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## FULL BENCH—Appeals against decision of Commission—

2017 WAIRC 01010

APPEALS AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 74/2016 GIVEN ON 26 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

### FULL BENCH

<b>CITATION</b>	:	2017 WAIRC 01010
<b>CORAM</b>	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
<b>HEARD</b>	:	WEDNESDAY, 27 SEPTEMBER 2017
<b>DELIVERED</b>	:	WEDNESDAY, 13 DECEMBER 2017
<b>FILE NO.</b>	:	FBA 8 OF 2017
<b>BETWEEN</b>	:	SHIRE OF DENMARK Appellant AND ROBERT WHOOLEY Respondent
<b>FILE NO.</b>	:	FBA 9 OF 2017
<b>BETWEEN</b>	:	ROBERT WHOOLEY Appellant AND SHIRE OF DENMARK Respondent

### ON APPEAL FROM:

<b>Jurisdiction</b>	:	Western Australian Industrial Relations Commission
<b>Coram</b>	:	Commissioner D J Matthews
<b>Citation</b>	:	[2017] WAIRC 00232; (2017) 97 WAIG 563
<b>File No.</b>	:	B 74 of 2016

CatchWords	:	Industrial Law (WA) - Appeal against decision of the Commission - Claim of contractual benefits - Turns on date of termination of employment - Employee a senior employee within the meaning of s 5.37 of <i>Local Government Act 1995</i> (WA) - Whether power to terminate a senior employee resides only with council - Whether termination of employee by CEO invalid - Whether agreement to compromise an unfair dismissal claim in Fair Work Commission could not bar a claim of contractual benefits on grounds the agreement void
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 27(1)(a), s 29(1)(b)(ii), s 49(2), s 83 <i>Local Government Act 1995</i> (WA) s 1.3(1), s 1.3(2), s 1.32(2), s 1.4, s. 2.7, s. 2.10, s 2.26, s 2.28(2), s 5.6, s 5.36(1), s 5.36(2), s 5.36(3), s 5.37, s 5.37(1), s 5.37(2), s 5.38, s 5.39, s 5.39(1a), s 5.39(2), s 5.39(3), s 5.39(5), s 5.41, s 5.41(g) <i>Australian Broadcasting Corporation Act 1983</i> s 25(1)(a), s 70(1) <i>Superannuation Guarantee (Administration) Act 1992</i> (Cth) <i>Local Government (Long Service Leave) Regulations</i> (WA) <i>Superannuation Guarantee Charge Act 1992</i> (Cth) <i>Minimum Conditions of Employment Act 1993</i> (WA) s 5, s 5(1)(c), s 7, s 7(c), s 23, s 23(2), s 24 <i>Fair Work Act 2009</i> (Cth)
Result	:	FBA 8 of 2017 - Decision quashed - Application at first instance dismissed FBA 9 of 2017 - Appeal dismissed

**Representation:**

Appellant/Respondent	:	Mr J Darams (of counsel)
Respondent/Appellant	:	Mr R Whooley (in person)
Solicitors:		
Appellant/Respondent	:	Clyde & Co

**Case(s) referred to in reasons:**

Australia Estates Pty Ltd v Cairns City Council [2005] QCA 328  
Australian Broadcasting Corporation v Redmore Pty Ltd (1987) 11 NSWLR 621  
Australian Broadcasting Corporation v Redmore Pty Ltd [1989] HCA 15; (1989) 166 CLR 454 (Cth)  
BGC (Australia) Pty Ltd v Phippard [2002] WASCA 191; (2002) 82 WAIG 2013  
Charitou v Owners of Strata Plan 10394 [2015] NSWSC 1059  
Director General of Department of Transport v McKenzie [2016] WASCA 147  
Errichetti Nominees Pty Ltd v Paterson Group Architects Pty Ltd [2007] WASC 77  
Galloway v Galloway (1914) 30 TLR 531  
Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2003] QB 679  
Green v Rozen [1955] 1 WLR 741  
HWG Holdings Pty Ltd v Fairlie Court Pty Ltd [2015] VSC 519; (2015) 302 FLR 230  
Masters v Cameron (1954) 91 CLR 53  
Menegazzo v Pricewaterhousecoopers (a firm) [2016] QSC 94  
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355  
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355  
Re Kenner; Ex parte Minister for Education [2003] WASCA 37  
Re Railway Appeal Board; Ex parte Western Australian Government Railways Commission [1999] WASCA 63; (1999) 21 WAR 1  
Rees v Rees [2016] VSC 452  
Solle v Butcher [1950] 1 KB 671  
Svanosio v McNamara (1956) 96 CLR 186

*Reasons for Decision***SMITH AP:****The appeals and the order appealed against**

