented about his heightened state of hypervigilance relating to 'the incident that precipitated the charges against him'. She also says that since his removal, he had set up his own business which appeared to be doing well.

30 Nothing in Mrs Villani's report attributes Mr Ferguson's mental health state specifically to his removal.

31 I note that Mr Ferguson appears to have been very much able to function within a short time after his removal, notwithstanding his mental health issues. He set up a business, purchased equipment, upgraded his credentials, entered into a contract, commenced work and earned income from the business within two months of his removal.

32 Ms Bevan's report of 20 June 2017 relates to her contact with Mr Ferguson from 8 April 2016, over 13 months after the removal. Her report includes references to injury arising from removal that:

> dismissal from the [P]olice [F]orce had left him feeling as though he had lost all that he had worked for. He reported that he felt as though he had become a burden to his wife by association because she is also a police officer. ... He was also worried about his use of alcohol as a means of avoiding pain which resulted from his removal from the Police Force. He expressed a wish to be a better father and husband but was at a loss as to how to reconcile with the alleged unfair dismissal.

33 Ms Bevan goes on to report about his heavy abuse of alcohol for a few weeks prior to their meeting in April 2016, noting that during that time, he sent angry emails to the Police Commissioner whilst intoxicated, which he deeply regretted. She said 'he appeared distressed by his actions and was experiencing a heightened emotional state of anxiety. He was distressed about the effect of this rash action on the validity of his case.' She assessed Mr Ferguson as experiencing the effects of post-traumatic stress and profound grief and loss. Therefore, Ms Villani also reports a mix of causes for Mr Ferguson's state, some relating to the removal and some from other causes.

34 It is very difficult to disentangle reports of Mr Ferguson's feelings, distress, anxiety and mental health issues generally associated with the incident itself, circumstances relating to his wife, the distress he felt at sending emails to the Commissioner, the court cases (that is, being charged and having to attend court in relation to the trial), and other matters, as well as distress and anxiety as a result of his removal.

35 As noted in his affidavit of 30 June 2017, Mr Ferguson had concerns about the future of his family; that the allegations relied on by the Commissioner to remove him were not proven in court; he felt betrayed because the Commissioner would not delay his decision until after the criminal trial; his dismissal left him feeling as though he had lost all he had worked for, and he worried about his use of alcohol as a means of avoiding the pain resulting from his removal.

36 I note that in her submissions on 10 July 2017, Ms Vernon for Mr Ferguson refers to Mr Ferguson suffering humiliation, and distress and anxiety that came from his removal and what it meant to him.

37 Mr Ferguson made no reference to feelings of humiliation in his affidavit of 20 July 2017, but referred to it in his affidavit of 12 June 2017, two days after Ms Vernon made that submission. He mentioned it, but did not elaborate on it, and did so only as part of quantifying his claim for compensation for injury rather than part of setting out the injury itself. In the circumstances, I would be inclined to discount any argument about humiliation.

38 Likewise, it was only in his affidavit quantifying his claim for compensation for injury, following the hearing of the matter, that Mr Ferguson claimed that his reputation had been damaged from references to his being under the influence of alcohol to the point of having no judgment, and being accused of committing crimes when he was subsequently acquitted.

39 There is no evidence of reputational damage. Further, the alleged reputational damage said to arise from being accused of committing crimes when he was subsequently acquitted is not an injury arising from the removal. Also, given the lateness of the issue of reputational damage being raised, I would not entertain this claim.

40 I point out that whilst I have a good deal of sympathy for Mr Ferguson having been removed and us having found that the removal was unfair because he was denied procedural fairness, it cannot be concluded one way or the other whether the removal would otherwise have been unfair on the grounds of Mr Ferguson's conduct on the night of the incident. The respondent's conduct denied him procedural fairness. That is not behaviour which, under normal circumstances, without more, could be seen to ground a claim for injury. It is not conduct which was malicious, callous or abusive. The first of the principles set out by Smith AP in *Richards* about whether the behaviour by or on behalf of the employer by the termination of the employment has caused injury to the employee is not satisfied. Rather, much of Mr Ferguson's injury goes back to the one incident and its various consequences, rather than injury 'caused by the removal' (*Police Act* s 33U(3)).

41 I have noted earlier that Mr Ferguson suffered injury which he identified in his affidavit of 30 June 2017 and in Ms Bevan's report which I have identified in [32]. These injuries are identifiable as being caused by the removal as opposed to those caused by the other circumstances set out by Mr Ferguson and the two psychologists, which do not arise from his removal but are consequences of his being charged with criminal offences, suffering flashbacks, and other matters.

42 I find that the injuries caused by the removal are beyond those normally experienced as a result of an unfair dismissal or unfair removal, and are at the lower end of the scale. This is in comparison with circumstances such as those applying in *Richards v Nicoletti*, where the employer's behaviour was described by the Full Bench as 'threatening and callous', and 'at a very high end of the scale of callous and abusive behaviour' (*Richards* at [51]). The injury he suffered was described as suffering 'fear and stress … during at least the period of behaviour' (*Richards* at [51]), and he was awarded compensation of $6,000.

43 In *Anthony v Fowler*, the Full Bench awarded $2,000 in circumstances where the dismissal was 'blatantly procedurally unfair' (see [60]) and the employer's conduct was 'oppressive, callous and humiliating' (see [62]).

44 In *Bogunovich*, the employer's conduct was described as not only procedurally unfair but 'harmful to the [employee's] psychological well-being' (*Bogunovich* 78 WAIG 3635 at 3644); Mr Bogunovich was dismissed despite having continued to work while in physical pain, the dismissal came out of nowhere and Mr Bogunovich had 'achieved very well' for the employer (*Bogunovich* 79 WAIG 8 at 11). This resulted in mental distress, anxiety and loss of dignity and self esteem, for which the employee was awarded $5,000.

45 In the circumstances of this case, I conclude that an award of $2,000 for injury is appropriate.

Particular injury to police officers generally?

46 The scheme of the provisions for removal under the *Police Act* gives no particular direction in respect of compensation for injury on the basis that a police officer holds a particular position within the community warranting compensation for injury assessed differently to other callings. It does not suggest that a police officer experiences a fall from grace any greater or lesser than anybody else's such as to warrant a 'tariff' or a specified range of compensation to be awarded to a police officer.

47 Section 33U(3) of the Police Act sets out that the WAIRC 'may instead of making an order (that the appellant's removal from office is and is to be taken to have always been of no effect), subject to subsection (5) and (6), order the Commissioner of Police to pay the appellant an amount of compensation for loss or injury caused by the removal'. Subsection (5) deals with particular issues to be considered in determining compensation, and (6) sets out a maximum payment. However, there is no provision which suggests an automatic assumption of injury because the person was a police officer. This contrasts with s 33Q(4), which recognises special considerations relating to particular interests and the special nature of the relationship between the Commissioner of Police and members of the Force.

48 *Jones v Commissioner of Police* (2007) 87 WAIG 1101; [2007] WAIRC 00440 is the only appeal under the *Police Act* where the WAIRC has considered the question of compensation for injury, and Ms Jones's circumstances were very different to Mr Ferguson's.

49 In *Jones*, Beech CC, with whom Wood and Mayman CC agreed, made the following comments regarding the removal of police officers (at [106]):

> It is difficult to put a value on the medical consequences caused by the removal process and the removal which occurred. It is recognised by the WAIRC that dismissal in virtually every case will cause the employee disappointment, distress and a host of unpleasant personal feelings; some employees will suffer a greater reaction than others and in the ordinary run of cases no allowance for hurt feelings or distress is made (*Lynam v Lataga Pty Ltd* [2001] WAIRC 2420; (2001) 81 WAIG 986 at [55]- [57]). I do not consider the facts of this case are part of the ordinary run of cases given the position in the community of police officers which is difference from that of employees in industry generally.

50 Beech CC's comment in the last sentence of [106] of *Jones* appears to suggest that because police officers have a position in the community which is different from that of employees generally; removal of a police officer is a situation which is not part of the ordinary run of cases. He made this comment following reference to authority in *Lynam v Lataga Pty Ltd* [2001] WAIRC 2420; (2001) 81 WAIG 986 'that 'some employees will suffer a greater reaction than others and in the ordinary run of cases no allowance for hurt feelings … is made.'

51 However, while suggesting that the removal of a police officer is not part of the ordinary run of cases, the learned Chief Commissioner did not go on to suggest that it follows that there ought to be an amount of compensation for a police officer removed unfairly simply because he or she was a police officer. Read in context, I respectfully suggest that the comment relates only to whether such a case is in the ordinary run of cases, but does not suggest that an unfairly removed police officer will automatically suffer a greater injury than any other employee. I also note that Beech CC did not proceed to identify any particular injury caused to Ms Jones by virtue only of her being a police officer, nor did he go on to identify any amount of compensation for such injury.

52 It is to be remembered that it is compensation for the *injury caused by the unfair removal*, and there can be no automatic assumption of injury, merely that the case of a police officer does not constitute the ordinary run of cases. What is necessary is to demonstrate the injury caused by the removal.

53 I would add that in my view, police officers have a particular position in the community, however, their standing is not dissimilar to a range of callings and professions, such as nurses, teachers, doctors and a number of others. The mere fact of the particular position does not, in my view, mean that in any given circumstance the person automatically has an unjustified fall from grace due to removal or dismissal, that results injury.

54 In this case, Mr Ferguson's removal was found to be unfair because he was denied procedural fairness and, as we pointed out, this could not now be rectified. It did not automatically follow that the removal was or was not fair on its merits, or that there has or has not been a 'falling from grace' that was warranted or not. There is no way of knowing now whether, if procedural fairness had been afforded, Mr Ferguson would or would not have been removed.

55 Therefore, it comes back to the requirement to decide whether the removal itself has caused injury to Mr Ferguson.

56 In conclusion, I would order that the respondent pay to Mr Ferguson compensation for loss and injury caused by the removal of:

1. $5,241.00 as lost income;
2. $17,535.00 as costs for the establishment of the business; and
3. $2,000.00 for injury.

EMMANUEL C

57 I have had the benefit of reading the draft reasons for decision of Matthews C. I agree with his reasons except in relation to [177], [180], [181] and [185].

58 Accordingly, I would not order that Mr Ferguson's removal from office is and has always been of no effect.

59 In relation to loss, I would order $5,241 for lost income and $27,535 for costs incurred by Mr Ferguson in setting up his business.

60 In relation to injury, I would respectfully qualify Matthews C's observations about the fall from grace associated with the removal of a police officer.

61 I agree with Matthews C's observations at [178] and [179]. There may well be a fall from grace associated with the removal of a police officer that is not experienced by most employees who lose their jobs, because police officers have an elevated status within the community.

62 It is not difficult to imagine that a person removed because of a loss of confidence having regard to factors including integrity, performance and conduct would experience humiliation and damage to his reputation. But Mr Ferguson did not prove that he suffered injury as a result of a fall from grace or humiliation or damage to his reputation because of those matters.

63 Mr Ferguson claims $10,000 for:

a. depression and anxiety;

b. humiliation from being removed unfairly without first being given the opportunity to provide a proper response to the Commissioner of Police; and

c. loss of reputation from references to being under the influence of alcohol to the point of having no judgment and being accused of committing crimes when he was subsequently acquitted.

64 I respectfully adopt Scott CC's summary of the evidence from [26] to [33]. There is little evidence of injury caused by the removal. I accept Mr Ferguson experienced depression and anxiety. Mr Ferguson's mental health issues appear to relate to a range of matters including:

a. the incident on 18 July 2014;

b. being charged with and acquitted of criminal offences;

c. matters relating to his wife and family;

d. the Commissioner of Police's refusal to delay the decision to remove;

e. the emails Mr Ferguson sent to the Commissioner of Police; and

f. Mr Ferguson's removal.

65 In the circumstances, Mr Ferguson's depression and anxiety cannot be solely, or even for the most part, attributed to his removal.

66 Mr Ferguson gave evidence that he despaired finding alternative employment, given the removal action and media attention. There was no other evidence of humiliation or damage to his reputation caused by the removal.

67 On the basis of the evidence of Mr Ferguson's feelings of stress and insecurity associated with his removal, I would award him $2,000 for injury.

MATTHEWS C:

68 By reasons for decision issued on 1 May 2017 the Western Australian Industrial Relations Commission found that the removal action taken in relation to Mr Ferguson by the Commissioner of Police was unfair and it is now necessary to determine the appropriate remedy.

69 By order made 23 June 2017 leave was granted for new evidence to be tendered in relation to the matter of remedy.

70 The following material was received pursuant to that order:

(1) A statement of Detective Sergeant Alan Bavich made 22 November 2016 with two annexures being:

(a) Three emails sent by Mr Ferguson to the Commissioner of Police on 6 April 2016; and

(b) Notes entered into the police database by Detective Sergeant Bavich on 8 April 2016 recording actions taken into relation to the three emails of 6 April 2016.

(2) An affidavit of Superintendent Kim Jonathon Massam sworn 23 June 2017 with two annexures being:

(a) A letter from Superintendent Massam to Mr Ferguson dated 18 January 2016; and

(b) An email from Mr Ferguson to Superintendent Massam dated 26 January 2016 in relation to the letter of 18 January 2016.

(3) An affidavit of Mr Ferguson sworn 30 June 2017 with six annexures being:

(a) A letter from Jacqui Molinari of WA Police - Payroll Administration, dated 24 February 2015, confirming Mr Ferguson's employment and current salary;

(b) A payslip for Mr Ferguson for the period 19 September 2014 to 25 September 2014;

(c) A PAYG Payment Summary for Mr Ferguson for the financial year ending 30 June 2014;

(d) An email chain, including relevantly an email from Mr Ferguson dated 9 November 2014, originally sent to his treating psychologist, Mrs Carleen Villani, that makes reference to Mr Ferguson's issues with anxiety at that time;

(e) A letter from Mrs Villani, dated 2 November 2014, to whom it may concern, which describes Mr Ferguson's mental health as assessed by Mrs Villani; and

(f) A letter from Ms Helen Bevan, a psychologist, dated 20 June 2017, addressed to Mr Ferguson's solicitors, that gives Ms Bevan's assessment of Mr Ferguson's mental health from April 2016 to November 2016.

71 At the hearing in relation to remedy on 10 July 2017 counsel for the Commissioner of Police sought leave to tender a further document but leave was not granted.

72 Subsequent to the hearing, and in response to an invitation that he do so, Mr Ferguson filed a further affidavit sworn 12 July 2017, annexing six related annexures, deposing to matters that will have relevance if the questions of compensation are considered.

73 In relation to remedy section 33U(2) *Police Act 1892* provides as follows:

> If this section applies and unless an order is made under subsection (3) the WAIRC may order that the appellant's removal from office is and is to be taken to have always been of no effect.

74 Section 33U(3) *Police Act 1892* provides as follows:

> If, and only if, the WAIRC considers that it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect, the Commission may instead of making an order under subsection (2), subject to subsections (5) and (6), order the Commissioner of Police to pay the appellant an amount of compensation for loss or injury caused by the removal.

75 Section 33U(4) *Police Act 1892* provides as follows:

> In considering whether or not it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect it is relevant to consider —
>
> (a) whether the position occupied by the appellant at the time of his or her removal is vacant; and
>
> (b) whether there is another suitable vacant position in the Police Force.

76 Given that section 33U(4) *Police Act 1892* obliges the Western Australian Industrial Relations Commission to consider those two matters I have done so and must find, given that no evidence or argument to the contrary was put, that either the position occupied by Mr Ferguson at the time of his removal is vacant or that there is another suitable vacant position in the Police Force.

77 The Commissioner of Police says that nonetheless it would be impracticable for it to be taken that Mr Ferguson's removal from office is and has always been of no effect.

78 The Western Australian Industrial Relations Commission found in reasons for decision issued 23 June 2017, and summarised here for the sake of convenience, the following in relation to the term "impracticable" in section 33U(3) *Police Act 1892*:

(1) Guidance as to its meaning can be provided by the authorities which deal with the term "impracticable" in section 23A *Industrial Relations Act 1979*; and

(2) To determine whether it is impracticable to conclude that a removal action be of no effect, and that an appellant be reinstated requires a factual evaluation to determine whether reinstatement is reasonably feasible or reasonably capable of being accomplished on the facts and in the circumstances of the particular case.

Practicability of removal action being of no effect

79 The Commissioner of Police argues that Mr Ferguson's return to WA Police is impracticable for two reasons, as set out at [27] of his written outline of submissions dated 6 July 2017 as follows:

(1) The underlying factual basis for the Commissioner having originally lost confidence in Mr Ferguson's suitability to be a police officer, based on his integrity, performance and conduct, have not been disturbed.

(2) Mr Ferguson's conduct since his removal has only further eroded any possibility of regaining the Commissioner's trust and confidence.

80 The first argument must fail as it has been found that Mr Ferguson was denied procedural fairness in putting his response to what the Commissioner of Police calls the "underlying factual bases" being the facts the Commissioner of Police ultimately relied upon to take removal action against him. It has further been found that that it is too late for that denial to be remedied.

81 Accordingly, it would now be unfair for me to make use of the "underlying factual bases" as reliable factual findings.

82 In relation to the second argument the Commissioner of Police relies upon the affidavit of Superintendent Kim John Massam and the statement of Detective Sergeant Alan Bavich and the annexures thereto referred to by me above.

83 Mr Ferguson deposes to the matters raised in those affidavits in his affidavit sworn 30 June 2017 and some of the annexures to that affidavit also touch on the matters.

84 The following story emerges in relation to them.

85 The original incident took place on 18 July 2014.

86 Since that date Mr Ferguson has had serious concerns about how he has been treated by WA Police.

87 Mr Ferguson deposes that the day after the incident, on 19 July 2014, he attended Midland Police Station, where Superintendent Massam told him there had been complaints about his behaviour the previous day. Mr Ferguson deposes that Superintendent Massam said he could undertake a disciplinary interview there and then, but recommended Mr Ferguson speak with the Police Union. Mr Ferguson deposes that he accepted this advice and declined an immediate interview. Mr Ferguson deposes that immediately after this, Superintendent Massam told him "you should pretty much kiss your job goodbye".

88 Mr Ferguson deposes that he was obliged to attend a police station on 24 July 2014, where he was charged with criminal offences, although he had only that day been discharged from hospital following hand surgery for an injury suffered in the incident on 18 July 2014.

89 Mr Ferguson deposes that "immediately upon being charged on 24 July 2014 I began to feel anxious and stressed and became very mentally unwell." Soon after he was referred to a psychologist, Carleen Villani, for treatment.

90 A letter from Mrs Villani annexed to Mr Ferguson's affidavit sets out that Mr Ferguson consulted her 13 times between August 2014 and November 2015, when Mrs Villani ceased practice.

91 In August 2014 Mr Ferguson made a formal complaint to WA Police about its response to the incident on 18 July 2014 and in particular about its treatment of him.

92 Mr Ferguson deposes that his stress was added to, and he became angry toward WA Police, because some dealings between his wife, a police officer, and WA Police related to proceedings in which Mr Ferguson was to be a witness had upset her and because of his perception that the conduct was "targeting my wife to intimidate me in the weeks before my own trial" on the most serious criminal charge against him.

93 In November 2015, after a two-week trial, Mr Ferguson was acquitted by a jury of that charge.

94 On or around 18 January 2016 Mr Ferguson received a letter from Superintendent Massam informing him to the effect that, after investigation, no action was to be taken in relation to the matters about which he had formally complained to WA Police in August 2014.

95 Mr Ferguson deposes that the letter "made me very upset because I believed that Massam should not have been involved in the investigation or reviewed my complaint on account of his comments to me on 19 July 2014."

96 On 26 January 2014 Mr Ferguson sent the following email to Superintendent Massam:

> "Hello Kimmy,
>
> Got your letter dated 18 January 2016. A bit random considering Leemburger shelved my complaint over 12 months ago.
>
> Anyway, must have something to do with my GBH acquittal.
>
> I guess we'll fight the next fight hey?
>
> All yours…"

97 The charge of common assault remained at this time but Mr Ferguson was informed on 29 March 2016 that WA Police were not proceeding with the charge and that it would be withdrawn.

98 Mr Ferguson deposes that "after initial elation I became extremely upset about what I had been through over the previous 20 months [and that] I quickly became angry and began to feel mentally unwell."

99 Mr Ferguson deposes that he felt he had been badly and unfairly treated. He came to the conclusion that the outcome of the jury trial and the withdrawal of the common assault charge was significant given that the incident in relation to which the removal action had been taken arose out of the same matter and he was aggrieved the removal action process had not been delayed until the outcome of those charges was known, as he had requested.

100 The events from the time of the incident until 29 March 2016 led, Mr Ferguson deposes, to "a serious mental deterioration causing me to have a breakdown."

101 Mr Ferguson deposes that he saw his general practitioner on 30 March 2016 and was prescribed anti-depressants, a first for him, and referred to a psychologist, Helen Bevan.

102 Mr Ferguson deposes that he made an appointment to see Ms Bevan but could not get in until 8 April 2016.

103 In the days between 30 March 2016 and 8 April 2016 Mr Ferguson deposes that "he was drinking alcohol heavily…to dull the pain and distress I felt."

104 During a drinking session on the night of 6 April 2016 he sent three emails to the Commissioner of Police as follows:

> From: Shane Ferguson
>
> Sent: Wednesday, 6 April 2016 7:02PM
>
> To: O'Callaghan Karl
>
> Subject: Talk time
>
> Hello Karl,
>
> I think you and I need to have a chat.
>
> Shane Ferguson

> From: Shane Ferguson
>
> Sent: Wednesday, 6 April 2016 7:53PM
>
> To: O'Callaghan Karl
>
> Subject: FWD: Talk time
>
> The Commissioner knows best…
>
> Like who's motorcycle Russell was using on the night he did all those horrible things?
>
> The truth is, the Commissioner of Police knew where his son was when he was wanted for arrest. At the Commissioners ex-wifes house. And the Commissioner of Police knew all along……
>
> And how do the COP keep tabs on is son's movements??? A bit of CCC investigative/media involvement might assist to find that out…

> From: Shane Ferguson
>
> Sent: Wednesday, 6 April 2016 8:52PM
>
> To: O'Callaghan Karl
>
> Subject: Fwd: Talk time
>
> All we need to do is get rid of Shane Ferguson.

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105 Mr Ferguson deposes that the emails were sent "without me giving a second thought to what I was doing or saying [that] I was not thinking straight and I definitely was not in my right mind [and that] I had never done anything like that before or since."

106 On 8 April 2016 police officers attended Mr Ferguson's house about the emails. Mr Ferguson was not home but the officers spoke to Mr Ferguson's wife about them as she knew what had happened.

107 Later that day Mr Ferguson rang and spoke to one of the officers.

108 The circumstances relating to the sending of the emails was discussed in both the conversation at the house and the later telephone conversation. Assurances were given that Mr Ferguson posed no threat to the Commissioner of Police and that he would not repeat the behaviour and the police officer, in the telephone conversation, told Mr Ferguson that the matter would not go any further.

109 Mr Ferguson saw Ms Bevan on nine occasions from 8 April 2016 to 10 November 2016 and a report from her annexed to Mr Ferguson's affidavit says that as at 13 April 2016 Mr Ferguson was "experiencing extremely severe depression, extremely severe levels of anxiety and severe stress" as well as "the effects of Post-Traumatic Stress and profound grief and loss."

110 In his affidavit sworn on 30 June 2017, Mr Ferguson apologises for his emails to the Commissioner of Police in the following terms:

> "I apologise for sending the emails to the Commissioner on 6 April 2016. I would not have sent them if I were thinking rationally with a clear mind, but I was suffering from a mental impairment at the time.
>
> I am extremely embarrassed and regretful for sending the emails and I personally offer my apology to the Commissioner.
>
> The emails were not intended to bring the WA Police into disrepute or to attack the office of the Commissioner himself. I accept that I made the email personal by reference to the Commissioner's family and that was wrong and unacceptable.
>
> If given the opportunity to return to WA Police, I would have no hesitation in applying myself diligently to the job, and would fulfil my role without any further resentment or anger towards WA Police, the current Commissioner, or the Office of Commissioner."

111 On their face the three emails sent to the Commissioner of Police are inappropriate. Mr Ferguson accepts as much by way of the apology he makes for them.

112 Mr Ferguson characterises the emails as being "wrong and unacceptable" because in them, or one of them, he "made the email personal by reference to the Commissioner's family."

113 In my view while that is one aspect of the inappropriateness of the email sent at 7.53pm it falls well short of recognising the true gravity of the seriousness of the email, especially in the current context.

114 In the email Mr Ferguson tells the Commissioner of Police that he has information that, if made public, could do the Commissioner of Police harm and cause him embarrassment and which could lead to further enquiries about the Commissioner of Police which may do him further harm and lead to further embarrassment.

115 Mr Ferguson goes on to intimate none too subtly that he might involve the media in the making of the further enquiries.

116 Properly characterising the conduct, Mr Ferguson informs the Commissioner of Police that he is considering conspiring with the media to cause embarrassment and harm to the Commissioner of Police, his former and intended future commanding officer.

117 In the current context, where the practicability of reinstatement is under consideration, it is highly relevant that Mr Ferguson should have revealed such an intention as being one of the ways he was considering dealing with his what he describes as his "anger and resentment" toward the Commissioner of Police.

118 It is fundamental to any effective employment or service relationship that an employee demonstrate fidelity and good faith. In relation to service within the WA Police, a police officer's fidelity and good faith must be demonstrated in particular ways and under particular stresses and exist at high levels for the arrangement to operate in a sound way.

119 Although fidelity and good faith must be demonstrated by all employees it must be understood that police officers have extraordinary powers and that accordingly they operate within an organisation where discipline is vitally important.

120 As a result of the extraordinary powers of police officers, and the need for discipline to be strictly maintained to protect public confidence in police officers having such powers, the Commissioner of Police must have a high level of confidence that his officers are the kind of people who will properly use their powers and that they are the kind of people who will respect the hierarchical structure that underpins the discipline required within the organisation whose members exercise them.

121 On their face the emails, and particularly that sent at 7.53pm, show that Mr Ferguson lacks judgment and personal discipline and that he has no or little respect for the hierarchical structure vital to public confidence in WA Police having the extraordinary powers it does.

122 The Commissioner of Police is entitled, on the basis of them, to have no confidence in Mr Ferguson having the integrity, judgment and discipline for service with WA Police as a police officer.

123 The only question is whether there has been something put forward by Mr Ferguson, or on his behalf, that means that objectively viewed, taking into account all of the circumstances, the Commissioner of Police has not discharged the onus upon him of proving reinstatement to be impracticable. That is, while the Commissioner of Police has the view he does, and is entitled to hold it on the basis of the emails to him, whether I consider, taking a wider view of the matter and considering all of the evidence put forward and the submissions made, that reinstatement is actually reasonably feasible or reasonably capable of being accomplished.

124 I am urged to have full regard to the history leading up to the night on which the emails were sent, Mr Ferguson's state of mental health on that night, Mr Ferguson's drunkenness on the night, that the conduct was out of character, Mr Ferguson's apology for the emails, Mr Ferguson's assurances that the conduct would never be repeated and that Mr Ferguson, if reinstated, would re-enter service without any further resentment or anger toward WA Police.

125 I have full regard to each of these matters.

126 In particular, I have no hesitation in accepting that the period from July 2014 to April 2016 would have been an extremely stressful one for Mr Ferguson. I accept that the stress led to the development of mental illness and that Mr Ferguson was suffering mental illness as at 6 April 2016. I accept also that Mr Ferguson was drunk that night and that this would have affected his judgment. Finally, although I think it was given belatedly, I cannot but accept that Mr Ferguson's apology is motivated by genuine contrition and that, if reinstated, he intends to apply himself diligently to his duties unaffected by anger or resentment.

127 However, I consider stress, and indeed extreme stress, is something that a police officer must deal with at various stages throughout their career. The stress can be such as to sometimes lead to mental health issues. In some persons it can lead at times to abuse of alcohol. It can lead to people doing things that are out of character.

128 Such stresses will from time to time be such that a police officer may think they have good cause, wrongly or rightly, to lay blame at the feet of their superior officers and perhaps even the Commissioner of Police.

129 Certain behaviour can be explained, or even excused, on the basis of the stress and the mental health or alcohol abuse issues that may result. Even insubordinate conduct may be excused in such circumstances. However, in my view, if a police officer, or someone who wants to be reinstated as a police officer, goes so far as to write to the Commissioner of Police threatening to cause him embarrassment and harm and to do so through media involvement that officer goes too far.

130 A police officer may, despite inappropriate conduct, retain the Commissioner of Police's confidence if there are defensible reasons for it and the police officer remains, to use a phrase, "within the fold". Put another way it might be unreasonable for the Commissioner of Police to believe the relationship is irretrievable in such circumstances.

131 However, if a police officer, or someone who was a police officer and wishes to again be one, shows that at times of stress, perhaps under such stress that they have mental health issues or are abusing alcohol, they are prepared to address their grievances by going to the press, especially in relation to completely separate matters to which their grievance relates, with the intention of causing embarrassment and harm to the Commissioner of Police, and also WA Police, they have gone too far.

132 On the factual evaluation required I find that in the circumstances of this matter, and even taking into account what has been said for Mr Ferguson, reinstatement is not reasonably feasible or reasonably capable of being accomplished.

133 I add that this finding would not have been open on the basis of the email Mr Ferguson sent to Superintendent Massam alone and it has not been material in my decision-making. Having said that I do find that certainly the tone of the email, and probably the content, were inappropriate and that the email was not a good advertisement for someone who wishes to be reinstated to a disciplined hierarchical organisation.

134 Finally, I have not found anything material in the notes Detective Sergeant Bavich took on 8 April 2016. They support that Mr Ferguson was drunk on 6 April 2016, which we know from other sources, and that Mr Ferguson, when questioned about the emails soon after sending them, admitted that sending them was inappropriate and was keen to give assurances that he did not present any threat to the Commissioner of Police. My decision, as explained above, accepts that Mr Ferguson is contrite and knows sending the emails was inappropriate and no argument was put that Mr Ferguson was or is a "threat" to the Commissioner of Police.

135 I place no store in Mr Ferguson telling Detective Sergeant Bavich that "he was only interested in putting the past behind him and getting on with his life", that not being his position at the hearing, or that Detective Sergeant Bavich said "the matter will not go any further", that comment clearly not being intended to have anything to do with a hearing in relation to reinstatement before the Western Australian Industrial Relations Commission.

Compensation

136 Having found that it is impracticable for it to be taken that Mr Ferguson's removal from office is and has always been of no effect the Western Australian Industrial Relations Commission may, instead of making such an order, compel the Commissioner of Police to pay an amount of compensation to Mr Ferguson for loss or injury caused by the removal, subject to sections 33U(5) and (6) *Police Act 1892*.

137 Section 33U(5) *Police Act 1892* provides as follows:

> In deciding the amount of compensation for the purpose of making an order under subsection (3), the WAIRC shall have regard to —
>
> (a) the efforts, if any, of the Commissioner of Police and the appellant to mitigate the loss suffered by the appellant as a result of the removal;
>
> (b) any maintenance payment received by the appellant under section 33M;
>
> (c) any redress the appellant has obtained under another enactment where the evidence necessary to establish that redress is also the evidence necessary to establish on the appeal that the removal was harsh, oppressive or unfair; and
>
> (d) any other matter that the WAIRC considers relevant.

138 Section 33U(6) *Police Act 1892* provides as follows:

> The amount ordered to be paid under subsection (3) shall not exceed 12 months' remuneration as a member.

139 Mr Ferguson provided evidence related to the matter of compensation in his affidavit sworn 30 June 2017 and the Commissioner of Police made written and oral submissions on that evidence.

140 Having been invited to do so, Mr Ferguson provided further evidence in an affidavit sworn 12 July 2017 and the Commissioner of Police commented on that evidence in written submissions filed 14 July 2017.

141 In terms of the difference between the remuneration Mr Ferguson would have earned had he remained a police officer and that he earned from other efforts in mitigation in the relevant period, it is deposed by Mr Ferguson that it is $5,241.00 and the Commissioner of Police takes no issue with this. Accordingly, I will grant that amount to Mr Ferguson.

142 Mr Ferguson also claims an amount of $27,535.00 which he deposes is the "cost to me to set up the company", being a company Mr Ferguson established as soon as he became aware that removal action was likely going to be taken against him.

143 Mr Ferguson deposes that the company was established for the purpose of it running a business to, in large part, provide Mr Ferguson with an opportunity to earn income.

144 The business was to provide services in which Mr Ferguson had experience and established skills.

145 The principle is that reasonably incurred costs in mitigation or attempted mitigation of loss are compensable, with it being a question of fact whether a person acted reasonably in incurring the costs. (see *Fox v Wood* (1981) 148 CLR 438 at 446-7 per Brennan J)

146 I find that the conduct of Mr Ferguson in establishing a business in an attempt to earn income in mitigation of the loss that would be suffered as a result of the removal action was eminently reasonable, as was his decision to do this by setting up a company to run the business. No contrary argument was put.

147 The costs incurred in the set up of the business are set out at paragraphs 1 to 11 of Mr Ferguson's affidavit sworn 12 July 2017. No issue is taken with the reasonableness of the items on which expenditure was made nor with the amounts expended.

148 I find that the costs were reasonable costs.

149 It is irrelevant that the expenditure came from loaned funds. It is the expenditure by Mr Ferguson and the reasonableness of that expenditure which is relevant, not the source of the funds.

150 It is irrelevant that expenditure occurred before the removal action and while Mr Ferguson remained in WA Police, as at the time the expenditure commenced removal was, to the knowledge of Mr Ferguson, a real possibility if not an inevitable outcome.

151 It is also irrelevant that the expenditure may have resulted in Mr Ferguson now having capital assets.

152 In *Tucker v. Westfield Designs and Construction Pty Ltd* (1993) 123 ALR 278 the plaintiff had, in reasonable mitigation of loss, incurred costs in completing a university degree. The judge at first instance disallowed those costs is the award of compensation on the basis that "the expenses of a university education have led to the acquisition of what is properly characterised as a capital asset". The Full Court of the Federal Court, at page 286 of its decision, overturned that finding not only on the basis that knowledge is not a capital asset but also because there is no "legal principle which requires that a portion of the cost of mitigation of damages should be borne by a plaintiff."

153 The principle is that reasonable costs incurred in mitigating or in reasonably attempting to mitigate loss are compensable, not reasonable losses. There may, if and when Mr Ferguson sells any capital assets, be a difference between his costs and his losses. However, not only are we not in a position to calculate that difference, if there is one, but it is not to the point.