- 1 The Full Bench has before it two appeals instituted under s 49(2) of the *Industrial Relations Act 1979* (WA) (the IR Act) against a decision made by the Commission in B 74 of 2016, being an order that the Shire of Denmark pay Robert Whooley the sum of \$43,893.71 forthwith.
- 2 In the proceedings at first instance, in an application referred to the Commission pursuant to s 29(1)(b)(ii) of the IR Act, it was claimed by Mr Whooley that he was denied benefits to which he was entitled under his contract of employment with the Shire of Denmark. Mr Whooley was first employed by the Shire of Denmark on 17 October 2005. He entered into a three-year fixed term contract on 8 September 2014 as the Director of Infrastructure Services and was employed as a 'senior employee' within the meaning of s 5.37 of the *Local Government Act 1995* (WA) (the LG Act).
- 3 At first instance before this Commission, it was agreed that the chief executive officer (CEO) of the Shire of Denmark dismissed Mr Whooley from his employment by way of letter on 5 June 2015.
- 4 The application before this Commission was not the first claim brought by Mr Whooley. Within 21 days of 5 June 2015, Mr Whooley filed an application in the Fair Work Commission alleging he had been unfairly dismissed. A conference was held by the Fair Work Commission on 15 July 2015. The conference was conducted by teleconference and was attended by Mr Whooley and his representative, Ms Ayen Nyariel, who is employed as an industrial officer by the Australian Services Union. The Shire of Denmark was represented by Mr Stewart, who was then the CEO of the Shire of Denmark, and Mr Brendan Taylor from the Western Australian Local Government Association.
- 5 In the proceedings before this Commission, Ms Nyariel gave evidence, accepted by the Commission, that an agreement was reached to compromise Mr Whooley's claim of unfair dismissal at the conciliation conference convened by the Fair Work Commission. Ms Nyariel's evidence was to the effect that the agreement was, relevantly, that the Shire of Denmark promised to pay Mr Whooley a sum of money and Mr Whooley agreed upon receipt to discontinue the action filed in the Fair Work Commission and to bring no other actions.
- 6 The following day after the conference in the Fair Work Commission, Mr Whooley telephoned Ms Nyariel and told her he wanted to change his mind about what was agreed at conciliation. Mr Whooley did not sign a deed of settlement and the sum the Shire of Denmark agreed to pay has not been paid.
- 7 On 19 October 2015, Mr Whooley, following the election of him as a councillor to the Shire of Denmark, sent an email to all councillors, councillors elect and the CEO, Mr Stewart, in which he stated that he considered his dismissal by the CEO as unlawful. He then went on to say (AB 242, FBA 8 of 2017):

So there is no ambiguity, or conflict, with legislation relating to being both an employee and Councillor, I hereby reluctantly tender my resignation as Director of Infrastructure for the Shire of Denmark, in accordance with my contract.
- 8 On 29 April 2016, Mr Whooley's solicitors filed a notice of application claiming unpaid contractual benefits. Among other matters pleaded in the schedule to the notice of application, s 5.37(2) of the LG Act was referred to which provides as follows:

The CEO is to inform the council of each proposal to employ or dismiss a senior employee, other than a senior employee referred to in section 5.39(1a), and the council may accept or reject the CEO's recommendation but if the council rejects a recommendation, it is to inform the CEO of the reasons for its doing so.
- 9 It was pleaded in the claim for contractual benefits that the Shire of Denmark did not comply with s 5.37(2) as councillors were not informed by the CEO of the proposal to dismiss Mr Whooley prior to his dismissal. In reliance of a breach of s 5.37(2), a claim was made that Mr Whooley had been denied a benefit to which he was entitled under his contract, being the balance of the remuneration payable pursuant to the terms of his contract, being from the date of the purported termination of employment until 7 September 2017.
- 10 After hearing evidence and submissions on behalf of the parties, the learned Commissioner at first instance found that the termination of Mr Whooley's employment on 5 June 2015 was invalid and ineffective because:
  - (a) the CEO had not complied with s 5.37(2) of the LG Act;
  - (b) the compromised agreement made by Mr Whooley and the Shire of Denmark on 15 July 2015, that included a term that operated as a bar to the proceedings before the Commission, was void on grounds that the parties were mistaken about whether Mr Whooley's employment had been validly terminated on 5 June 2015. In light of this finding, the learned Commissioner found that the subject matter of the 15 July 2015 agreement was 'entirely absent'; and
- 11 The learned Commissioner also found if he was wrong in concluding that the agreement reached on 15 July 2015 was not, at law, an agreement at all, then he would have found that there was an agreement reached that bars the claim for contractual benefits and Mr Whooley's claim ought to be dismissed.
- 12 In light of his finding that Mr Whooley's dismissal on 5 June 2015 was invalid and ineffective, the learned Commissioner found that Mr Whooley should be compensated on the basis of remuneration that he would have earned between 5 June 2015 to 19 October 2015 (being the date of his resignation), less the amount of one month's salary he was paid upon termination on 5 June 2015 and any amount he earned from other work during that period of time.

13 In supplementary reasons for decision delivered on 19 April 2017 ([2017] WAIRC 00219; (2017) 97 WAIG 562), the learned Commissioner found that the following amounts should be paid as compensation for the period between 6 June 2015 and 19 October 2015:

(1)	Annual salary:	\$41,353.96;
(2)	Cash in lieu of vehicle:	\$9,496.10;
(3)	Telephone landline:	\$175.00;
(4)	Mobile phone:	\$550.00;
(5)	Rental subsidy:	\$4,857.14;
	Sub total	<u>\$56,432.20</u>
(6)	Month of salary paid on termination:	- \$11,538.49;
(7)	Money earned by claimant:	<u>- \$1,000.00</u>
	Total	\$43,893.71

14 The learned Commissioner rejected Mr Whooley's claims of an association allowance, clothing allowance and a professional development allowance on the basis that Mr Whooley's evidence was that they were paid as lump sums when the expense to which they related was incurred, that is on the joining of an association, the purchase of clothing or the occurrence of professional development.

15 Mr Whooley made a claim for three months' remuneration as three months' pay in lieu of notice he claims he was required to give when he resigned pursuant to the terms of his contract. This claim was also rejected.

16 Mr Whooley also made a claim for payment of accrued annual leave, pro rata long service leave and superannuation which Mr Whooley claims were items he was entitled to claim pursuant to the terms of his contract of employment. The learned Commissioner found that the entitlements to accrued annual leave and pro rata long service leave would arise under an award or legislation and not under the contract. In respect of superannuation, the learned Commissioner found that the Commission does not have jurisdiction to enforce payments of superannuation as the obligation to make such payments, and what occurs where there is a failure to do so, arises under Commonwealth legislation.

#### Grounds of appeal

17 The grounds of appeal in FBA 8 of 2017 are as follows:

1. The Commissioner erred in holding that the termination of employment of the Respondent was invalid and ineffective because s.5.37(2) of the *Local Government Act 1995* (WA) was not complied with before notice of termination was provided on 5 June 2015 because:
  - a. on the proper construction of the *Local Government Act 1955* [sic] it is not a purpose of the legislation to render such decisions invalid.
2. The Commissioner erred in holding that the agreement reached between the Appellant and the Respondent on 15 July 2015 was void in that:
  - a. the decision relied upon by the Commissioner in finding the agreement void, *Galloway v Galloway* (1914) 30 TLR 531, does not represent the current position of the law in Australia; and/or
  - b. the subject matter of the agreement reached between the Appellant and Respondent on 15 July 2015 was not entirely non-existent.

18 The grounds of appeal in FBA 9 of 2017 are as follows:

1. The Commissioner erred in holding that the employment of the Respondent ended with his resignation on 19<sup>th</sup> October 2015 because:
  - a. The resignation was not accepted, nor acknowledged.
  - b. The resignation was too far removed from the notice of termination dated 5 June 2015 and was not intended to prejudice the denied benefits claim.
  - c. Many other events, along with standing for Council, could be deemed to have the same effect as resignation - such as taking other employment - which is permitted without prejudice.
2. In the event of the resignation holding, The [sic] Commissioner erred in holding that the West Australian Industrial Commission does not have the power to award compensation for annual leave and superannuation etc because:
  - a. This forms part of the Respondents [sic] specific contractual entitlements in line with the decision that the contract remained afoot.
  - b. Nothing in the contract makes reference to the entitlements of superannuation or annual leave being derived from an award or national legislation.

3. In the event of the resignation holding, The [sic] Commissioner erred in holding that compensation period was from 5 June 2015 until resignation on 19 October 2015 because:
- a. This takes no account of the notice period required under the contract and events proceeding in a normal manner without prejudice and with fundamental bargaining equality.
- 19 If ground 1 of the grounds of appeal in FBA 8 of 2017 is upheld, then it is not necessary to decide ground 2 and the appeal in FBA 9 of 2017 must fail. Further, if ground 1 of FBA 8 of 2017 fails, but ground 2 succeeds, then necessarily FBA 9 of 2017 must also fail.

#### **FBA 8 of 2017**

- (a) **Ground 1 of FBA 8 of 2017 - Was the termination of the employment of Mr Whooley on 5 June 2015 wholly invalid and ineffective?**
- 20 Pursuant to cl 11 of Mr Whooley's contract of employment, the CEO could terminate Mr Whooley's contract at will (cl 11.2) or by default (cl 11.3).
- 21 It is accepted by the Shire of Denmark that the CEO did not comply with s 5.37(2) of the LG Act. After the CEO dismissed Mr Whooley on 5 June 2015, the CEO on the same day sent a memorandum to the councillors in which he stated that he had informed Mr Whooley that his employment had terminated with effect from 5 June 2015 on grounds of breaches of his contract of employment and code of conduct.
- 22 A local government is the employer of its employees. Section 5.36(1) of the LG Act provides:
- A local government is to employ —
- (a) a person to be the CEO of the local government; and
- (b) such other persons as the council believes are necessary to enable the functions of the local government and the functions of the council to be performed.
- 23 Section 5.41(g) of the LG Act provides:
- The CEO's functions are to —
- ...
- (g) be responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees); and
- 24 The learned Commissioner found that s 5.37(2), when read with s 5.41(g), clearly creates a pre-condition to the power to employ or dismiss a senior employee and that the ultimate decision to do so resides with council [33] - [36].
- 25 At [37] - [39] the learned Commissioner observed:
- Parliament clearly intended that while a CEO might do all of the work leading up to the identification of an appropriate person for appointment or all of the work required to form a basis for the dismissal of a senior employee, and do whatever was administratively required to achieve those things, the final decisions in relation to those matters for senior employees rests with councils.
- It is clear that Parliament intended councils, and not CEOs, to have ultimate control over the important matter of who is employed or dismissed as senior employees. Given the significance of the role of senior employees, both in terms of their seniority and the financial impact of their employment, and the financial and other potential impacts of their dismissal, it is plain why Parliament intended councils and not CEOs to carry ultimate responsibility for the matters referred to in section 5.37(2) *Local Government Act 1995*.
- In my view if it was determined that there need not be compliance with section 5.37(2) *Local Government Act 1995* for an appointment or dismissal of a senior employee to be valid the purpose and intent of the legislation would be hopelessly undermined. On such a construction the relevant responsibilities would be in the hands of the CEO, a clearly unintended outcome given that the legislation clearly seeks to put councils in charge of these matters and to take full responsibility for them.
- 26 The modern approach to statutory construction requires that the meaning of a provision is to be construed within a statute as a whole and in context. Thus, it is artificial to focus on words in a statute in isolation.
- 27 In *Director General of Department of Transport v McKenzie* [2016] WASCA 147, Buss P observed [46] - [48]:
- The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The statutory text is the surest guide to Parliament's intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of the provision, in particular the mischief it is seeking to remedy. See *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby & Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 [47] (Hayne, Heydon, Crennan & Kiefel JJ).
- The context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed. See *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ).
- The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. See *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012)

248 CLR 378 [26] (French CJ & Hayne J). The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose. See *Minister for Employment and Workplace Relations (Cth) v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194 [21] (Gleeson CJ, Hayne, Callinan & Heydon JJ).