154 I note and emphasise that the costs incurred by Mr Ferguson have resulted in a reduced claim for loss and that the Commissioner of Police has the benefit of that.

155 I will award Mr Ferguson the amount nominated in his affidavit as that incurred by way of expenditure in the setting up of the business, being $27,535.00.

156 Mr Ferguson also seeks compensation for severe depression and anxiety, humiliation associated with being unfairly removed and loss of reputation associated with findings in the investigation that he was under the influence of alcohol to the point of having no judgment on 18 July 2014 and with him being accused of crimes which did not result in convictions against him.

157 In *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849 at [200] the Full Bench of the Western Australian Industrial Relations Commission held:

> "For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained…The injury may be manifested by the detrimental impact on the physical or emotional wellbeing of the person whose services were terminated. However dismissals will impact to varying degrees on individuals and while the need for professional care may be evidence of that impact, this will not necessarily always be the case in order to establish the causal link between the termination of employment and the injury. While it is necessary to exercise a degree of caution to ensure that compensation is confined to reasonable limits (*Timms v Phillips Engineering Pty Ltd* (1997) 70 WAIG 1318 and *Burazin v Blacktown City Guardian Pty Ltd* 142 ALR 144) that is not to say that every claim for injury necessarily involves expert evidence of emotional trauma.

158 In *Mark Darren Richards v GB & G Nicoletti* (2017) 97 WAIG 117 Acting President Smith held that when considering whether to make an award of compensation for injury, and, if so, the amount of that award, it is necessary to consider whether injury has in fact been caused by the employer in terminating the employee and, if so, it is then necessary to consider the gravity of the conduct of the employer which caused the injury.

159 I understand the decision to mean that if there is evidence of loss of dignity, anxiety, stess or humiliation those matters are compensable but I also understand that where those feelings are no more than what might be expected where a person has been unfairly dismissed the awards are likely to be nominal.

160 Where there is evidence of nervous shock or mental illness resulting from an unfair dismissal awards may, depending on that evidence, be higher. These are cases which may be said to be "outside of the ordinary run of cases."

161 Additionally, I understand from the decision in *Mark Darren Richards v GB & G Nicoletti* that if the employer has, in unfairly dismissing an employee, or in actions associated with that unfair dismissal, distinguished themselves by their conduct, that is by way of particularly reprehensible conduct, an award of damages may be increased, essentially by way of punitive or aggravated damages. Again these are cases which may be said to be "outside of the ordinary run of cases."

162 Properly understood there is no need for there to be a demonstration that a case is "outside the ordinary run of cases" for compensation for injury to be awarded although distinguishing features may affect the quantum of the award made.

163 I have carefully considered all of the evidence in this matter.

164 I have found surprisingly little evidence to support an award of compensation for injury to Mr Ferguson.

165 Mr Ferguson deposes in his affidavit sworn 30 June 2017 that the likelihood of him being removed caused him to "feel extremely stressed and insecure" but he does not depose about what impact the action, when actually taken, had upon him. It may, I suppose, be assumed that those feelings would have been unlikely to have been alleviated by the removal action but at the same time Mr Ferguson was able to apply himself, most commendably, to taking steps to mitigate his loss by establishing a business and company at that time.

166 Nonetheless, and proceeding on what I consider to be a reasonable assumption, there is evidence here that would support an award for compensation.

167 The other emotional reactions and mental health issues deposed to relate, so far as Mr Ferguson's affidavit sworn 30 June 2017 goes, to other matters, occurring earlier or later in time, such as the criminal investigation into his conduct on 18 July 2014, him being charged with criminal offences, the course of unrelated criminal proceedings and the process in relation to and the outcome of the criminal charges against him.

168 Although Mr Ferguson deposes in his affidavit sworn 30 June 2017 that the withdrawal of the common assault charge, combined with his acquittal on the most serious charge he faced, caused him to feel extreme anger and betrayal because he "had requested the Commissioner to delay his decision until after my criminal trial and he had refused", these feelings, and the breakdown he said they developed into soon after, are too remote from the removal action to be evidence that the removal action caused them.

169 It seems what caused them was Mr Ferguson's analysis of the history of the matter rather than the removal action itself. In any event, Mr Ferguson's analysis seems to have proceeded on the basis that if the Commissioner of Police had delayed consideration of the removal action until the outcome of the charges against him was known, and those outcomes were favourable to Mr Ferguson, then this would have ultimately and necessarily made a difference.

170 This analysis is not correct and the feelings and mental health effects of Mr Ferguson analysing the matters in this way cannot be linked to the removal action itself.

171 I have had regard to the report of the clinical psychologist Mrs Villani dated 2 November 2015 relating to treatment of Mr Ferguson from 12 August 2014 to November 2015 and the report of the clinical psychologist Ms Bevan dated 20 June 2017 relating to treatment from 8 April 2016 to 10 November 2016.

172 There is no evidence whatsoever in the report of Mrs Villani linking any symptoms with which Mr Ferguson presented to his removal.

173 The report of Ms Bevan does record a history given to her by Mr Ferguson which appears to link his symptoms to the removal action. However, it is noted that Mr Ferguson first presented to Ms Bevan on 8 April 2016 and from the affidavit of Mr Ferguson sworn 30 June 2017 I have a fuller understanding of Mr Ferguson's emotional state at that time and the reasons for it. Mr Ferguson was upset and had a breakdown because of the erroneous analysis to which he deposed and not, in fact, because of the removal action which had been taken more than a year before.

174 There is nothing in the evidence relating to injury suffered by Mr Ferguson which takes this matter out of the ordinary run of cases.

175 Mr Ferguson asserts however that the award of compensation should be increased because the fact he was removed from service as a police officer automatically distinguishes the matter in a relevant way.

176 Reliance is placed on Beech CC's comments in the last sentence of [106] of his reasons for decision in *Jones v Commissioner of Police* (2007) 87 WAIG 1101 which suggest that the removal action of a police officer is, in itself and without more, outside the ordinary run of cases. Beech CC gives as the reason, if his comment is properly interpreted in this way, that "the position in the community of police officers …is [different] from that of employees in industry generally."

177 It is clear enough that what Beech CC meant is that there is a "fall from grace" associated with the removal of a police officer that is not experienced by most employees who lose their jobs, because police have an elevated status within the community.

178 It is true that police officers hold a special position in the community. In this case the real significance of this is that police officers have extraordinary powers and for that reason it is important the Commissioner of Police have a high level of confidence in their ability and integrity and their willingness to submit to the disciplined nature of the WA Police hierarchical structure. This is so the public may have trust and confidence in police officers having extraordinary powers.

179 However, it must also be accepted that concomitant to this police officers do hold a position of some status and gravitas in the community. I also find that police officers do not merely do a job, they hold an office and do so at all times. That is, it is what they are as much as it is what they do.

180 I find that Beech CC was right to conclude, as I find he did, that there is a fall from grace associated with removal action that takes such cases outside of the ordinary run of cases.

181 Accordingly, I have decided to increase the amount that Mr Ferguson would have otherwise received by way of compensation for injury.

182 I am not however prepared to increase the amount on the basis that the conduct of the Commissioner of Police was outside that found in the ordinary run of cases such that there should be an award of a type that may be described as aggravated or punitive damages.

183 It has been found that the Commissioner of Police should have delayed the removal action process but I do not find that his decision to not delay was made frivolously or vexatiously or capriciously. The decision was taken after consideration had been given to what was said by and on behalf of Mr Ferguson on the matter and reasons were given for the decision, as the letter found at tab 5.3 of the respondent's bundle provided pursuant to regulation 92 of the *Police Force Regulations 1997* show.

184 There was nothing associated with the removal action that would take the matter out of the ordinary run of cases in my view. That is, there was no callous or abusive conduct on the part of the Commissioner of Police which should affect the quantum of damages.

185 On the basis of the evidence of Mr Ferguson's feelings of stress and insecurity associated with his removal I would have awarded him $1000 but I increase that to $2000 given the fall from grace involved in the removal action.

186 Accordingly I would order that the respondent pay to Mr Ferguson the sum of $34,776.00.

Minute of Proposed Order

187 A Minute of Proposed Order now issues. The Commission should be advised by 4.00 pm on Wednesday, 20 September 2017 whether or not a speaking to the minutes is required.

2017 WAIRC 00832

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE MICHAEL FERGUSON
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 20 SEPTEMBER 2017
FILE NO/S	APPL 109 OF 2015
CITATION NO.	2017 WAIRC 00832

Result	Order issued
Representation	
Appellant	Ms K Vernon, of counsel
Respondent	Mr N John, of counsel

Declaration and Order

WHEREAS on 1 May 2017 the Western Australian Industrial Relations Commission (WAIRC) issued Reasons for Decision upholding Mr Ferguson's appeal ([2017] WAIRC 00238); and

WHEREAS on 15 September 2017 the WAIRC issued Reasons for Decision in relation to compensation for loss and injury caused by the removal of Mr Ferguson from office ([2017] WAIRC 00805);

NOW THEREFORE the WAIRC, pursuant to the powers conferred under the *Industrial Relations Act 1979* and the *Police Act 1892* hereby:

1. DECLARES:

   (a) THAT the Commissioner of Police's decision to take removal action relating to Shane Michael Ferguson was unfair; and

   (b) THAT it is impracticable for it to be taken that Mr Ferguson's removal from office is and has always been of no effect.

2. ORDERS the Commissioner of Police forthwith pay Mr Ferguson the amount of $34,776 as compensation for loss and injury caused by the removal.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 00833

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE LORRAINE BALL
	APPLICANT
	-v-
	WESTERN AUSTRALIAN COLLAGE OF AGRICULTURE CUNDERDIN
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 22 SEPTEMBER 2017
FILE NO/S	U 100 OF 2016
CITATION NO.	2017 WAIRC 00833

Result	Application dismissed
Representation	
Applicant	Ms J Ball
Respondent	Mr J Carroll (of counsel)

Order

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

AND WHEREAS this application was listed for a show cause hearing on 22 September 2017;

AND WHEREAS on 21 September 2017 the applicant informed the Commission by email that she did not wish to proceed with her claim;

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.

2017 WAIRC 00820

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID CUSCHIERI
	CLAIMANT
	-v-
	TELFERWESTCORP PTY LTD FORMALY KNOW AS (GENTLEMAN GUARDS)
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 18 SEPTEMBER 2017
FILE NO/S	B 52 OF 2016
CITATION NO.	2017 WAIRC 00820

Result	Claim dismissed
Representation	
Claimant	No appearance
Respondent	No appearance

Order

WHEREAS on 23 March 2016 the claimant made a claim to the Western Australian Industrial Relations Commission alleging denied contractual entitlements;

AND WHEREAS this matter was listed on 18 September 2017 for hearing to show cause;

AND WHEREAS at the hearing on 18 September 2017 there was no appearance by or for the claimant and the Commission proceeded in the absence of the claimant;

NOW THEREFORE I, the undersigned, having given my reasons for decision during the hearing and pursuant to the powers conferred on me under section 27(1)(a) *Industrial Relations Act 1979* hereby order –

THAT the claim be dismissed for want of prosecution.

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

2017 WAIRC 00818

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALAN GOOCH
	CLAIMANT
	-v-
	STEVE MADSON
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 18 SEPTEMBER 2017
FILE NO/S	B 169 OF 2016
CITATION NO.	2017 WAIRC 00818

Result	Claim dismissed
Representation	
Claimant	No appearance
Respondent	No appearance

Order

WHEREAS on 12 October 2016 the claimant made a claim to the Western Australian Industrial Relations Commission alleging denied contractual entitlements;

AND WHEREAS this matter was listed on 18 September 2017 for hearing to show cause;

AND WHEREAS at the hearing on 18 September 2017 there was no appearance by or for the claimant and the Commission proceeded in the absence of the claimant;

NOW THEREFORE I, the undersigned, having given my reasons for decision during the hearing and pursuant to the powers conferred on me under section 27(1)(a) *Industrial Relations Act 1979* hereby order –

THAT the claim be dismissed for want of prosecution.

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

2017 WAIRC 00815

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHAN KARABA
	APPLICANT
	-v-
	ANTHONY DAWKINS - TRADING AS TIMELESS WA HARDWOODS
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 18 SEPTEMBER 2017
FILE NO/S	U 36 OF 2016
CITATION NO.	2017 WAIRC 00815

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 4 March 2016 the applicant made an application to the Western Australian Industrial Relations Commission alleging unfair dismissal;

AND WHEREAS this matter was listed on 18 September 2017 for hearing to show cause;

AND WHEREAS at the hearing on 18 September 2017 there was no appearance by or for the applicant and the Commission proceeded in the absence of the applicant;

NOW THEREFORE I, the undersigned, having given my reasons for decision during the hearing and pursuant to the powers conferred on me under section 27(1)(a) *Industrial Relations Act 1979* hereby order –

THAT the application be dismissed for want of prosecution.

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

2017 WAIRC 00794

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00794
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 28 AUGUST 2017, TUESDAY, 29 AUGUST 2017, WEDNESDAY, 30 AUGUST 2017
DELIVERED	**:**	FRIDAY, 8 SEPTEMBER 2017
FILE NO.	**:**	U 41 OF 2017
BETWEEN	**:**	ZAINAL OMAR MATTAR
		Applicant
		AND
		THE MINISTER FOR CORRECTIVE SERVICES
		Respondent

CatchWords	:	Industrial law (WA) - Alleged harsh, oppressive and unfair dismissal - Applicant summarily dismissed for misconduct - Respondent accepts onus to prove allegation - Respondent unable to prove allegation on balance of probabilities - Application upheld - Compensation and reinstatement ordered
Legislation	:	*Prisons Act 1981*
Result	:	Application upheld; compensation and reinstatment ordered
Representation:		
Counsel:		
Applicant	:	Ms R Cosentino
Respondent	:	Mr J Carroll
Solicitors:		
Applicant	:	Slater & Gordon
Respondent	:	State Solicitor's Office

Cases cited:

Garbett v Midland Brick Co Pty Ltd (2003) 83 WAIG 893

Minister for Health v Drake-Brockman (2012) 92 WAIG 203

Newcrest Australia Ltd v The Australian Workers' Union, Western Australian Branch (1988) 68 WAIG 677

RT v The School [2015] FWC 2927

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

Reasons for Decision

1 The applicant was dismissed after the respondent found proven against him an allegation that during the escort of a prisoner, Trent Hayes, he had forced Mr Hayes' head into a wall.

2 The respondent at hearing accepted the applicant's contention that he had summarily dismissed the applicant and that he had the onus to prove the allegation before me.

3 The respondent has fallen well short of proving the allegation on the balance of probabilities.

4 The applicant denied the allegation and his denials were not in any way, either directly or by collateral attacks on credit, undermined in these proceedings.

5 Footage of the incident became an exhibit in these proceedings and shows, to my eye, that the applicant was, along with the prisoner, wheeled around as they passed through the doorway of unit one, C Wing day room by the other officer involved in the escort. The footage shows that the applicant got dragged along by the momentum created by that other officer and stumbled toward the wall with which Mr Hayes came into contact.

6 I accept that the applicant, as he says, thought the party would be going to the right when they passed through the doorway and was caught unawares by the other officer swinging the party to the left.

7 The applicant's expert witness, Dr Andrew Short, was able to give evidence on the biomechanical factors at play in what is shown by the footage.

8 Dr Short explained, and I accept, that the other officer involved in the escort had two feet planted on the ground at the doorway and thus had established greater friction than Mr Hayes and the applicant at the crucial time.

9 Dr Short explained that with that greater friction the other officer was able to act as a pivot around which Mr Hayes and the applicant moved. As that officer moved to the left, as he clearly did when the footage is viewed, he was able to wheel Mr Hayes and the applicant around to the left.

10 The applicant, being unprepared for movement to the left, got dragged around and had no control over what happened in the next couple of seconds, including Mr Hayes' contact with the wall.

11 The evidence of Mr Hayes was the only evidence put up by the respondent in support of his case. I can understand Mr Hayes thinking he had been forced into the wall but his position, being bent over facing the ground, was not a good one to assess who was doing what. A viewing of the footage, informed by the expert evidence, is a more reliable guide.

12 The contact of Mr Hayes' head with the wall was, in my view, accidental. It certainly did not result from the applicant's actions.

13 There was a second allegation found proven against the applicant.

14 However, the respondent accepted that the finding in relation to that other allegation was not, and could not, in itself be relied upon to dismiss the applicant from his employment.

15 Having found that the misconduct the respondent relied upon to dismiss the applicant from his employment has not been proven to me on the balance of probabilities I turn to the matter of remedy.

16 The respondent did not contend that reinstatement was impracticable and I will order the respondent to reinstate the applicant to the applicant's former position on conditions at least as favourable as the conditions on which he was employed immediately before dismissal.

17 I will also make an order that the applicant's employment is to be treated by the respondent as unbroken.

18 Further, I will make an order the respondent pay to the applicant the remuneration lost by the applicant because of his dismissal.

19 The applicant informs me that his gross wages were $82,000 per annum and no issue was taken with this by the respondent.

20 Since termination the applicant has received payments from employment and Newstart benefits totalling $24,875.05.

21 I would ask the parties to agree upon the final figure payable for remuneration lost assuming that the order will be made on 15 September 2017.

22 There was a great deal of evidence led and argument put in relation to the misconduct found on the second allegation.

23 I note that Exhibit 10 proposed that the penalty on that misconduct would be dismissal and I cannot find in Exhibit 12 any indication that some different penalty was actually imposed for the misconduct.