28 The modern approach to construction of contracts made pursuant to a power conferred by statute is that courts do not declare void a contract unless, as a matter of construction, the statute was intended to have that effect: *Australian Broadcasting Corporation v Redmore Pty Ltd* (1987) 11 NSWLR 621, 634 (McHugh JA).

29 In *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ found that the determination whether a failure to comply with a statutory condition for the exercise of a power depended upon an assessment whether the legislature intended the failure to render the exercise of the power invalid. At [91] their Honours said:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied (*Howard v Bodington* (1877) 2 PD 203 at 211, per Lord Penzance); there is not even a ranking of relevant factors or categories to give guidance on the issue.

30 Their Honours in *Project Blue Sky* were critical of the use of the distinction of classifying statutory obligations as mandatory (requiring strict compliance and thus invalidity in the event of non-compliance) and obligations that are merely directory. At [93] their Honours observed:

In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* ([1978] 1 NSWLR 20 at 23-24. See also *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 161-162, per Gibbs J) in criticising the continued use of the 'elusive distinction between directory and mandatory requirements' (*Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119 at 146, per Gummow J) and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning (*McRae v Coulton* (1986) 7 NSWLR 644 at 661; *Australian Capital Television* (1989) 86 ALR 119 at 147). That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales (*Hatton v Beaumont* [1977] 2 NSWLR 211 at 213, 226; *Attorney-General (NSW); Ex rel Franklins Stores Pty Ltd v Lizelle Pty Ltd* [1977] 2 NSWLR 955 at 965; *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24; *National Mutual Fire Insurance Co Ltd v The Commonwealth* [1981] 1 NSWLR 400 at 408; *TVW Enterprises Ltd v Duffy [No 3]* (1985) 8 FCR 93 at 102; *McRae v Coulton* (1986) 7 NSWLR 644 at 661 and see *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457-460; *Yates Security Services Pty Ltd v Keating* (1990) 25 FCR 1 at 24-26. See also two recent decisions of the Court of Appeal of the Supreme Court of the Northern Territory: *Johnston v Paspaley Pearls Pty Ltd* (1996) 110 NTR 1 at 5; *Collins Radio Constructions Inc v Day* (1997) 116 NTR 14 at 17; and *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 at 1294, 1296; [1995] 1 All ER 367 at 375, 377). In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute' (*Tasker v Fullwood* [1978] 1 NSWLR 20 at 24).

31 In *Project Blue Sky*, McHugh, Gummow, Kirby and Hayne JJ found the legislative provision in question regulated the exercise of functions already conferred on the Australian Broadcasting Authority rather than imposed essential preliminaries to the exercise of its functions [94].

32 A similar issue was raised in *Australian Broadcasting Corporation v Redmore Pty Ltd* [1989] HCA 15; (1989) 166 CLR 454 (Cth). In that matter, s 25(1)(a) of the *Australian Broadcasting Corporation Act 1983* empowered the Corporation to enter into contracts and s 70(1) of that Act provided that the Corporation shall not, without the approval of the Minister enter into a contract under which the Corporation is to pay or receive an amount exceeding \$500,000. Chief Justice Mason, Deane and Gaudron JJ construed s 70(1) as directory and said s 70(1) provides (458 - 459):

[T]hat the moneys of the Corporation 'shall not' be expended otherwise than in accordance with the estimates of expenditure approved by the Minister. That direction could not, however, sensibly be construed as concerned to confine power or invalidate the otherwise lawful expenditure of money by the A.B.C. It would, for example, border on the absurd to construe s. 69(2) as having the effect that no supplier of goods or services to the A.B.C. could know that he had a lawful or valid claim to payment unless he first ascertained that the purchase price, however small, came within the four corners of the detailed estimates of the A.B.C. in the form (possibly unpublished or unavailable to him) in which they had been approved by the Minister.

It can therefore be seen that both the general structure of the Act and the context provided by the other provisions of Pt VI, particularly s. 69(2), support a construction of s. 70(1) which sees the sub-section as directory (to the A.B.C.) about the manner of exercise of powers conferred and confined by other provisions and as not concerned to confine the actual

content of those powers or to invalidate or render unenforceable contracts with innocent outsiders made in the exercise of them. That construction of s. 70(1) is also supported by the legislative history of the sub-section.

33 They also observed that:

- (a) s 70(1) imposes a statutory duty upon the Australian Broadcasting Corporation and its officers which the Australian Broadcasting Corporation board is required to enforce; and
- (b) a failure to observe the directive of s 70(1) could, depending upon the circumstances, constitute misconduct for the purposes of disciplinary proceedings (459).