24 I have noted that at the hearing the respondent accepted, appropriately, that that misconduct could not, in itself, sustain a decision to dismiss the applicant from his employment.

25 Strictly speaking it is not necessary for me to deal with the second matter as any finding on it could not impact on my ultimate order that the respondent reinstate the applicant to his former position.

26 However, given the evidence led and arguments made I will give my views.

27 Section 14(1)(d) *Prisons Act 1981* provides that prison officers may use such force as they believe on reasonable grounds to be necessary to ensure a lawful order given to a prisoner are complied with.

28 Here Mr Hayes had been ordered to move from unit one C Wing day room to another place within the prison. Instead of complying he sat still in a chair and began mouthing off at the prison officers present.

29 An officer brought Mr Hayes to the ground and three officers, including the applicant, handcuffed him while he was lying face down.

30 I accept that Mr Hayes continued to abuse the officers and was probably also making wild, and largely unachievable, threats at this time as well as struggling against the attempts to handcuff him.

31 When it came time to use force to ensure that Mr Hayes complied with the order to go elsewhere within the prison the applicant decided to use the underhook and pike method, shown in pictorial form at page 46 of Exhibit 3.

32 This method involved more force that the "standard" escort method shown at page 45 of Exhibit 3, according to the unchallenged evidence of Bruce Mark Kentish, Acting Senior Team Leader, Training Services at the respondent's training academy, Graham Robert Carlson, a Principal Prison Officer (ts 74), Christopher David Rule, Senior Prison Officer (ts 115) and the applicant himself (ts 50).

33 For a more forceful method to be preferred to a less forceful one there must be reasonable grounds for a belief that it is necessary to ensure the lawful order is complied with.

34 No reasonable grounds were put forward by the applicant. The applicant says that while on the ground Mr Hayes was making threats, generally mouthing off, and physically resisting the force being applied to him and for these reasons he thought it was reasonable to go straight to the underhook and pike method without attempting the less forceful option of the standard escort method.

35 I appreciate fully that I am addressing reasonableness in the comfort of my chambers and that the applicant was assessing it in a volatile situation in a volatile working environment.

36 Nonetheless, it is plain from all of the evidence that the respondent takes the proper application of force as a very serious matter, as it should given the powers his officers enjoy, and spends a great deal of time in training and in production of manuals which are intended to assist officers in assessing what force to use.

37 It is also clear from the evidence that officers themselves, no doubt as a result of the emphasis their employer puts upon it, have, or should have, at the forefront of their minds in situations such as this what force should be used.

38 By mentioning these factors I do not mean to suggest that split second decisions do not need to be made or that getting it entirely right is not a very difficult thing to do in volatile situations, but rather to emphasise that it cannot be said when I come to objectively assess the actions of the applicant that I am dealing with a person who would have little idea how to handle such a situation but rather with someone who is expected to behave reasonably in volatile situations in a volatile working environment and operates in a culture where this is emphasised.

39 I consider that there was no good reason to not first attempt the standard escort method. Mr Hayes may have been threatening harm and abusing the prison officers while on the ground but he was handcuffed and had a limited ability to carry out his threats, even if they were taken seriously.

40 None of those threats involved spitting, biting or headbutting.

41 Mr Hayes was not a "notorious" prisoner known for assaulting prison officers (ts 110).

42 My viewing of the footage indicates that, whatever he may have been saying and doing while on the ground, when Mr Hayes was raised to his feet he was a defeated man. He was not spitting or attempting to spit or bite or headbutt anyone. His non-compliance had been, at this point, overcome by bringing him to the ground and handcuffing him.

43 A standard escort would have involved two trained and hefty prison officers marching Mr Hayes, a slight man by comparison, to the intended destination each holding one of his arms.

44 I consider it would have been reasonable to attempt compliance by means of the standard escort method and to escalate the force used to an underhook and pike if something happened.

45 The applicant seems to have been unduly influenced by past experiences with other prisoners. (for instance ts 17)

46 I do not consider it reasonable to have gone straight from subduing and handcuffing Mr Hayes on the floor into an underhook and pike method of escort.

47 If the standard escort method had been used, the accident I have found occurred may have been avoided, not that that speculation is material to any of my conclusions.

48 The applicant used slightly more force than he, reasonably, ought to have done.

49 I did not raise with the parties whether, if the applicant was returned to his employment, the respondent would get a second bite at the cherry on that misconduct given that it did not, for understandable reasons given its findings on the first allegation, appear to have given discrete consideration to the appropriate penalty if the second matter stood alone. I expressly do not deal with whether the respondent is now estopped from imposing a different penalty on the applicant for the act of misconduct that, in my view, did occur.

50 For what it is worth it seems to me that the misconduct that occurred, the application of a bit more force than was warranted, was minor only in all of the circumstances and that it could be adequately addressed by improvement action.

2017 WAIRC 00804

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ZAINAL OMAR MATTAR
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 15 SEPTEMBER 2017
FILE NO/S	U 41 OF 2017
CITATION NO.	2017 WAIRC 00804

Result	Application allowed; reinstatement and compensation ordered
Representation	
Applicant	Ms R Cosentino of counsel
Respondent	Mr J Carroll of counsel

Order

HAVING heard Ms R Cosentino, of counsel, for the applicant and Mr J Carroll, of counsel, for the respondent; and

HAVING given reasons for decision on 8 September 2017;

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

(1) declare the applicant's dismissal was harsh, oppressive and unfair;

(2) order the applicant forthwith be reinstated to his former position on conditions at least as favourable as the conditions on which the applicant was employed immediately before dismissal;

(3) order the applicant's employment be considered continuous for all relevant purposes; and

(4) order the respondent pay to the applicant the sum of $14,765.50 less applicable tax within 30 days of the date of this order.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2017 WAIRC 00814

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN MCDADE
	APPLICANT
	-v-
	TNT
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 18 SEPTEMBER 2017
FILE NO/S	U 181 OF 2016
CITATION NO.	2017 WAIRC 00814

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	Mr E Soo

Order

WHEREAS on 3 November 2016 the applicant made an application to the Western Australian Industrial Relations Commission alleging unfair dismissal;

AND WHEREAS this matter was listed on 18 September 2017 for hearing to show cause;

AND WHEREAS at the hearing on 18 September 2017 there was no appearance by or for the applicant and the Commission proceeded in the absence of the applicant;

NOW THEREFORE I, the undersigned, having given my reasons for decision during the hearing and pursuant to the powers conferred on me under section 27(1)(a) *Industrial Relations Act 1979* hereby order –

THAT the application be dismissed for want of prosecution.

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

2017 WAIRC 00230

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL EDWARD MUIRHEAD
	APPLICANT
	-v-
	MATHEW BIRNEY
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 26 APRIL 2017
FILE NO/S	B 185 OF 2016
CITATION NO.	2017 WAIRC 00230

Result	Order made
Representation	
Applicant	In person (via telephone)
Respondent	Mr M Birney

Order

HAVING heard the applicant on his own behalf and Mr M Birney for the respondent at conference on 26 April 2017 and by the consent of the parties;

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

That the name of the respondent in B 185 of 2016 be changed to "Gold City Corp Pty Ltd as Trustee for the Mattellee Trust t/as Vendwest Vending Machines".

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

2017 WAIRC 00831

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00831
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 31 AUGUST 2017
DELIVERED	**:**	WEDNESDAY, 20 SEPTEMBER 2017
FILE NO.	**:**	B 185 OF 2016
BETWEEN	**:**	DANIEL EDWARD MUIRHEAD
		Claimant
		AND
		GOLD CITY CORP PTY LTD AS TRUSTEE FOR THE MATTELLEE TRUST T/AS VENDWEST VENDING MACHINES
		Respondent

CatchWords	**:**	Contractual benefits claim - Claimant's employment terminated - Claimant initially terminated due to redundancy - Respondent contends claimant was subsequently summarily dismissed for dishonesty - Claim for salary - Claim for payment in lieu of notice - Claim for accrued annual leave - Claim for a bonus - Respondent contends no entitlements as claimant summarily dismissed - Principles discussed and applied - Legislation discussed and applied - Found claimant could have been summarily dismissed for negligence and incompetence - Claim for salary and accrued annual leave upheld - Claim for payment in lieu of notice fails - Claim for a bonus not made out
Legislation	**:**	*Industrial Relations Act 1979*
		Fair Work Act 2009 (Cth)
Result	**:**	Claims for salary and annual leave upheld; payment ordered
		Claim for payment lieu of notice and payment of a bonus dismissed
Representation:		
Claimant	**:**	In person
Respondent	**:**	Mr M Birney

Case referred to in reasons:

Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224

Reasons for Decision

1 The claimant says the following contractual entitlements have not been allowed by his former employer:

(1) two weeks of salary;

(2) two weeks of salary in lieu of notice;

(3) an accrued annual leave entitlement of 115 hours; and

(4) a bonus.

2 The respondent says that, while there may ordinarily have been a contractual entitlement to the above, respectively in relation to each:

(1) the claimant did not work or render service to the respondent in the two weeks for which he was not paid;

(2) the respondent had grounds upon which it could have summarily dismissed the claimant as at the date of his termination, and has notified the claimant of this, and accordingly no contractual entitlement to notice, or payment in lieu of notice, arises;

(3) for the same reasons as in (2) above no contractual entitlement to payment for accrued annual leave arises;

(4) the circumstances giving rise to the payment of a bonus did not arise.

3 The respondent operated vending machines. The claimant was employed by the respondent as its general manager from 26 January 2015 to 16 September 2016.

4 When the claimant commenced work he had "hands-on" responsibility for some machines, including one machine about which evidence was heard at Armadale Hospital in relation to which he had a hands-on role from around March 2015 to November 2015.

5 Mr Matthew Birney was the owner of the business but he left the running of the business largely to the claimant, only dropping in to check how things were going once every six weeks or so and otherwise responding to emails when and if the need arose from his office in West Perth.

6 On 16 September 2016 there was a meeting between the claimant and Mr Birney at which the claimant was informed his employment was terminated on the grounds of redundancy. It appears clear, and I find, that at that time there was a meeting of the minds that the claimant would be paid his final two weeks of salary, two weeks of salary in lieu of notice, all of his accrued annual leave entitlement and a bonus if such were due to him.

7 Mr Birney for the respondent later changed his mind in relation to the contractual obligations of the respondent.

8 Mr Birney did so, he says, because events over the next few days led him to the conclusion that the claimant had failed to manage, or had mismanaged, the Armadale Hospital vending machine.

9 In fact Mr Birney came to the conclusion, he says reasonably, that the claimant had been stealing money from the machine. The key planks in his reasoning, which he says he discovered after 16 September 2016, were that:

(1) no money had been banked from the machine between 21 May 2015 and 16 September 2016;

(2) the claimant had told the person who took over the hands-on role with the machine in November 2015 that it was a "free" vend machine (by which was meant the machine was a machine from which nurses at the Armadale Hospital could get coffee by use of a swipe card rather than cash) and that there was no need for him to collect cash from the machine; and

(3) on 16 September 2016, and after having been terminated, the claimant went to the machine, for a trumped up reason, and removed a card from the machine which contained information showing the claimant's deceit.

10 Mr Birney says that if he had known those things as at 16 September 2016 the respondent would have summarily dismissed the claimant and, if summary dismissal was properly open to it, then the respondent would not have had to pay an amount in lieu of notice or the accrued annual leave entitlement to the claimant.

11 My findings are as follows.

12 I am satisfied that the claimant rendered service to the respondent in the last two weeks of his employment.

13 The claimant tells me that he generally worked from home attending meetings and site visits as the need arose. I find this to be the case and that the respondent either knew it, or ought to have known it, given the length of the claimant's employment. That is, it was not a matter of controversy between the parties during the bulk of the claimant's employment on the evidence before me.

14 I note that Mr Birney asked the claimant to attend the warehouse from 9am till 5pm from 8 September 2016 and that Mr Birney disputed that the claimant attended in accordance with that instruction.

15 The respondent did not prove that the claimant did not attend at the warehouse from 9am to 5pm from 8 September 2016 until he was dismissed on the morning of 16 September 2016.

16 Mr Birney was not present at the warehouse and the respondent did not call evidence from anyone who was present.

17 In any event a failure on the part of the claimant to attend the warehouse, given that it was plain on the evidence that this was not the claimant's general practice during his period of employment, would not prove that he had not rendered service on those days.

18 The claimant had a contractual entitlement to be paid during the course of his employment. The claimant says he worked in the usual way until 16 September 2016, except that he did attend the warehouse more after 8 September 2016.

19 The respondent has not been successful in undermining the evidence.

20 The claimant is entitled to payment of salary until his employment ended.

21 The claimant tells me he has not been paid $2500 by way of salary and that amount is not disputed so I will order the respondent to pay it to him.

22 In relation to the issue of summary dismissal, an argument that an employee has been summarily dismissed, or dismissed, on the basis of knowledge acquired only after termination is usually raised in unfair dismissal cases to give an alternative basis for an employer to resist the claim or to limit compensation or damages payable. However, I see no reason why the issue cannot be raised, with legal effect, in the current context.

23 I find that the respondent could have summarily dismissed the claimant as at 16 September 2016 if it had then had the knowledge it only later acquired. I note that I am not aware of any authority that an employer can nominate, with legal effect, a date earlier than that upon which an employee was actually dismissed as being the date upon which an employee could have been summarily dismissed.

24 I find that if the respondent had known on 16 September 2016 the full extent of the claimant's incompetence and negligence in relation to the management of the Armadale Hospital machine it could have summarily dismissed, and would have been entitled to summarily dismiss, the claimant on that date.

25 There was no banking done of money from the Armadale Hospital machine from June 2015 to 16 September 2016 inclusive, a period over which the claimant was the general manager of the respondent's business.

26 The claimant says that after the banking he did in May 2015 there was never enough money in the machine to warrant banking to occur while he had a hands-on role with the machine.

27 The claimant says he doesn't know if the machine produced enough money to warrant banking from November 2015 to 16 September 2016 and he never looked into the matter of how the Armadale Hospital machine was performing because it was not his job to look for discrepancies.

28 The claimant did not seriously try to dispute Mr Birney's evidence that no banking was done in the period June 2015 to 16 September 2016.

29 From May 2015 to November 2015 the claimant had a hands-on role with the machine and thereafter he was the manager of the person who did.

30 It is clear from evidence produced by the respondent that:

(1) the machine earned money for the respondent before June 2015;

(2) the machine earned money for the respondent after September 2016;

(3) the machine had the capacity to dispense coffee upon payment and, all things being equal, ought to have produced revenue for the respondent in the period June 2015 to September 2016.

31 That the claimant did not notice, or make himself aware, that the machine was not earning enough money to warrant banking from June 2015 to September 2016, and accordingly did not enquire as to why this was the case, is evidence that he was, at the least, incompetent and negligent in his duties.

32 The claimant says that the machine may have been switched onto a "free vend" mode and left there with the result that cups of coffee which should have been paid for were dispensed for free.

33 That explanation, whether believable or not, does not assist the claimant. The general manager of the respondent's business, especially when from May 2015 to November 2015 he had a hands-on role with the machine, should have noticed this problem, if it had occurred, and taken action in relation to it.

34 A long period of the machine not being financially productive, given the performance of the machine outside the period May 2015 to September 2016, should have alerted the claimant to the potential problem.

35 The claimant does not dispute that the machine made little or no money for the respondent between May 2015 and September 2016. This situation arose on his watch. His excuse that he did not need to take a close interest in the machine because he had been told to "focus" on sales is not credible. A focus on sales would not excuse the general manager from not noticing and responding to a machine that made money for the respondent before June 2015 and after September 2016 not making money in the period June 2015 to September 2016.

36 If the respondent had been aware on 16 September 2016 that the machine had made no real money for it since May 2015, and that the claimant either was not aware of this or, if aware, had done nothing about it, then the respondent could have quite fairly summarily dismissed the claimant for incompetence and negligence on that date.

37 This was not a one-off instance of negligence. It extended over 16 months. Even if the claimant's explanation about the machine being left in the wrong mode for an extended period of time is accepted the negligence in allowing that situation to persist cost the respondent revenue, with all thing being equal, that loss running into the thousands if it can be assumed, which I find it safe to do so on the evidence, that at least one thousand cups of coffee would have been dispensed upon payment in that time.

38 If the claimant was not dismissed in September 2016 there was nothing to indicate that the situation was ever, while the claimant remained the respondent's general manager, going to be identified and corrected.

39 The situation also shows that the claimant was an incompetent general manager. As general manager he had represented to the respondent that he had the skills necessary to run the respondent's machines successfully. This would include monitoring their performance and identifying and addressing any problems, or potential problems, with their performance. This, in relation to the Armadale Hospital machine at least, the claimant utterly failed to do.

40 The respondent says that it could have, and indeed has, dismissed the claimant summarily on 16 September 2016 for dishonesty.

41 In cases of dismissal for dishonesty an employer does not need to prove to anyone that dishonesty actually occurred. It is enough that an employer establishes that it had reasonable grounds to believe that its employee was dishonest. (see *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224)

42 It may be the case that the respondent's belief that the claimant had been dishonest, in that he had been taking money from the Armadale Hospital machine, was reasonably based. Various matters may be said to underpin the reasonableness of the belief such as:

(1) that no money was banked from the machine for an extended period;

(2) that the person who took over the hands on role with the machine in November 2015 told Mr Birney that he was told by the claimant that the machine was a free vend machine only and did not take cash;

(3) the performance of the machine before May 2015 and after September 2016 being inconsistent with its performance from June 2015 to September 2016;

(4) the claimant's conduct in opening the machine on 16 September 2016 after being told of his dismissal;

(5) the lack of a convincing reason for the claimant opening the machine on 16 September 2016; and

(6) the comments made by the claimant about the financial record card for the machine.