34 Justices Brennan and Dawson in *Australian Broadcasting Corporation v Redmore Pty Ltd* [1989] HCA 15; (1989) 166 CLR 454 also rejected the argument that non-compliance with s 70(1) rendered a contract entered into by the Australian Broadcasting Corporation without the approval of the Minister ultra vires and void. Their Honours observed (461):

That argument was rejected by the Court of Appeal (Samuels and McHugh JJ.A., Kirby P. dissenting). McHugh J.A. pointed to the express grant of power to enter into contracts for the performance of its functions (s. 25(1)(a)) and held that s. 70(1) 'merely regulates the use of the power'. We respectfully agree. The powers of the A.B.C. are granted by Pt IV of the Act - which includes s. 25 - and the directions to the A.B.C. contained in Pt VI ('Finance') - which includes s. 70 - are directions as to their exercise, not limitations on the grant. If s. 70 were expressed as a limitation on power to enter into contracts (as a similar provision in an earlier Act was expressed), it would be construed together with the provision granting the power and would operate as a limitation on the grant. As s. 70 is not so expressed, the A.B.C. cannot escape liability under the contract on the ground that it had no power to enter into it.

35 Their Honours then added (462):

If contravention of the direction not to enter into contracts of a particular class is not punishable as an offence on the part of the party to whom the direction is given, can the direction be construed as a prohibition of contracts of that class? A statute may render a contract void without creating an offence of entering into or performing the contract, just as a statute may create an offence of entering into or performing a contract without rendering the contract void. But when a statute directs a party not to enter into contracts of a particular class without creating an offence of entering into contracts of that class and without expressly declaring contracts of that class to be void, the question arises whether the statute prohibits contracts of that class. In *Yango Pastoral Co. Pty. Ltd v. First Chicago Australia Ltd.* ((1978) 139 C.L.R. 410, at p. 425) Mason J. pointed out that *Cope v. Rowlands* and the cases which followed it 'do no more than demonstrate that the question whether a statute prohibits contracts is always a question of construction turning on the particular provisions, the scope and purpose of the statute'.

36 The LG Act does not create an offence or a penalty in the event of non-compliance with s 5.37(2).

37 It is notable that where an employer is vested by statute with a jurisdiction of a disciplinary nature, such provisions usually give rise to a quasi-judicial function which must be exercised in compliance with the rules of procedural fairness. A failure to do so renders a decision arrived at, where applicable statutory provisions have not been substantially complied with, ultra vires and void ab initio: *Re Kenner; Ex parte Minister for Education* [2003] WASCA 37 [23] - [24] (Olsson AUJ, Parker and Templeman JJ agreeing); see also *Re Railway Appeal Board; Ex parte Western Australian Government Railways Commission* [1999] WASCA 63; (1999) 21 WAR 1).

38 Section 5.37(2) of the LG Act is not a provision of this kind. Unlike a statutory disciplinary regime, s 5.37(2) does not create a right of a senior employee to be heard, such as the right to make a representation to council prior to being dismissed. The regime created by s 5.37(2) is simply to require the CEO to inform the council of a proposal to dismiss (or to appoint).

39 Consequently, the question to be determined in this appeal is whether the act of a CEO to employ or dismiss a senior employee, without first putting a proposal to employ or dismiss to council, is intended by the operative effect of s 5.37(2) to have no legal force or effect. Or is the effect of s 5.37(2) when employing or dismissing a senior employee simply a directive to the CEO or a duty to act in accordance with as to the procedure set out in s 5.37(2)?

40 Contracts for CEOs and senior employees are regulated by s 5.39 of the LG Act which provides:

- (1) Subject to subsection (1a), the employment of a person who is a CEO or a senior employee is to be governed by a written contract in accordance with this section.
- (1a) Despite subsection (1) —
  - (a) an employee may act in the position of a CEO or a senior employee for a term not exceeding one year without a written contract for the position in which he or she is acting; and
  - (b) a person may be employed by a local government as a senior employee for a term not exceeding 3 months, during any 2 year period, without a written contract.
- (2) A contract under this section —
  - (a) in the case of an acting or temporary position, cannot be for a term exceeding one year;
  - (b) in every other case, cannot be for a term exceeding 5 years.
- (3) A contract under this section is of no effect unless —
  - (a) the expiry date is specified in the contract; and
  - (b) there are specified in the contract performance criteria for the purpose of reviewing the person's performance; and
  - (c) any other matter that has been prescribed as a matter to be included in the contract has been included.