43 On that last point the claimant said he did take some items from the machine on 16 September 2016. He described these as "rubbish" and says he put them in the bin. He says the financial record card was not among them. In fact he says he was not aware that the machine even had a financial record card.

44 The claimant, however, accepted that he later provided these items of "rubbish" to the respondent.

45 As to how this could occur, the claimant said that some days after 16 September 2016, and upon demand from the respondent, he retrieved those items from the bin at Armadale Hospital.

46 The claimant's evidence about the reasons for attending upon the Armadale Hospital machine on 16 September 2016, what he did to the machine and what became of the "rubbish" he removed from it, that is he put it in the bin but was able to retrieve it some days later, is highly questionable and may very well have fed into a reasonable belief that the claimant had been stealing from the machine for an extended period of time and had gone to the machine on 16 September 2016, aware that he had been dismissed, to try and cover his tracks.

47 However, ultimately, I do not need to make a finding on whether the claimant was dishonest (and I would have been reluctant to do so without hearing evidence from the person who took over the hands-on role for the machine from the claimant) or whether the respondent's belief that the claimant was dishonest was reasonable.

48 I have found that the claimant was incompetent and negligent and that, as at 16 September 2016, the respondent could have summarily dismissed him on the basis of the knowledge the respondent acquired after this date in relation to the claimant's management of the Armadale Hospital machine.

49 Notice, or payment in lieu of notice, is not required in a case of summary dismissal so this aspect of the claim fails.

50 Despite the respondent's assertion to the contrary, summary dismissal has no implications for payment of accrued annual leave entitlements.

51 In this regard section 90(2) *Fair Work Act 2009* (Cth) makes it clear that if, when employment ends, an employee such as the claimant (that being an employee of a constitutional corporation) has a period of untaken paid annual leave the employer must pay the employee the amount that would have been paid to the employee had the employee taken that period of leave.

52 There is no exception to this in relation to summary dismissal and section 90(2) *Fair Work Act 2009* (Cth) would override any common law authority to the effect that accrued annual leave entitlements are not payable if an employee is summarily dismissed.

53 In terms of the accrued annual leave entitlement of the claimant the claim says there was an entitlement of 115 hours. The claimant said the final payslip shows an entitlement to 111.19 hours but said that figure was calculated on the basis that he had not worked for the final week of his employment when in fact he had. That proposition was not put to Mr Birney when he gave evidence so I will proceed on the basis that the figure in the final payslip, 111.19 hours, is accurate.

54 The respondent says the figure should be reduced by 27.08 hours because the claimant took some annual leave during his employment that was not processed. This was never put to the claimant and I reject the proposition.

55 I will order that the respondent pay to the claimant his accrued annual leave entitlement, an amount of $3474.63 (being 111.19 hours x $31.26, the claimant's hourly rate).

56 The claimant led no evidence in support of the claim for payment of a bonus and that aspect of the claim fails.

57 I will make an order the respondent pay to the claimant the sum of $5974.63 ($2500 + $3474.63) less tax.

2017 WAIRC 00849

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL EDWARD MUIRHEAD
	CLAIMANT
	-v-
	GOLD CITY CORP PTY LTD AS TRUSTEE FOR THE MATTELLEE TRUST T/AS VENDWEST VENDING MACHINES
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 28 SEPTEMBER 2017
FILE NO/S	B 185 OF 2016
CITATION NO.	2017 WAIRC 00849

Result	Claims for salary and annual leave upheld; payment ordered Claim for payment in lieu of notice and payment of a bonus dismissed
Representation	
Claimant	In person
Respondent	Mr M Birney

Orders

HAVING heard the claimant, on his own behalf, and Mr M Birney, for the respondent, on 31 August 2017; and

HAVING given reasons for decision;

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

1. The respondent forthwith pay to the claimant the sum of $5974.63 less tax comprising $2500 less tax for unpaid salary and $3474.63 less tax for unpaid annual leave entitlements;
2. The claimant's claim for payment in lieu of notice be dismissed; and
3. The claimant's claim for payment of a bonus be dismissed.

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

2017 WAIRC 00850

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMMANUEL DAMIEN O'HARA **APPLICANT** **-v-** CITY OF COCKBURN **RESPONDENT**
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 2 OCTOBER 2017
FILE NO/S	B 102 OF 2017
CITATION NO.	2017 WAIRC 00850

Result	Application dismissed

Order

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

WHEREAS on 26 September 2017, the applicant advised the Commission that the matter would shortly be discontinued; and

WHEREAS on 29 September 2017, the applicant filed a Notice of discontinuance.

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

THAT this application be, and is hereby dismissed.

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

2017 WAIRC 00819

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREGORY ALAN OLSEN
	CLAIMANT
	-v-
	STEVEN IERACI SDI FINANCIAL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 18 SEPTEMBER 2017
FILE NO/S	B 132 OF 2016
CITATION NO.	2017 WAIRC 00819

Result	Claim dismissed
Representation	
Claimant	No appearance
Respondent	No appearance

Order

WHEREAS on 3 August 2016 the claimant made a claim to the Western Australian Industrial Relations Commission alleging a denied contractual entitlement;

AND WHEREAS this matter was listed on 18 September 2017 for hearing to show cause;

AND WHEREAS at the hearing on 18 September 2017 there was no appearance by or for the claimant and the Commission proceeded in the absence of the claimant;

NOW THEREFORE I, the undersigned, having given my reasons for decision during the hearing and pursuant to the powers conferred on me under section 27(1)(a) *Industrial Relations Act 1979* hereby order –

THAT the claim be dismissed for want of prosecution.

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

2017 WAIRC 00769

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATALIE TODD
	APPLICANT
	-v-
	CHRIS MORGAN
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 31 AUGUST 2017
FILE NO/S	U 63 OF 2017
CITATION NO.	2017 WAIRC 00769

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Ms A Curtis as agent

Order

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

THAT the application be and is hereby discontinued by leave.

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

2017 WAIRC 00844

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MICHAEL WOODBURY

APPLICANT

-v-

EASTERN GOLDFIELD LTD

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT
DATE WEDNESDAY, 27 SEPTEMBER 2017
FILE NO/S B 106 OF 2017
CITATION NO. 2017 WAIRC 00844

Result Application dismissed
Representation
Applicant Mr M Woodbury
Respondent Mr B Di Girolami of counsel

Order

WHEREAS this is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* referred to the Commission on 18 August 2017; and

WHEREAS on 11 September 2017, the respondent filed its *Form 5 – Notice of answer*, in which it said that part of the amount claimed had already been paid and the balance of the amount owed would be paid to the applicant in due course; and

WHEREAS on 27 September 2017, the applicant advised that the balance of the amount owed to him had been paid, and requested that the application be discontinued.

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

THAT the application be, and is hereby dismissed.

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

2017 WAIRC 00813

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ROBERT WRAIGHT

APPLICANT

-v-

CATEGORY5 LABOUR MANAGEMENT PORT HEDLAND WESTERN AUSTRALIA HIRING FOR FUSION CONTRACTING

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE MONDAY, 18 SEPTEMBER 2017
FILE NO/S U 124 OF 2016
CITATION NO. 2017 WAIRC 00813

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	Mr S Sycamore

Order

WHEREAS on 28 July 2016 the applicant made an application to the Western Australian Industrial Relations Commission alleging unfair dismissal;

AND WHEREAS this matter was listed on 18 September 2017 for hearing to show cause;

AND WHEREAS at the hearing on 18 September 2017 there was no appearance by or for the applicant and the Commission proceeded in the absence of the applicant;

NOW THEREFORE I, the undersigned, having given my reasons for decision during the hearing and pursuant to the powers conferred on me under section 27(1)(a) *Industrial Relations Act 1979* hereby order –

THAT the application be dismissed for want of prosecution.

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

2017 WAIRC 00835

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00835
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	WEDNESDAY, 26 JULY 2017; TUESDAY, 12 SEPTEMBER 2017
DELIVERED	**:**	FRIDAY, 22 SEPTEMBER 2017
FILE NO.	**:**	B 24 OF 2017, B 25 OF 2017
BETWEEN	**:**	YI ZHANG; RONG ZHANG Applicants AND ENJOY GOING (AUSTRALIA) PTY LTD Respondent

CatchWords	**:**	Industrial Law (WA) - Contractual benefits claim - Entitlements under contract of employment - Claims for unpaid salary, notice and annual leave - Employer could choose to give notice or pay an amount in lieu of notice - Distinction between a debt owed under a contract and a claim for damages for breach of contract - Applications upheld - Orders issued
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7, s 27(1)(d), s 29(1)(b)(ii)
Result	**:**	*Applications upheld*
Representation:		
Applicants	**:**	Ms Y Zhang and Ms R Zhang
Respondent	**:**	No appearance

Cases referred to in reasons:

Hotcopper Australia Ltd v Saab [2001] WAIRC 03827; (2001) 81 WAIG 2704

Matthews v Cool or Cosy [2004] WASCA 114; (2004) 136 IR 156

Spencer v Marchington [1988] IRLR 392

Zhang v Enjoy Going (Australia) Pty Ltd [2017] WAIRC 00315; (2017) 97 WAIG 665

Reasons for Decision

1 Yi Zhang was the Office Manager and Rong Zhang was the Managing Director for Enjoy Going (Australia) Pty Ltd (**Enjoy Going**).

2 As the applicants have the same surname, I refer to them by their first names to avoid confusion.

3 Yi and Rong have asked the Commission to hear their matters together because they make very similar claims against Enjoy Going. English is not their first language and they were assisted by an interpreter during the hearing.

4 Yi and Rong say that Enjoy Going dismissed them without notice and in breach of their employment contracts.

5 Yi claims her unpaid wages for December 2016 and part of January 2017, 12 months' notice and annual leave. Rong claims 12 months' notice and annual leave.

6 Enjoy Going did not file answers to the claims, respond to the Commission's correspondence or appear at the hearing.

7 As I found in ***Zhang v Enjoy Going (Australia) Pty Ltd*** [2017] WAIRC 00315; (2017) 97 WAIG 665, Enjoy Going's registered office address is 161B Leake Street Belmont. On 27 June 2017 and 4 September 2017 my Associate sent Enjoy Going notices of listing for the hearing. I am satisfied that Enjoy Going has been duly served with notice of these proceedings. The Commission has power under s 27(1)(d) of the *Industrial Relations Act 1979* (WA) to hear and determine these matters in Enjoy Going's absence in the circumstances.

8 To resolve these matters, I must decide whether Enjoy Going owes Yi and Rong 12 months' notice and annual leave. I must also decide whether Enjoy Going owes Yi unpaid wages from December 2016 to January 2017.

Witnesses

9 Yi and Rong both gave evidence at the hearing. They also called Mr Li to give evidence. Mr Li works for New Solution Accountants and has been Enjoy Going's accountant and tax advisor since 1 September 2012. Yi, Rong and Mr Li all presented as credible witnesses. I find they gave evidence truthfully and to the best of their recollection. Much of their evidence was supported by documents. I accept their evidence.

Rong's employment with Enjoy Going

10 Rong gave evidence that she was employed in 2008 as Sales Manager by Hunan Province Wanda Enjoy Going Travel Co. Ltd, which is Enjoy Going's parent company.

11 Rong and Mr Li gave evidence that Rong transferred to Enjoy Going in Perth in March 2014 to work as Enjoy Going's Travel Agency Manager and Managing Director. Rong tendered into evidence an employment contract signed on 15 January 2014. That employment contract provides that Rong is entitled to four weeks' annual leave per year of service. Further, that employment started on the 'employee's 457 visa granting day'. Rong tendered into evidence a visa grant notice. That document shows Rong was granted a 457 visa on 19 March 2014 which is valid until 19 March 2018. Enjoy Going is listed as her sponsor.

12 In 2015 Rong became Enjoy Going's Deputy General Manager.

13 Rong and Mr Li gave evidence that Rong renewed her employment contract with Enjoy Going on 1 July 2016, when she became Enjoy Going's Managing Director. Rong tendered into evidence an employment contract dated 1 July 2016 which is signed by her and by Chao Hui Liu as Enjoy Going's Director/Secretary. Mr Li confirmed that document was Rong's employment contract. He said he had seen the employment contract at the time it was signed by Rong and Enjoy Going. He gave evidence that his office needed a copy of the employment contract so that it could process payroll. Mr Li gave evidence that although Rong's employment was 'put on hold' for some months before she became Managing Director in 2016 due to Enjoy Going's restructure, her employment was continuous. I understand his evidence to be that Rong was paid her salary for the period of the restructure and she continued to accrue entitlements. Those entitlements carried over when Rong became Enjoy Going's Managing Director in July 2016.

14 Rong's evidence is that she accrued entitlements under her two employment contracts from March 2014 until Enjoy Going terminated her employment. She tendered into evidence a bundle of payslips from 2014 to 2016. Those payslips are consistent with and support Rong and Mr Li's evidence.

15 Rong's evidence is, and her employment contracts and payslips show, that her salary was $98,000 per year. Her hourly rate was $49.5951.

16 Rong gave evidence that in late November 2016 Mr Li forwarded her an email that said a new Director and General Manager, Mr Da Zheng, would replace her.

17 Mr Li gave evidence that on 29 November 2016 Mr Zheng wrote to him and asked Mr Li to prepare documents to appoint Mr Zheng to replace Rong as the sole director of Enjoy Going. Mr Li says he met with Mr Zheng the next day and quoted a fee to prepare the documents.

18 Rong gave evidence that on 2 December 2016 she was told by Enjoy Going's parent company that she was dismissed by Enjoy Going. She tendered into evidence a Notice of Appointment and Dismissal dated 1 December 2016. It states:

> **Attention to:**
>
> All departments of head office, all subsidiaries
>
> As per the needs of business development and management, with combining the actual staff situation, we have gained approval from general manager and general manager's meeting discussion, and hereby announce that:
>
> Ms. ZHANG Rong was removed from the position of deputy general manger [sic] in Western Australia company. As from today, she will be transferred to head office, specific job allocation will be arranged by head office.

> This notice will become effective as of December 1, 2016. Upon the date of announcement, Ms. ZHANG Rong shall carry out her work handover with the guidance of superior management. Ms. ZHANG Rong shall report for duty at head office on December 5, 2016, to make sure routine work activities can be operated well both in head office and WA company.
>
> Hunan Province Wanda Enjoy Going Travel Co. Ltd
>
> Seal for Hunan Province Wanda Enjoy Going Travel Co. Ltd
>
> December 1, 2016

19 Rong says she returned to China five days later, as requested, to do job reporting. Rong told Enjoy Going's parent company that Enjoy Going had breached her employment contract but she received no response.

20 Mr Li says that on 9 December 2016 Mr Zheng told him that Mr Zheng had already changed the director's details with the Australian Securities & Investments Commission (**ASIC**). Mr Li says he reminded Mr Zheng that Enjoy Going either needed a signed resignation letter from Rong or Enjoy Going would need to call a shareholder meeting to remove Rong. He says Mr Zheng told him everything was under control.

21 Rong says that on 9 December 2016 she was contacted by business partners, which I understand means clients and organisations that do business with Enjoy Going, who wanted to know what had happened to Enjoy Going. The business partners said Mr Zheng told them that Enjoy Going had stopped operating on 8 December 2016. Yi tendered into evidence an email dated 9 December 2016 from Mr Zheng in support of Rong's evidence:

> Dear Stakeholders,
>
> On behalf of HUNAN WANDA ENJOYGOING INTERNATIONAL TRAVEL SERVICE CO., LTD, holding company of Enjoy Going Australia, I would like to inform you that Enjoy Going Australia Pty Ltd has ceased operation as of 8th of December, 2016.
>
> Ms Fion Zhang (Rong Zhang) is no longer part of Enjoy Going Australia nor is she affiliated with the company. If you receive any contact from Ms. Fion Zhang regarding bookings and tour operation, it will be her personal dealings and will have nothing to do with Enjoy GoingAustralia [sic].
>
> If you have any queries regarding any past unpaid payments or future bookings that have been made by Enjoy Going Australia through Ms Fion Zhang prior to the 8th of December, please contact myself, Da Zheng at zhengda@qhlly.com to discuss.
>
> Thank you for your attention to this matter.
>
> Sincerely Yours,
>
> Da Zheng
>
> *Managing Director*
>
> *Enjoy Going Australia Pty Ltd.*

22 Rong tendered three ASIC forms, Form 484 – Change to company details, which show Mr Zheng was appointed as Enjoy Going's Director and Secretary on 5 December 2016 while Rong stopped being Enjoy Going's Director and Secretary on 8 December 2016.

23 Mr Li says that when he saw a copy of ASIC Form 484 on 14 December 2016, he realised that Rong had been removed as director without having signed a resignation letter and without Enjoy Going having called a shareholder meeting. That day Mr Li wrote an urgent letter to Mr Zheng and Enjoy Going's parent company's Administration Manager, Finance Manager, Acting CEO and Director to remind them that this was a serious breach of the *Corporations Act 2001* (Cth). He says he did not receive a reply.

24 Rong gave evidence that she did not take any annual leave while employed by Enjoy Going and has accrued annual leave which was not paid out. Rong's payslip for the period 1 - 30 November 2016 shows she was entitled to 452.60 hours' annual leave.

25 Rong said she was last paid by Enjoy Going in November 2016. She was not given notice of termination or paid in lieu of notice.

26 Mr Li's evidence supports Rong's evidence. He says she has accrued annual leave under her employment contracts. To his knowledge, Rong has never taken any annual leave. She has not claimed annual leave and he has not processed it. He says Enjoy Going owes Rong all of her accrued annual leave. Further, Mr Li's evidence is that Enjoy Going has not paid Rong her salary or any other amount since the November 2016 pay period.

27 Rong gave evidence that she would have worked out the entire 12-month notice period because her visa, which was valid to March 2018, was sponsored by Enjoy Going. In September 2016 Rong applied for permanent residency, sponsored by Enjoy Going. Rong says that had Enjoy Going not dismissed her in breach of her contract, she would already have been granted permanent residency and would have been required to work for Enjoy Going for another two years. Rong's evidence is that this shows she was prepared to work for Enjoy Going for at least another two years.

28 Rong gave evidence that she has not earned any money since Enjoy Going dismissed her. She has been looking for other employment but cannot work until she has been granted a new visa.

29 In February 2017, Rong accepted an offer to be a Travel Agency Manager for Hopetoun Quarry Industries Pty Ltd (**Hopetoun**) on a yearly salary of $80,000.

30 Rong tendered into evidence a letter dated 6 February 2017 from the Department of Immigration and Border Protection acknowledging a visa application showing Hopetoun as her sponsor. Rong says that before that visa could be approved, her occupation of Travel Agency Manager was removed from the list of eligible skilled occupations. Again, Rong provided documents in support of her evidence.

31 As a result, Rong's visa application was withdrawn in May 2017. In July 2017, Hopetoun submitted another visa application for Rong. That same month, Hopetoun's standard business sponsor number expired, requiring Hopetoun to renew its sponsorship status before Rong's visa can be approved.

32 Rong gave evidence that she will not know for many months whether her visa will be granted and she can start working.

Yi's employment with Enjoy Going

33 Yi gave evidence that she started work for Enjoy Going on 1 July 2016 as its Office Manager. Yi tendered into evidence her employment contract which is signed by her and by Rong as Enjoy Going's Director. Mr Li confirmed that document was Yi's employment contract. He said he had seen the employment contract at the time it was signed by Yi and Enjoy Going. He gave evidence that his office needed a copy of the employment contract so that it could process payroll.

34 Yi's evidence is, and her employment contract and payslip shows, that her salary was $50,000 per year. Her hourly rate was $25.3036.

35 Yi gave evidence that in December 2016 Rong told her that Rong had been replaced by Mr Zheng, and that he would contact Yi.

36 I understand Yi's evidence to be that on 9 December 2016 she was told by business partners that Mr Zheng had sent them an email saying Enjoy Going stopped operating on 8 December 2016.

37 Yi gave evidence that Mr Zheng did not contact her and no one from Enjoy Going told Yi that she was dismissed.

38 Yi gave evidence that Enjoy Going did not pay her wages for December 2016.

39 Yi wrote to Mr Zheng on 2 January 2017. She explained that she had not been paid for the month of December 2016 and that Enjoy Going owed money to suppliers. Mr Zheng wrote back to Yi the next day, although the email did not get through to her until 16 January 2017. He said he did not know she was employed by Enjoy Going and he asked her to send him a copy of her employment contract, which Yi did on the same day she received his reply.

40 Yi gave evidence that she continued to work and was dealing with Enjoy Going's business partners who contacted her to check whether they would be paid. She said she was working partly from home because she was uncomfortable staying in the office given Enjoy Going was no longer paying its rent. She says that in around mid-January 2017 all staff had to leave the office because Enjoy Going had not paid its rent.

41 On 19 January 2017, Mr Zheng wrote to Yi asking her to give him information about suppliers that Enjoy Going owed money to. She wrote back to him that day, confirming that she would do so and asking when she would be paid her December salary. Mr Zheng never replied. Yi tendered certified translated copies of those emails into evidence.

42 Yi lodged a claim for unfair dismissal at the Fair Work Commission on 17 January 2017. Enjoy Going did not attend the conciliation listed by the Fair Work Commission.

43 Yi gave evidence that she did not take any annual leave while employed by Enjoy Going and she has accrued annual leave which was not paid out by Enjoy Going. She said she was last paid by Enjoy Going on 28 or 29 November 2016. Yi tendered into evidence a payslip and bank records to support her evidence. She says she continued to work until at least 19 January 2017. She was not given notice of termination or paid in lieu of notice.

44 Rong gave evidence that Yi did not take any annual leave while employed by Enjoy Going.

45 Mr Li's evidence also supports Yi's evidence. He said she has accrued annual leave under her employment contract. To his knowledge, Yi has never taken any annual leave. Mr Li's evidence is that Yi has not claimed annual leave and he has not processed it. I understand Mr Li's evidence to be that Yi accrued annual leave from 1 July 2016 until she stopped working for Enjoy Going.

46 Mr Li also gave evidence that Yi has not been paid since November 2016. He said Enjoy Going owes Yi all of her accrued annual leave.

47 Yi's payslip for the pay period 1 - 30 November 2016 shows she was entitled to 43.07 hours' annual leave.

48 Yi gave evidence that she looked for new employment after Enjoy Going dismissed her. She is a permanent resident and was able to find another job. Since 1 March 2017 Yi has been working for My Austravel Pty Ltd (**My Austravel**) as its Office Manager. Her position is permanent and full-time. Yi's salary is $50,000 per year. Yi tendered into evidence her employment contract with My Austravel. It supports her oral evidence.

49 Yi says she hopes to remain in her current role. Her employer is a new company and is struggling to get established.

Mr Li's evidence about Enjoy Going

50 Mr Li gave evidence that after Mr Zheng removed Rong as director of Enjoy Going, the authorisations for Enjoy Going's bank accounts were changed. Mr Li was not able to access the funds in Enjoy Going's bank accounts and neither could

Rong or Yi. From the middle of December 2016, his office began to receive calls and emails from Enjoy Going's suppliers, including its landlord. They were asking for outstanding payments. Mr Li emailed Mr Zheng at least twice to remind him that the landlord and other suppliers had a right to be paid for their services. Mr Li says Mr Zheng did not reply to him.

51 Mr Li's evidence is that Enjoy Going stopped operating on 9 December 2016 and the last lodgement he prepared for Enjoy Going was in March 2017, when he prepared Enjoy Going's December 2016 business activity statements. He considers that he is still Enjoy Going's accountant and tax agent because Enjoy Going has not terminated its service agreement with New Solution Accountants. Mr Li gave evidence that in mid-July 2017 he saw that Enjoy Going's ABN and registration status with ASIC is active.

Law

52 The principles that apply to denied contractual benefits claims are well settled. The claim must relate to an 'industrial matter' and be made by an employee. The benefit claimed must be one the employee is entitled to under a contract of service and not arise under an award or order of the Commission. The benefit must have been denied by the employer: ***Hotcopper Australia Ltd v Saab*** [2001] WAIRC 03827; (2001) 81 WAIG 2704 [34].

Consideration

53 I find that the benefits claimed relate to an industrial matter as defined by s 7 of the *Industrial Relations Act 1979* (WA) and they arise under the applicants' employment contracts. Based on the documents and oral evidence, which I accept, I have no difficulty finding that Rong and Yi were Enjoy Going's employees. Their claims relate to industrial matters and they had contractual benefits to wages, annual leave and 12 months' notice of termination.

The employment contracts

54 Rong's 2014 and 2016 employment contracts state that her salary is $98,000 and Yi's employment contract states that her salary is $50,000.

55 Rong's 2014 employment contract states that she is entitled to four weeks' annual leave per year.

56 Rong's 2016 employment contract and Yi's employment contract have the same clauses in relation to annual leave (clause 12 in Rong's contract and clause 11 Yi's contract), notice of termination and termination without notice (clause 13 in Rong's contract and clause 12 in Yi's contract). They state:

> **[12 or 11] Leave**
>
> a) For each year of service, you will be entitled to four weeks' annual leave which accrues on a pro rata basis. Annual leave accrues from year to year.
>
> …
>
> **[13 or 12] Termination**
>
> **[13.1 or 12.1] Termination by either party on notice**
>
> a) Either party may terminate this Agreement at any time by giving the other party 12 months' written notice.
>
> b) The Employer may elect to pay an amount that you would have been entitled to receive as remuneration during the notice period (or unexpired portion of the notice period) in lieu of notice, in which case you will not be required to work out the notice period.
>
> **[13.2 or 12.2] Termination by employer without notice**
>
> The Employer may terminate this Agreement at any time without notice if you:
>
> a) commit any serious or persistent breach of any of the provisions of this Agreement…;
>
> b) engage in serious misconduct or wilful neglect in the discharge of your duties…;
>
> c) are convicted of any major criminal offence…;
>
> d) become bankrupt or lose or fail to obtain any necessary…perquisite to or condition of the performance of your duties…; or
>
> e) become of unsound mind or are incapacitated...

57 The effect of the notice of termination clause is that either party is entitled to 12 months' notice of termination. Enjoy Going may pay an amount in lieu of notice.

58 On the evidence before me, I find Enjoy Going did not have the right to, and did not, terminate the employment of Rong or Yi without notice in accordance with clause 13.2 of Rong's 2016 employment contract and clause 12.2 of Yi's employment contract.

Rong's contractual benefits

59 I find Enjoy Going terminated Rong's employment without notice on 2 December 2016, in breach of her 2016 employment contract.

60 I find Rong has accrued annual leave in accordance with her employment contracts. I accept her and Mr Li's evidence that Rong has not taken annual leave since she was employed in March 2014 and that Enjoy Going has denied Rong her contractual benefit to annual leave. Rong's June 2016 payslip shows that she had accrued 389.27 hours' annual leave on 30 June 2016. None of Rong's payslips show that Rong took annual leave during her employment.

61 The 452.60 hours' accrued annual leave on Rong's November 2016 payslip are consistent with Mr Li and Rong's evidence that Rong accrued four weeks' annual leave per year and had not taken any annual leave since March 2014.

62 Rong had a contractual benefit to be given 12 months' notice of termination. I find Enjoy Going denied Rong this contractual benefit.

63 I find Rong was ready, willing and able to perform the employment contract, and would have had it not been for Enjoy Going's breach.

64 Unlike her contractual benefit to annual leave, Rong's contractual benefit to be given 12 months' notice is not a debt under the contract. In effect it is a claim for unliquidated damages and therefore subject to reduction for avoided losses, avoidable losses and eventualities.

65 EM Heenan J states in ***Matthews v Cool or Cosy*** [2004] WASCA 114; (2004) 136 IR 156 at [68] 'unless there is an express contractual term providing for the payment to an employee of wages or some other agreed sum in lieu of notice, the employee will not be entitled to wages in lieu of notice because his remedy will be damages for breach of the contract, being the failure to give the requisite notice – ***Spencer v Marchington*** [1988] IRLR 392 at 395'.

66 Here there is no express contractual term entitling Rong and Yi to payment in lieu of notice as such. Rather, Enjoy Going could choose to pay Rong and Yi 12 months' wages instead of giving 12 months' notice, or choose to give them 12 months' notice. The Commission can make orders to deal with the industrial matter by awarding damages for breach of contract.

67 EM Heenan J's reasoning at [77] is relevant:

> In a case such as the present the employee's claim for damages for breach of the contract of employment by the employer's failure to give 12 months' notice of termination has meant that the appellant has been unable to earn, by employment with the respondent, the salary which he would probably have earned had he been permitted to serve out his period of notice. That may or may not mean that his damages should be assessed at the value of the remuneration which he would have received during that period less any amounts actually paid to him by the respondent. This is because the appellant employee has not in fact earned that remuneration and therefore, it is the effect of the loss of the opportunity to earn that remuneration which must be valued by the assessment of damages. This assessment will take into account any income which the appellant might have earned, or might have been capable of earning, from other employment or remunerative activity during the notice period and less such amounts, if any, which should be brought to account for the possibility of adverse contingencies which have been mentioned. It will be for the Commission to have regard to these factors when considering what, if any, damages should be assessed for this breach of contract.

68 The measure of damages is the wages payable during the notice period, less any reduction for remuneration earned during the notice period and intervening eventualities, such as death or disablement. See also [69] and [75] of ***Matthews v Cool or Cosy***.

69 An employee should take reasonable steps to mitigate avoidable loss, for instance by trying to find another job. It is for a respondent to prove any avoided or avoidable losses, something Enjoy Going has not done, having not attended the hearing in these matters.

70 Rong cannot claim loss that has been avoided or could have been avoided by taking reasonable steps. Avoided loss is the financial benefits Rong received. Avoidable loss is the financial benefits Rong should have received by acting reasonably.

71 Based on Rong's evidence, I find no avoided or avoidable losses. It is clear that Rong has acted reasonably. She has done her best to mitigate her loss. For reasons she could not control, such as complications relating to her visa and her occupation being removed from the list of eligible skilled occupations, Rong has not earned any money since Enjoy Going dismissed her.

72 I accept Rong's evidence that she will not know the outcome of her latest visa application for some months, and that her situation has been further exacerbated because Hopetoun must go through the process of renewing its sponsorship status. I find that Rong is very unlikely to earn any money before the end of the 12-month notice period. There is no evidence of any other eventualities.

73 Accordingly, I consider the appropriate order is an award of damages in the amount of $98,000 to deal with this aspect of the industrial matter. That is the amount Rong would have earned had she not been denied her contractual benefit to notice.

Yi's contractual benefits

74 Yi's bank records support her evidence that Enjoy Going stopped paying her after November 2016.

75 I find Yi considered that she had been dismissed by Enjoy Going on 17 January 2017 when she lodged her claim for unfair dismissal at the Fair Work Commission.

76 Even though Enjoy Going never told Yi she was dismissed, I find that Enjoy Going's conduct amounted to constructive dismissal. I say this because Enjoy Going failed to pay Yi's wages after November 2016 and failed to respond to her questions about when she would be paid, it informed its business partners it had stopped operating, it failed to give Yi work and it failed to pay its suppliers, including the landlord of its business premises. I find Enjoy Going terminated Yi's employment on 17 January 2017 without notice, in breach of Yi's employment contract.

77 I find Yi was ready, willing and able to perform the contract, and would have had it not been for Enjoy Going's breach.

78 I find Enjoy Going denied Yi her contractual benefit to be paid wages for the work she performed from 1 December 2016 to 17 January 2017.

79 Yi's November 2016 payslip shows 43.07 hours' accrued annual leave, which is less than she would have accrued after five months of employment. But I accept the evidence of Yi, Rong and Mr Li that Yi did not take annual leave while she was employed by Enjoy Going. Accordingly, I find Yi has accrued at least 94.95 hours' annual leave in accordance with her employment contract, being 12.66 hours' annual leave per month for the seven and a half months from July 2016 until 17 January 2017. I accept the evidence of Yi, Rong and Mr Li that Enjoy Going denied Yi this contractual benefit.

80 I find Yi had a contractual benefit to be given 12 months' notice of termination. I find Enjoy Going denied Yi this contractual benefit.

81 As I say at [70] in relation to Rong, Yi cannot claim loss that has been avoided or could have been avoided by taking reasonable steps.

82 In circumstances where Yi found alternative employment at the same salary from 1 March 2017, which I consider on the balance of probabilities will continue for the rest of the 12-month notice period, I find the appropriate order is an award of damages in the amount of $6,250.00. This amount represents the wages Yi would have earned after she was dismissed on 17 January 2017 and before she started her new job on 1 March 2017.

Conclusion

83 For these reasons, I find Enjoy Going denied Rong her contractual benefits to:

a. 452.60 hours' annual leave, which equates to $22,446.74 (gross); and

b. 12 months' notice, which equates to $98,000 (gross).

84 I will order that Enjoy Going pay Rong $120,446.74 (gross), being $22,446.74 + $98,000.

85 For these reasons, I find Enjoy Going denied Yi her contractual benefits to:

a. 48 days' unpaid wages for 31 days in December 2016 and 17 days in January 2017, which equates to $6,250.01 (gross);

b. 94.95 hours' annual leave, which equates to $2,402.58 (gross); and

c. notice from 18 January to 28 February 2017, which equates to $6,250.00 (gross).

86 I will order that Enjoy Going pay Yi $14,902.59 (gross), being $6,250.01 + $2,402.58 + $6,250.00.

2017 WAIRC 00836

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YI ZHANG
	APPLICANT
	-v-
	ENJOY GOING (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 22 SEPTEMBER 2017
FILE NO/S	B 24 OF 2017
CITATION NO.	2017 WAIRC 00836

Result	Application upheld
Representation	
Applicant	Ms Y Zhang
Respondent	No appearance

Declaration and order

HAVING heard from Ms Y Zhang on her own behalf and there being no appearance on behalf of the respondent;

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

1. DECLARES that the respondent denied the applicant contractual benefits of wages, annual leave and notice.
2. ORDERS that the respondent pay the applicant $14,902.59 (gross), being the total of the denied contractual benefits, within 21 days of the date of this order.