- (4) A contract under this section is to be renewable and subject to subsection (5), may be varied.
- (5) A provision in, or condition of, an agreement or arrangement has no effect if it purports to affect the application of any provision of this section.
- (6) Nothing in subsection (2) or (3)(a) prevents a contract for a period that is within the limits set out in subsection 2(a) or (b) from being terminated within that period on the happening of an event specified in the contract.
- (7) A CEO is to be paid or provided with such remuneration as is determined by the Salaries and Allowances Tribunal under the *Salaries and Allowances Act 1975* section 7A.
- (8) A local government is to ensure that subsection (7) is complied with in entering into, or renewing, a contract of employment with a CEO.
- 41 Whilst in this matter what is being considered is whether the decision of the CEO of the Shire of Denmark to dismiss Mr Whooley was invalid and of no effect as the decision contravened s 5.37(2) of the LG Act, s 5.37(2) also applies to the power of a CEO to appoint a senior employee.
- 42 It is notable that whilst s 5.37(2) requires a CEO to inform the council of each proposal to employ or dismiss a senior employee and the council is empowered with a discretion to accept or reject the CEO's 'recommendation':
- (a) the CEO is responsible for the employment and dismissal of a senior employee pursuant to s 5.41(g); and
- (b) section 5.37(2) is silent as to its effect in the event of non-compliance, unlike s 5.39(3) which, in the event that a contract does not specify the matters stated in that subsection, deems a contract of a CEO or senior employee to be of no effect. It is also notable that pursuant to s 5.39(5), a provision in, or condition of, an agreement is deemed to have no effect if it purports to affect the application of s 5.39.
- 43 As the power to employ a senior employee resides with the CEO in s 5.41(g) and not the council, it is my opinion that the effect of s 5.37(2) is that it is simply a directive to first submit a recommendation to the council for the council to accept or reject, before employing or dismissing a senior employee. If s 5.37(2) was intended to limit rather than regulate the power of the CEO to employ or dismiss a senior employee, it could be expected that, like s 5.39(3) and s 5.39(5), a decision by a CEO that does not comply with s 5.37(2) would be expressly deemed to have no effect.
- 44 An analysis of the consequences of construing a decision void in breach of s 5.37(2) also supports this construction. As the Shire of Denmark points out, if a senior employee is employed without the CEO first obtaining approval of council, and the person 'employed' by the CEO commences employment purportedly as a senior employee and works for a period of time prior to the error being revealed, if the contract of employment for that period is rendered ultra vires, invalid and of no effect, the consequences to the person engaged is that they would not be at law an 'employee' or engaged pursuant to a contract. Whilst a claim for payment for the fair and reasonable value of work performed by the person may be made by the person as a claim of quantum meruit which is a claim in equity grounded in the principle of unjust enrichment, the consequences to that person is that they would not be entitled to make any claim that relied upon the law of contract. Nor would they be entitled to payment of any statutory entitlements that accrue to an employee, such as an entitlement to superannuation pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth) or pro rata long service leave, pursuant to the *Local Government (Long Service Leave) Regulations* (WA).
- 45 For these reasons, I am of the opinion that ground 1 of FBA 8 of 2017 has been made out. I would uphold the appeal, quash the decision and dismiss B 74 of 2016. In these circumstances, it is strictly not necessary to consider ground 2 of FBA 8 of 2017.

**(b) Ground 2 of FBA 8 of 2017 - Is the compromise agreement void?**

- 46 If I am wrong about the construction of s 5.37(2) of the LG Act and the effect in law of the decision of the CEO of the Shire of Denmark to dismiss Mr Whooley was invalid and ineffective, the issue whether the compromise agreement concluded in the Fair Work Commission is void and of no effect is a live issue.
- 47 This ground of appeal raises a question of law that is not without controversy.
- 48 In *Galloway v Galloway* (1914) 30 TLR 531, an agreement was found to be void at common law as the subject matter of the contract was lacking. In that matter, a separation deed was found to be void, as the parties entered into the agreement on the erroneous assumption that they were married.
- 49 The Shire of Denmark argues that the current law in Australia is that a common mistake about the subject matter of an agreement does not render the agreement void. Alternatively, the Shire of Denmark contends that the subject matter of the 15 July 2015 agreement was not entirely absent. It is argued on behalf of the Shire of Denmark that the current position of the law with respect to common mistake is as set out in the following passage by Dixon CJ and Fullagar J in *Svanosio v McNamara* (1956) 96 CLR 186, 195 - 196:

The subject of 'mistake' in relation to contracts has recently received a good deal of attention in the courts and in legal journals. This Court in *McRae v Commonwealth Disposals Commission* ((1951) 84 C.L.R. 377, at p. 407) adopted with respect a passage in the judgment of *Denning* L.J. (while saying nothing as to the actual decision) in *Solle v. Butcher* ((1950) 1 K.B. 671). To quote now from that judgment at somewhat greater length, his Lordship said:- '... once a contract has been made, this is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A

*fortiori*, if the other party did not know of the mistake, but shared it' ((1950) 1 K.B., at p. 691). *Denning* L.J. has since expressed the same view in *Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd.* ((1953) 2 Q.B. 450, at p. 460), after saying that he was 'clearly of opinion that the contract was not a nullity', although 'both parties were under a mistake, and the mistake was of a fundamental character with regard to the subject-matter' ((1953) 2 Q.B., at p. 459). Reference should also be made to two learned articles – *The Myth of Mistake in the English Law of Contract* by Mr. C. J. Slade ((1954) 70 L.Q.R. 385) and *The Supposed Doctrine of Mistake in Contract* by Professor K. O. Shatwell ((1955) 33 Can. B.R. 164).

'Mistake' might, of course, afford a ground on which equity would refuse specific performance of a contract, and there may be cases of 'mistake' in which it would be so inequitable that a party should be held to his contract that equity would set it aside. No rule can be laid down *a priori* as to such cases: see an article by Professor R. A. Blackburn in *Res Judicatae* (1955), vol. 7, p. 43. But we would agree with Professor Shatwell ((1955) 33 Can. B.R., at pp. 186, 187) that it is difficult to conceive any circumstances in which equity could properly give relief by setting aside the contract unless there has been fraud or misrepresentation or a condition can be found expressed or implied in the contract.