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

2017 WAIRC 00837

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RONG ZHANG
	APPLICANT
	-v-
	ENJOY GOING (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 22 SEPTEMBER 2017
FILE NO/S	B 25 OF 2017
CITATION NO.	2017 WAIRC 00837

Result	Application upheld
Representation	
Applicant	Ms R Zhang
Respondent	No appearance

Declaration and order

HAVING heard from Ms R Zhang on her own behalf and there being no appearance on behalf of the respondent;

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

1. DECLARES that the respondent denied the applicant contractual benefits of annual leave and notice.
2. ORDERS that the respondent pay the applicant $120,446.74 (gross), being the total of the denied contractual benefits, within 21 days of the date of this order.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Antony William Robertson	K.G Osterberg & L.E Osterberg & S.L Osterberg trading as 'Osterberg Painting'	U 58/2017	Commissioner D J Matthews	Discontinued
Damien Michael King	Blueprint Homes WA Pty Ltd	B 94/2017	Senior Commissioner S J Kenner	Discontinued
Glen Knight	M.M. Attwood, R.G. Attwood, S.A. Attwood, R.E. Drage	U 154/2016	Commissioner D J Matthews	Discontinued
Joan Goerling	Derbarl Yerrigan Health Service	U 73/2016	Commissioner D J Matthews	Discontinued
Robert O'Brien	Shire of Victoria Plains	U 73/2017	Commissioner D J Matthews	Discontinued
Yvonne Khan	Swan Valley Anglican Community School	U 98/2017	Senior Commissioner S J Kenner	Discontinued

CONFERENCES—Matters arising out of—

2017 WAIRC 00825

DISPUTE RE NOTICE GIVEN TO TERMINATE EMPLOYMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00825
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 11 SEPTEMBER 2017
DELIVERED	**:**	MONDAY, 18 SEPTEMBER 2017
FILE NO.	**:**	C 28 OF 2017
BETWEEN	**:**	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES Applicant AND COMMUNITY LIVING ASSOCIATION INC. Respondent

CatchWords	**:**	Industrial Law (WA) - Dispute over possible termination of employment - Employer entitled to continue disciplinary proceedings - Unless allegations baseless proceedings should not be interfered with
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 44, s 44(6), (ba)(i)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Ms B Tussler and with her Mr G Upham
Respondent	**:**	Ms A Woods of counsel
Solicitors:		
Respondent	**:**	DLA Piper Australia

Case referred to in reasons:

Civil Service Association of Western Australia Inc v. Director General of Department for Community Development [2002] WASCA 241

Reasons for Decision

1 The applicant's member, Mr Xiaomen Peng, was employed by the respondent as at the date of the conference held under section 44 *Industrial Relations Act 1979*, but had been informed that her employment was to end on 14 September 2017.

2 The application for a conference was brought by the applicant so that submissions could be made to the respondent as to why Ms Peng ought not be dismissed on 14 September 2017 and, if those submissions failed, to seek an order from me staying the decision to dismiss Ms Peng until the matter was fully heard and determined.

3 The respondent did not agree to countermand its decision and an order was sought from me. I declined to grant the order and these are my reasons for doing so.

4 An employer is entitled to commence disciplinary proceedings against an employee where it sees fit to do so and, unless the allegations made are demonstrated to be baseless, those proceedings ought to be allowed to conclude without interference by the Western Australian Industrial Relations Commission. (see *Civil Service Association of Western Australia Inc v. Director General of Department for Community Development* [2002] WASCA 241 at [20]).

5 There was no argument made to me that the allegations were baseless.

6 If the applicant or Ms Peng wish to contest the decision to dismiss there are avenues open to them to challenge that outcome and to raise the complaints they presently have.

7 Except in an extreme case, such as when allegations are baseless, it is appropriate for disciplinary proceedings to run their course and for any complaints to be aired later.

8 That the application seeks to have the Western Australian Industrial Relations Commission interfere with the proceedings before they have run their course in circumstances where there is no argument that the allegations are baseless is my main reason for dismissing it.

9 I note also that, even if that reason were absent, the applicant has not demonstrated that this matter is within section 44(6)(ba)(i) *Industrial Relations Act 1979*.

10 The submission that the orders sought are needed to "prevent the deterioration of industrial relations" was not a strong one and there was no request to lead evidence to support it.

11 The argument was not put higher than the impact on Ms Peng personally, which is not enough, in my view, to trigger the subparagraph.

12 The application is, for the reasons given above, dismissed.

2017 WAIRC 00827

DISPUTE RE NOTICE GIVEN TO TERMINATE EMPLOYMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	COMMUNITY LIVING ASSOCIATION INC.
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 18 SEPTEMBER 2017
FILE NO/S	C 28 OF 2017
CITATION NO.	2017 WAIRC 00827

Result	Application dismissed
Representation	
Applicant	Ms B Tussler and with her Mr G Upham
Respondent	Ms A Woods of counsel

Order

HAVING heard Ms B Tussler and with her Mr G Upham for the applicant and Ms A Woods, of counsel, on behalf of the respondent;

AND HAVING given reasons for decision;

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

THAT the application be dismissed.

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

CONFERENCES—Matters referred—

2017 WAIRC 00846

DISPUTE RE FIXED TERM CONTRACTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00846
CORAM	**:**	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
HEARD	**:**	WRITTEN SUBMISSIONS: THURSDAY, 17 AUGUST 2017, TUESDAY, 22 AUGUST 2017, WEDNESDAY, 23 AUGUST 2017, FRIDAY, 25 AUGUST 2017
DELIVERED	**:**	WEDNESDAY, 27 SEPTEMBER 2017
FILE NO.	**:**	PSACR 25 OF 2015
BETWEEN	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED Applicant AND DIRECTOR GENERAL, HOUSING AUTHORITY Respondent

CatchWords	:	Industrial Law (WA) - Public Service Arbitrator - Matter referred for hearing and determination pursuant to s 44 - Machinery of government changes - Change in employing authority - Whether it is in the public interest to hear and determine the matter - Whether the matter should be dismissed - Whether the Arbitrator should refrain from further hearing or determining the matter
Legislation	:	*Industrial Relations Act 1979* (WA) s 6(c), s 26(1)(a), s 26(1)(b), s 26(1)(c), s 27(1)(a), s 27(1)(a)(ii)
		Public Sector Management Act 1994 (WA) s 22B, s 35, s 64, s 64(1)(b), s 65, s 66, Schedule 2
		Housing Act 1980 (WA) s 7, s 17, s 17(1)(b), s 18A, s 18A(1)
Result	:	*Application dismissed in part; Arbitrator refrains from further hearing or determining the matter*
Representation:		
Applicant	:	Mr W Claydon (of counsel)
Respondent	:	Mr R Andretich (of counsel)

Cases referred to in reasons:

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 00451; (2014) 94 WAIG 787

The Civil Service Association of Western Australia Incorporated v Director General, Housing Authority [2016] WAIRC 00902; (2016) 96 WAIG 1630

Fitzgerald v Muldoon [1976] 2 NZLR 615

Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia [1987] HCA 27; (1987) 72 ALR 1; (1987) 21 IR 151

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1987) 68 WAIG 4

Reasons for Decision

1 The Civil Service Association of Western Australia Incorporated (**CSA**) seeks a new workplace right for fixed term employees who cannot be considered for permanent appointment because the requirements in the Public Sector Commissioner's Instruction No.2: Filling a Public Sector Vacancy (**Commissioner's Instruction**) have not been met. The Housing Authority opposes this.

2 The CSA says the Housing Authority's execution, management and administration of fixed term contracts resulted in a 'mischief' because the Housing Authority did not do what was required under clause 7 of the Commissioner's Instruction to allow certain fixed term employees to be appointed permanently. The CSA asks the Arbitrator to order that a number of fixed term employees be deemed to have satisfied the requirements in clause 7 and require the Housing Authority to, if a suitable vacancy arises, consider whether these employees can be permanently appointed. The CSA also asks for orders that the Housing Authority comply with a range of requirements for all future fixed term contracts, including in relation to advertising, the selection process, performance management and merit assessment.

3 The Housing Authority denies there was a 'mischief' and says its use of fixed term contracts was reasonable. It argues I do not have power to make the orders sought and, even if I do, I should not make the orders because they are not necessary, they unreasonably constrain the Housing Authority and they do not resolve the substantial dispute.

4 The parties were unable to resolve the matter through conciliation and the matter was referred for hearing.

5 The Housing Authority objected to the matter being heard and I dismissed its objection: ***The Civil Service Association of Western Australia Incorporated v Director General, Housing Authority*** [2016] WAIRC 00902; (2016) 96 WAIG 1630.

6 At the start of the substantive hearing on 15 August 2017, the Housing Authority raised a new objection to the matter being heard.

7 In essence, the Housing Authority says:

a. as a result of recent machinery of government changes, the Housing Authority is no longer the employing authority of the employees in question; and

b. there is no evidence that the new employing authority has engaged in the alleged employment practices the subject of the CSA's application.

8 The Housing Authority seeks an order under s 27(1)(a)(ii) of the *Industrial Relations Act 1979* (WA) (**IR Act**) that 'further hearing be discontinued in the public interest.'

9 The CSA opposes the Housing Authority's application.

What must I decide?

10 I must decide whether further proceedings are not necessary or desirable in the public interest, or whether for any other reason the matter should be dismissed or discontinued. If so, I may dismiss the matter, or any part of it, or refrain from further hearing the matter.

Parties' submissions

Housing Authority's submissions

11 In summary, the Housing Authority says:

a. The employees were employed by the Housing Authority under the *Housing Act 1980* (WA) (**Housing Act**). The employing authority was the Housing Authority, not its Director General, who is the current respondent.

b. A new department, the Department of Communities, was created on 1 July 2017 under s 35 of the *Public Sector Management Act 1994* (WA) (**PSM Act**). It amalgamated a number of departments including the Department of Housing. The Housing Authority was not part of the amalgamation. Notice of the amalgamation was published in the Government Gazette on 28 June 2017 (**Section 35 Notice**).

c. By a Disposition Order made by the Public Sector Commissioner by notice on 30 June 2017 under s 22B of the PSM Act in connection with the establishment of the Department of Communities (**Disposition Notice**), all employees of the Housing Authority (other than the Chief Executive Officer (**CEO**)) were employed by the Department of Communities and the CEO of the Department of Communities became their employing authority on 1 July 2017.

d. The Department of Communities' employees are made available to the Housing Authority under a memorandum of understanding (**MOU**).

12 The Housing Authority says it is not reasonable to infer that the effect of the Disposition Notice is to substitute the CEO of the Department of Communities as the respondent in this application or other legal proceedings.

13 While the Section 35 Notice provides that a reference to the Department of Housing will be a reference to the new Department of Communities 'in any law, or in any instrument, contract, or legal proceedings made or commenced before 1 July 2017', the Disposition Notice merely provides that 'all references to the Housing Authority as the employing authority, in instruments, notices and notifications in operation as at midnight on 30 June 2017, shall be read and construed as references to the employing authority of the department designated the Department of Communities'. The Disposition Notice does not define 'instruments'. The ordinary meaning of 'instrument' does not extend to initiating process in legal proceedings.

14 The Housing Authority says that the deeming orders sought by the CSA can only apply to one employee, Mr Rye, out of the original 10 employees. The other employees are no longer relevant to the matter.

15 The Housing Authority says the orders sought would have no practical effect because the Housing Authority is no longer the employing authority. It has no employees to be affected by the orders and will not have any employees for the foreseeable future. It would therefore be futile to hear the matter because the outcome has no meaningful consequences.

16 Even if the Arbitrator could substitute the CEO of the Department of Communities for the Housing Authority as respondent, the Housing Authority argues that the result would be the same and the orders would have no effect. This is because the orders are based on alleged long-standing 'misuse' by the Housing Authority of its power to employ employees for fixed terms under s 64(1)(b) of the PSM Act. The Department of Communities cannot be held vicariously responsible for the Housing Authority's employment decisions and the Department of Communities' employment practices only began on 1 July 2017. The Housing Authority says the CSA has not raised a case against the Department of Communities and there is no evidence that it has engaged in the alleged employment practices the subject of the substantive application.

17 In the circumstances, the Housing Authority says I should discontinue the matter in the public interest under s 27(1)(a)(ii) of the IR Act.

CSA's submissions

18 I found the CSA's submissions largely unhelpful. I understand its argument to be as follows.

19 The CSA questions how the interim Director General of the Housing Authority and the Public Service Commissioner can move Housing Authority employees to the Department of Communities and then reallocate them back to carry out the Housing Authority's functions under the Housing Act. It says '[t]he exercise does not make sense.'

20 The CSA argues that the dispute that led to this matter being referred to the Arbitrator was about the use of fixed term contracts, and the fixed term contracts were between the Director General of the Housing Authority and particular employees. It argues the contractual documents provided by the Housing Authority in response to a discovery request show no change in the employing authority as at August 2017.

21 The CSA seems to argue that it does not matter if the employees are now employed by a different entity because 'in reality the State of Western Australia is the employer and the employing authority is the agent for the State of Western Australia'. It says the emphasised words in s 64(1)(b) of the PSM Act support this argument:

> **64. Appointing officers**
>
> (1) Subject to this section and to any binding award, order or industrial agreement under the *Industrial Relations Act 1979* or employer-employee agreement under Part VID of the *Industrial Relations*

Act 1979, the employing authority of a department or organisation may in accordance with the Commissioner's instructions ***appoint for and on behalf of the State a person as a public service officer*** (otherwise than as an executive officer) on a full-time or part-time basis —

(a) for an indefinite period as a permanent officer; or

(b) for such term not exceeding 5 years as is specified in the instrument of his or her appointment.

(CSA's emphasis)

22 The CSA refers to s 7 of the Housing Act, which provides:

7. Authority a body corporate and Crown agency

(1) The [Housing] Authority —

(a) is a body corporate with perpetual succession and a common seal; and

(b) is capable in law in its corporate name of suing and being sued.

(2) All courts, judges and persons acting judicially shall take judicial notice of the seal of the Authority or the former body (within the meaning of section 6) affixed to any document and shall presume that it was duly affixed.

(3) The Authority is an agent of the Crown in right of the State.

23 The CSA says that having regard to s 7, the Housing Act would have to be amended to authorise the incorporation of the Housing Authority as an entity into the Department of Communities. For that reason, it says machinery of government changes cannot be made with respect to the Housing Authority and, if they have been, they are ultra vires.

24 The CSA also refers to s 17 and s 18A of the Housing Act.

25 Those sections provide:

17. Chief executive officer of Authority and other officers and employees

(1) To enable the Authority to exercise and perform the powers, functions and duties conferred on it by or under this Act or any other Act —

(a) there shall be a chief executive officer of the Authority who shall be appointed, under and subject to Part 3 of the *Public Sector Management Act 1994*;

(b) there shall be appointed under and subject to Part 3 of the *Public Sector Management Act 1994*, such officers as the Authority considers necessary;

(c) the Authority may employ such wages staff as it considers necessary.

(2) The chief executive officer of the Authority cannot be excluded from the Senior Executive Service under section 43(3) of the *Public Sector Management Act 1994*.

(3) The chief executive officer is responsible for, and has the necessary powers to administer, the day to day operations of the Authority.

18A. Use of other staff and facilities

(1) The Authority may by arrangement with the relevant employing authority make use, either full-time or part-time, of the services of any officer or employee —

(a) in the Public Service; or

(b) in a State agency or instrumentality; or

(c) otherwise in the service of the State.

(2) The Authority may by arrangement with —

(a) a department of the Public Service; or

(b) a State agency or instrumentality,

make use of any facilities of the department, agency or instrumentality.

(3) An arrangement under subsection (1) or (2) is to be made on such terms as are agreed to by the parties.

(4) In this section, ***employing authority***, ***Public Service*** and other expressions used in the *Public Sector Management Act 1994* have the same respective meanings as they have in that Act.

26 It argues that s 18A of the Housing Act does not contemplate or authorise the MOU. Further, it says s 18A cannot be used as a substitute for appointment under s 17 of the Housing Act.

27 The CSA says the MOU is a sham to 'obviate the problem of securing legislative amendment to the Housing Act to incorporate the [Housing] Authority into the Department of Communities [and] runs foul of decisions like ***Fitzgerald v Muldoon***' [1976] 2 NZLR 615.

28 The CSA says that ***Fitzgerald*** establishes Parliament's sovereignty and that the Crown, the Executive or any other entity, such as the Housing Authority, cannot without specific delegation by Parliament make decisions that are contrary to legislation such as the Housing Act.

29 The CSA says the principle in ***Fitzgerald*** is that it is 'impermissible for a decision maker to take into account, for the purposes of exercising an administrative discretion, the possibility of an amendment to the law' and cites ***Re A-G (Northern Territory) v the Minister of Aboriginal Affairs*** [1987] FCA 244, [55]-[56].

30 The CSA refers to a letter dated 3 July 2017 from Grahame Searle, Interim Director General of the Department of Communities, to the CSA. In that letter, Mr Searle says the new Department of Communities is an amalgamation of the:

a. Department for Child Protection and Family Support;

b. Disability Services Commission;

c. Department of Housing (including the Housing Authority);

d. Communities functions from the Department of Local Government and Communities; and

e. Regional Services Reform Unit from the Department of Regional Development.

31 Mr Searle goes on to explain that the Disability Services Commission and the Housing Authority 'will remain as separate legal entities to facilitate the legislative requirements to maintain existing services and functions as an interim measure'. He says the 'Department of Communities will directly employ all public servants from all the amalgamated agencies. The staff movements have been actioned via a section 22B disposition notice under the *Public Sector Management Act 1994*. Staff who are employed under the *Disability Services Act 1993* will remain employees of the Disability Services Commission'.