50 In the United Kingdom, *Solle v Butcher* [1950] 1 KB 671 had been overturned in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 after an extensive review of the authorities. In *Great Peace Shipping*, the Court of Appeal held the following elements must be present for a contract to be void at common law on grounds of common mistake (703):

- (i) there must be a common assumption as to the existence of a state of affairs;
- (ii) there must be no warranty by either party that that state of affairs exists;
- (iii) the non-existence of the state of affairs must not be attributable to the fault of either party;
- (iv) the non-existence of the state of affairs must render performance of the contract impossible;
- (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

51 In *Errichetti Nominees Pty Ltd v Paterson Group Architects Pty Ltd* [2007] WASC 77, Newnes M observed at [60] that Atkinson J (with whom Jerrard JA agreed) in *Australia Estates Pty Ltd v Cairns City Council* [2005] QCA 328 had reviewed the Australian authorities (including *Svanosio*) and concluded that *Solle* was no longer good law in Australia and the test to be applied to determine whether a contract is void at common law for common mistake is that found in the five elements in *Great Peace Shipping*. Master Newnes in *Errichetti Nominees* also observed at [61] that in 2006 *Great Peace Shipping* and *Australia Estates* have been the subject of criticism by one of the learned authors of Cheshire and Fifoot, *Law of Contract*, Dr Seddon.

52 *Great Peace Shipping* and the observations of Atkinson J in *Australia Estates* have subsequently been applied in *Menegazzo v Pricewaterhousecoopers (a firm)* [2016] QSC 94, approved of in *Charitou v Owners of Strata Plan 10394* [2015] NSWSC 1059, disapproved of in *Rees v Rees* [2016] VSC 452 and considered with some equivocation in *HWG Holdings Pty Ltd v Fairlie Court Pty Ltd* [2015] VSC 519; (2015) 302 FLR 230.

53 The learned authors, N Seddon, R Bigwood and M Ellinghaus, in Cheshire and Fifoot, *Law of Contract*, (10<sup>th</sup> Australian ed), point out, however, a special class of contracts may be void on grounds of *res extincta* (the subject matter does not exist), that is, a contract is void if the effect of the mistake empties the agreement of all content [12.11]. At [12.12], the learned authors explain:

Cases of *res extincta* (the subject-matter does not exist). This principle has been applied in a number of decisions dealing with what has been called cases of *res extincta*. It is well established that if, unknown to the parties, the subject-matter of the agreement does not exist, no contract ensues. If, for instance, the agreement is to sell specific goods that have already perished, there is nothing upon which a binding contract can operate ...

In the leading case at common law of *Couturier v Hastie* ((1852) 8 Exch 40; 155 ER 1250. Reversed (1853) 9 Exch 102; 156 ER 43; reversal affirmed (1856) 5 HL Cas 673; 10 ER 1065; [1843-60] All ER Rep 280. See Nicholas, 48 *Tulane LR* 946 at 966-72) the question concerned the sale of a cargo of corn supposed at the time of the contract to be in transit from Salonica to the United Kingdom, but which, unknown to the parties, had become fermented and had already been sold by the master of the ship to a purchaser in Tunis. It was held that the buyer was not liable for the price of the cargo. The case was heard by the Court of Exchequer, the Court of Exchequer Chamber and finally, after a consultation with nine of the judges, by the House of Lords. It was the unanimous view of each court that everything depended upon the construction of the contract. Had the purchaser agreed to buy specific goods or had he agreed to buy an adventure – namely the benefit of the insurance that had been effected to cover the possible failure of the goods to arrive? The former construction was ultimately preferred. Both parties were treated as contemplating existing goods to be bought and sold. It was not the mistake *per se* that prevented the formation of a contract in *Couturier v Hastie*, and, indeed, the word 'mistake' was never mentioned in any of the judgments. The crucial fact was the absence of the contemplated subject-matter, which prevented a contract of sale from coming into existence (See also the exhaustive discussion of *Couturier v Hastie* in the judgment of Dixon and Fullagar JJ in *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 402-9, ending in the conclusion that *Couturier v Hastie* cannot be regarded as a case in which a contract was void *ab initio* by reason of a common mistake, and pointing out the extent to which the case turned on a question of construction. See 12.16).

The view adopted in *Couturier v Hastie* had already been taken at common law in the earlier case of *Strickland v Turner* ((1852) 7 Exch 208; 155 ER 919) where X had bought and paid for an annuity upon the life of a person who, unknown to the buyer and seller, was already dead (See also the somewhat analogous cases of *Scott v Coulson* [1903] 2 Ch 249 (in which the name of the person, who was already dead, was AT Death); and *Pritchard v Merchant's and Tradesman's*

*Mutual Life Assurance Society* (1858) 3 CBNS 622; 140 ER 885). It was held that X had got nothing for his money and that the total failure of consideration entitled him to recover it in full.

In the decision of the High Court of Australia in *Owners, Master and Crew of 'The Cartela' v 'The Inverness Shire'* ((1916) 21 CLR 387 at 407; 22 ALR 126. See also *Galloway v Galloway* (1914) 30 TLR 531 (separation deed made upon the erroneous assumption that the parties were married); followed in *Law v Harragin* (1917) 33 TLR 381) where a towing contract for a vessel was entered into on the mistaken basis that the vessel to be towed was of 300-400 tons, whereas in fact it was of over 1300 tons, Isaacs J (dissenting) was prepared to treat the case as one where no contract had come into operation, because there was no such ship of 300-400 tons to be towed. Although he did mention the matter of a common mistake, this reference seems incidental to his main reasoning that the contract should be deemed void because of the totally different nature of the subject-matter.