32 The CSA emphasises that Mr Searle's letter demonstrates the Housing Authority is a statutory authority. The CSA questions why the Housing Authority is treated differently to the Disability Services Commission. The CSA appears to place importance on the lack of explanation for why the Housing Authority has been treated differently to the Disability Services Commission, even though the Disability Services Commission 'has also a discrete Act with employing and other powers.'

33 The CSA seems to concede that the Housing Authority has not been amalgamated into the Department of Communities. It concludes this means 'the liability and obligations of the Housing Authority [have] not changed and the proceedings are competent to proceed.'

34 The CSA says that while the Department of Housing may have been properly amalgamated, the Governor has no authority to terminate the functions of the Housing Authority. The employees remain employed by the Housing Authority.

35 The CSA says s 22B of the PSM Act does not apply to the Housing Authority because it is not a department established under s 35 of the PSM Act.

36 The CSA argues that the Disposition Notice is invalid because it cannot override the explicit power of appointment under s 17 of the Housing Act. The language of s 17 of the Housing Act, namely, that 'there shall be appointed…', means the employment status of an employee appointed under s 17 of the Housing Act cannot be changed by Executive authority.

37 The CSA says appointments under s 64 of the PSM Act are made by the employing authority, being the CEO of the Housing Authority, for and on behalf of the State. So a change in entity or designation is not the same as a change in employer. The actual employer is the State and the employing authority is the agent of the State. However, the CSA concedes that a dispute of this type is brought under the IR Act against the employing authority.

38 I understand the CSA to argue that the only way the Housing Authority employees could be employed by the Department of Communities is through transfer under s 65 of the PSM Act or secondment under s 66 of the PSM Act. It says that this has not happened so the employees are still employed by the Housing Authority. Alternatively, the CSA says if this has happened, the new employer could be joined as a party and liabilities would have been assigned. The application could proceed on that basis.

39 The CSA maintains that the Housing Authority is the proper respondent, but it says if I do not agree, then the Department of Communities can be joined as a party by amendment.

40 The CSA does not dispute that deeming orders could only apply to one of the employees listed in the Memorandum of Matters Referred for Hearing and Determination under Section 44 (**Memorandum of Referral**), Mr Rye. The CSA says the current employment status of the nominated CSA members is irrelevant to the fundamental issue. The fundamental issue is whether the machinery of government provisions have a fatal effect on the repondency to the CSA's application. The employment status, permanent or otherwise, may affect the Arbitrator's decision to issue deeming orders based on the substantial merits of the case.

41 In relation to the orders sought, the CSA says they can be quarantined to a division of the Department of Communities known as Housing.

42 The CSA says the Arbitrator should proceed on the original application.

Housing Authority's reply

43 The Housing Authority disputes that s 17 of the Housing Act has the effect contended by the CSA. The Housing Authority says s 18A(1) of the Housing Act enables the Housing Authority to use other agencies' employees to discharge its functions by arrangement with another employing authority.

44 The Housing Authority says that it now employs no public service employees other than the CEO and the employing authority of its former public service employees is now the CEO of the Department of Communities.

45 It is irrelevant that the CSA considers the changes made in relation to the employment arrangements of the Housing Authority's former employees to be unnecessary.

46 To the extent that the CSA refers to transfer or secondment as mechanisms to effect the movement of public service employees, they are not the only mechanisms that may be used. The CSA's submission is not relevant to this matter.

47 The Housing Authority concedes that these proceedings are not incompetent but says the question is whether there should be a hearing. I understand its main submission to be that an order made in these proceedings will be of no effect to deal with the alleged 'mischief' the CSA says the Housing Authority engaged in.

The law

48 Section 27(1)(a) of the IR Act provides:

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

49 In exercising my discretion under s 27(1)(a) of the IR Act, I must have regard to s 26(1)(a) to s 26(1)(c) and act according to equity, good conscience and the substantial merits of the case: ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1987) 68 WAIG 4.

Consideration

50 I accept:

a. The Housing Authority was the employing authority (and not the Director General) at the time the application was filed. That issue could be dealt with.

b. The employees employed by the Housing Authority (other than the CEO) are now employed by the CEO of the Department of Communities and are made available to the Housing Authority under the MOU.

c. The employment practices of the Housing Authority cannot be attributed to the Department of Communities.

d. In circumstances where the Housing Authority no longer employs employees other than the CEO, and will not employ any other employees for the foreseeable future, it would not be appropriate for the Arbitrator to order that the Housing Authority comply with a range of requirements for all future fixed term contracts, including in relation to advertising, the selection process, performance management and merit assessment.

Irrelevant arguments

51 A number of the CSA's arguments are irrelevant. For example, that the:

a. contractual documents provided by the Housing Authority in response to a discovery request show no change in the employing authority as at August 2017;

b. Disability Services Commission may have been treated differently to the Housing Authority;

c. orders sought could be quarantined to a division of the Department of Communities, when the matter referred does not involve the conduct of the Department of Communities; and

d. CSA considers the changes made in relation to the employment arrangements of the Housing Authority's former employees to be unnecessary.

52 Those matters do not assist the CSA's case.

Substituting the CEO of the Department of Communities as the respondent

53 I am not persuaded that the ordinary meaning of 'instrument' extends to initiating process in legal proceedings. More persuasive is that the reference to the Director General of the Housing Authority as the employing authority in the Notice of Application could perhaps be considered a reference in a notice for the purpose of the Disposition Notice, and therefore be read as a reference to the employing authority of the department designated the Department of Communities.

54 But even if I agreed with the CSA's argument that the effect of the Disposition Notice is to substitute the CEO of the Department of Communities as the respondent in this application, that is not an answer to the Housing Authority's application for an order to discontinue the matter.

55 The CSA argues that if the employing authority is now the Department of Communities, then the Department of Communities can be joined as a party to this application. Again, that may be so. But that the Department of Communities can be joined as a party to this application does not mean that it should be joined as a party, for the reasons outlined by the Housing Authority.

56 In particular, the Department of Communities' employment practices only began on 1 July 2017, the CSA has not raised a case against the Department of Communities and there is no evidence the Department of Communities has engaged in the alleged 'mischief' that is the subject of the application.

Appointments and moving public service employees

57 ***Fitzgerald*** does not assist the CSA's case. That case concerned the Prime Minister of New Zealand announcing that employers could stop complying with compulsory superannuation contributions because the government intended to introduce empowering legislation with retrospective effect. The plaintiff alleged a breach of s 1 of the Bill of Rights (1688) Eng which relevantly provides that 'the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall'.

58 Laws have not been suspended or amended without Parliament's consent. Parliament passed the PSM Act. The Disposition Notice was made under that Act. Contrary to the CSA's submission, the Governor has not 'terminate[d] the functions of the Housing Act'. ***Fitzgerald*** does not apply to this matter.

59 I disagree with the CSA's submission that s 22B of the PSM Act does not apply to the Housing Authority because it is not a department established under s 35 of the PSM Act. Section 22B enables the Public Sector Commissioner to effect the disposition of offices, posts, persons, positions and employees to give effect to the changes in departments or organisations. The Housing Authority is a SES organisation: item 47 of Schedule 2 to the PSM Act.

60 Contrary to the CSA's submission that appointments are made under s 17 of the Housing Act, s 17 provides that such employees the Housing Authority considers necessary are appointed under Part 3 of the PSM Act, which includes s 64.

61 The CSA's submission that the Disposition Notice is invalid because it cannot override the explicit power of appointment under s 17 of the Housing Act is misguided. The employees are appointed under the PSM Act where the Housing Authority considers such appointments are necessary under s 17(1)(b) of the Housing Act. Clearly, employees of the Housing Authority can be affected by a disposition order made under s 22B of the PSM Act, as I accept they have been here.

62 I accept the Housing Authority's submission that the effect of s 18A(1) of the Housing Act is that the Housing Authority may use other agencies' employees by arrangement. The MOU is such an arrangement.

63 It does not follow that the Housing Authority is still the employing authority because the employees have not been transferred under s 65 of the PSM Act or seconded under s 66 of the PSM Act. Transfers or secondments are not the only mechanisms that may be used to move public service employees.

64 The CSA argues that a change in entity may not be a change in employer. That may be so. But relevantly, it is not the amalgamation that caused a change in employer. The Disposition Notice caused the change in employer. To argue that the State is the employer does not assist. Applications are brought under the IR Act not against the State, but against the employing authority. When the application was filed, the employing authority was the Housing Authority. The employing authority is now the CEO of the Department of Communities.

Public interest

65 The parties did not make submissions about the test for public interest or how it should be applied.

66 The reasoning of Smith AP in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2014] WAIRC 00451; (2014) 94 WAIG 787 at [49] to [56] is relevant. I respectfully adopt Her Honour's reasoning.

67 Clearly s 27(1)(a) of the IR Act involves the exercise of a broad discretion. A party is entitled to invoke the Commission's jurisdiction and prima facie expect it to be exercised: ***Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia*** [1987] HCA 27; (1987) 72 ALR 1; (1987) 21 IR 151 (12-13); (162) (***Re QEC***) (Deane J).

68 The onus is on the Housing Authority to persuade me that, in the circumstances, the CSA's prima facie right to have the Arbitrator hear this matter should be overridden.

69 Where the public interest lies often depends on a balancing of interests, including competing public interests, and is very much a question of fact and degree: ***Re QEC*** (5); (154) (Mason CJ, Wilson & Dawson JJ).

70 I do not consider that the matter should proceed on the original application. It is not appropriate to hear the matter as referred because what was at the heart of this dispute, the alleged 'mischief', will not be resolved by further hearing and determination.

71 I accept that the Housing Authority has not been amalgamated into the Department of Communities. As I state at [33], the CSA seems to concede this. I accept the CSA's submission that the liability and obligations of the Housing Authority have not changed but do not accept the CSA's conclusion that the proceedings are therefore competent to proceed. Competence is not the issue. The matter as referred should not proceed so far as it relates to all future fixed term contracts, as set out at [7] of the Memorandum of Referral, because the orders sought would not deal with the 'mischief' alleged by the CSA, so it is not in the public interest.

72 In circumstances where:

a. the dispute concerns alleged 'mischief' in the employment practices on the part of a party that no longer employs the employees listed in the Memorandum of Referral, or any employees other than the CEO;

b. the CSA seeks orders in relation to all future fixed term contracts;

c. no case has been raised against the Department of Communities; and

d. taking into account my obligation to act according to equity, good conscience and the substantial merits of the case;

I consider that further proceedings are not necessary or desirable in the public interest.

73 Moreover, the CEO of the Department of Communities should not be joined or substituted as respondent.

74 On that basis, I will issue an order to dismiss the part of the matter that relates to all future fixed term contracts.

75 I have also considered whether I should refrain from further hearing the remaining part of the matter, being the part that relates to the orders sought at [6] of the Memorandum of Referral in relation to the listed employees.

76 I have taken into account the interests of the parties and the listed employees as persons immediately concerned with the matter.

77 I consider that it would not be appropriate or efficient to unravel the Memorandum of Referral in order to hear that part of the matter.

78 One of the objects of the IR Act is to provide a means for settling industrial disputes with the maximum of expedition and the minimum of legal form and technicality: s 6(c) of the IR Act.

79 No submission was made by the CSA about hardship or prejudice if the matter were discontinued.

80 An order refraining from further hearing of the matter, to the extent that it relates to the orders sought at [6] of the Memorandum of Referral in relation to the listed employees, would not finally determine anything against the CSA. It would not leave the CSA without a remedy to resolve that remaining part of the industrial matter in dispute.

81 In the circumstances, I consider that the hearing of that remaining part of the matter should be discontinued. I will issue an order refraining from further hearing or determining that part of the matter.

82 I encourage the parties to confer about whether they can reach an agreement to resolve the remaining part of the matter. If they are unable to reach an agreement, it is open to the CSA to refer a new dispute about that remaining part of the matter to the Arbitrator.

2017 WAIRC 00851

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	MONDAY, 2 OCTOBER 2017
FILE NO	PSACR 25 OF 2015
CITATION NO.	2017 WAIRC 00851

Result	Application dismissed in part; Arbitrator refrains from further hearing or determining the matter
Representation	
Applicant	Mr W Claydon (of counsel)
Respondent	Mr R Andretich (of counsel)

Order

WHEREAS on 23 October 2015 the applicant filed 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 Schedule to the *Memorandum of Matters Referred for Hearing and Determination under Section 44* (**Memorandum of Referral**) was amended on 14 July 2016;

AND WHEREAS the respondent seeks an order that further hearing be discontinued in the public interest;

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

1. THAT the part of this matter referred as it relates to the orders sought at [7] of the Memorandum of Referral in relation to all future fixed term contracts be, and by this order is, dismissed.

2. THAT the Public Service Arbitrator will refrain from further hearing or determining the matter.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Director General Department of Communities	Kenner SC	PSAC 19/2017	N/A	Dispute re union member's return to work	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00863

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MARIO GEORGIOU

APPLICANT

-v-

THE COMMISSIONER OF POLICE

RESPONDENT

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

DATE WEDNESDAY, 11 OCTOBER 2017

FILE NO. APPL 4 OF 2017

CITATION NO. 2017 WAIRC 00863

Result Further amended further direction issued

Representation **(by written correspondence)**

Applicant Mr M Georgiou

Respondent Mr N van Hattem of counsel

Further Amended Further Direction

WHEREAS on 3 August 2017, the WAIRC issued further amended further directions to extend time for the applicant to comply with reg 92 of the *Industrial Relations Commission Regulations 2005* (the IR Regulations), and directed that the matter would be listed for a directions hearing if the appellant failed to comply with reg 92 by 1 October 2017 ([2017] WAIRC 00693; (2017) 97 WAIG 1371); and

WHEREAS on Saturday, 30 September 2017, by email, the appellant requested a further extension of time until 1 January 2018 to comply with reg 92 of the IR Regulations, and included a medical certificate which says the appellant has been unable to comply with reg 92 since 22 September 2017 and has a medical condition that will prevent him from so complying until 1 January 2018; and

WHEREAS on 10 October 2017, by email, the respondent noted the history of this matter and the appellant's circumstances, and advised that the Commissioner of Police does not object to the extension of time, and would not object to time being extended for the appellant to comply with reg 92 of the IR Regulations to another date such as the first day that the WAIRC's Registry is open in 2018; and

WHEREAS the WAIRC is of the opinion that granting the request is expedient for the expeditious and just hearing and determination of the appeal.

NOW THEREFORE, the WAIRC, pursuant to the powers conferred on it under s 33S of the *Police Act 1892* and the *Industrial Relations Act 1979*, hereby directs –

1. THAT compliance with reg 92 of the *Industrial Relations Commission Regulations 2005* by the appellant be by close of business on Tuesday, 2 January 2018.

2. THAT any further application by the appellant for a further extension of time be received by the WAIRC by close of business on Thursday, 21 December 2017.

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

2017 WAIRC 00859

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 2 AUGUST 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT ADAMS
	APPELLANT
	-v-
	THE GOLDFIELDS REGIONAL DIRECTOR, WESTERN AUSTRALIAN COUNTRY HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR D HILL - BOARD MEMBER
	MR S GREGORY - BOARD MEMBER
DATE	TUESDAY, 10 OCTOBER 2017
FILE NO	PSAB 16 OF 2017
CITATION NO.	2017 WAIRC 00859

Result	Name of respondent amended
Representation	
Appellant	Mr C Fordham (of counsel)
Respondent	Ms M Muccilli (as agent) and Mr B Chapman (as agent)

Order

WHEREAS this is an appeal under s 80I of the *Industrial Relations Act 1979* (WA);

AND WHEREAS at a directions hearing on 10 October 2017 the parties asked the Public Service Appeal Board to amend the name of the respondent;

AND HAVING heard from the parties, the Public Service Appeal Board is of the opinion that it is appropriate to amend the name of the respondent;

NOW THEREFORE the Public Service Appeal Board, 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 'WA Country Health Service'.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2017 WAIRC 00860

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 2 AUGUST 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT ADAMS
	APPELLANT
	-v-
	WA COUNTRY HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR D HILL - BOARD MEMBER
	MR S GREGORY - BOARD MEMBER
DATE	TUESDAY, 10 OCTOBER 2017
FILE NO.	PSAB 16 OF 2017
CITATION NO.	2017 WAIRC 00860

Result	Direction issued
Representation	
Appellant	Mr C Fordham (of counsel)
Respondent	Ms M Muccilli (as agent) and Mr B Chapman (as agent)

Direction

HAVING heard Mr C Fordham (of counsel) on behalf of the appellant and Ms M Muccilli (as agent) and Mr B Chapman (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the appellant file and serve a document setting out his grounds of appeal by 24 October 2017.
2. THAT the parties file a statement of agreed facts and bundle of agreed documents by 31 October 2017.
3. THAT the appellant file and serve outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 21 November 2017.
4. THAT the respondent file and serve outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 12 December 2017.
5. THAT the appellant file and serve written submissions by 16 January 2018.
6. THAT the respondent file and serve written submissions by 30 January 2018.
7. THAT this matter be listed for a four-day hearing after 13 February 2018.
8. THAT discovery be informal.
9. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
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 66/2017	N/A	N/A	Matthews C	Request for mediation	26/06/2017	Concluded