54 In **HWG Holdings**, Sifris J made similar observations. At [55] - [56] his Honour said:

Neither *Great Peace Shipping* nor *Australian Estates* (The decisions in *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd* [2003] QB 679 and *Australia Estates Pty Ltd v Cairns City Council* [2005] QCA 328 have been criticised. See eg Nick Seddon 'Contract: Mistake Mistake' (2006) 80 Australian Law Journal 92 at 95-96. *Australia Estates Pty Ltd v Cairns City Council* [2005] QCA 328 is inconsistent with the decision of the High Court in *Taylor v Johnson* (1983) 151 CLR 422 and older cases that specifically follow *Solle v Butcher* [1950] 1 KB 671) affects the common law position. In fact it clarifies and reinforces it, in slightly different language (Impossibility of performance or contractual adventure not possible. See [52] above), by reference to and approval of both *Bell v Lever Bros* and *Associated Japanese Bank*. Accordingly, if the parties establish that the common mistake rendered the subject matter of the contract 'essentially and radically different' from the subject matter which the parties believed to exist, or if there is no subject matter so that the contract has no content, the contract may be void ab initio. As pointed out there are very few cases on point. The principle, however, remains (NC Seddon & MP Ellinghaus, *Law of Contract* (9<sup>th</sup> Australian ed, LexisNexis Butterworths, 2008) 646 [12.11]). Most cases are of *res extincta*, that is where the subject matter does not exist and the contract is incapable of fulfilment (Ibid, [12.12]). These cases involve mistakes that are obviously very serious and fundamental. Contracts where the subject matter does exist, but is of a lesser quality are more difficult. Nevertheless, the mistake may still be serious and fundamental (John Cartwright, *Misrepresentation, Mistake And Non-Disclosure* (3<sup>rd</sup> ed, Sweet & Maxwell, 2015) 735 [15-14], 742-761 [15-19]-[15-28]).

Courts do not lightly declare or find contracts to be void ab initio for common mistake. However, it is ultimately a matter of construction of the particular contract made by the parties, particularly in relation to which party is to bear the risk (The contractual allocation of risk may exclude reliance on mistake. Cases such as *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377 were decided on this basis. See also Cartwright, above FN 53, 736-742 [15-15-18]). In the unusual case where the contract is silent, gap filling [sic] mechanisms are not available, there is no misrepresentation or misleading conduct, and the breach is serious, the result in a particular case may well be the stated narrow common law position, namely that the contract is void ab initio

- 55 It was an agreed fact before the learned Commissioner at first instance that Mr Whooley's employment was terminated by the CEO on 5 June 2015. The application brought by Mr Whooley in the Fair Work Commission was a claim of unfair dismissal following the summary 'termination' of his employment by the CEO of the Shire of Denmark on grounds of serious misconduct.
- 56 In this matter, there is no appeal against the finding made by the learned Commissioner at [69] - [72] that the terms of the compromise agreement were that the Shire of Denmark promised to pay Mr Whooley a sum of money and Mr Whooley agreed upon receipt to discontinue the action filed in the Fair Work Commission and to bring no other actions. In these circumstances, it cannot be said that the fact that the parties were mistaken about the legal effect of the termination of employment of Mr Whooley on 5 June 2015 was invalid resulted in the absence of any contractual subject matter as the subject matter of the agreement was wider than a claim of unfair dismissal, it included any other action Mr Whooley may contemplate bringing against the Shire of Denmark in the future.
- 57 The question then arises, could the mistake about the legal effect of the termination have the effect of rendering the compromise agreement void by applying the principles in *Svanosio* or *Great Peace Shipping*. In my opinion, the application of either approach would not result in a finding on the facts that the compromise agreement was void.
- 58 Whilst Mr Whooley and the Shire of Denmark may not have been aware at the time the compromise agreement was reached that the decision of the CEO to terminate Mr Whooley's employment on 5 June 2015 was invalid at law, even if the mistake could be said to be fundamental, applying the criteria in *Solle*, unless there was fraud or misrepresentation, the compromise agreement could not be set aside. In this matter, there was no evidence of such.
- 59 Alternatively, if the principles in *Great Peace Shipping* are applied, the five necessary elements cannot be said to be present. In particular, the fact that the decision of the CEO to terminate the employment of Mr Whooley, if invalid, could not render the performance of the compromise agreement impossible. The Shire of Denmark could still pay the settlement sum and Mr Whooley file a notice of discontinuance of the action in the Fair Work Commission.
- 60 For these reasons, if I am wrong on ground 1 of the appeal, I would uphold ground 2 of the appeal.
- 61 In light of my findings in respect of ground 1 and ground 2 of FBA 8 of 2017, I am of the opinion that the decision of the learned Commissioner should be quashed and an order be made that B 74 of 2016 be dismissed on grounds that the:
- (a) decision by the CEO to terminate the employment of Mr Whooley on 5 June 2015 was not invalid and ineffective; and

- (b) compromise agreement made between Mr Whooley and the Shire of Denmark in the Fair Work Commission on 15 July 2015 barred the claim for contractual benefits referred to the Commission by Mr Whooley in B 74 of 2016.

**FBA 9 of 2017**

- 62 I am of the opinion that this appeal must necessarily fail and an order be made that this appeal be dismissed.
- 63 In light of the findings made in FBA 8 of 2017, it is not necessary to consider the issues raised in FBA 9 of 2017. However, in light of the submissions made by the parties, there are two matters raised in ground 2 of the appeal that require comment.
- 64 Firstly, I agree and I note that the Shire of Denmark concedes that if Mr Whooley's employment had at law continued until 19 October 2015, that Mr Whooley was entitled to be paid 5% of his salary component as superannuation, being a sum of \$2,086.58 pursuant to cl 5.4(1)(a) and item 9 of sch 2 of his contract of employment. This amount would be payable as a contractual entitlement and is an amount in addition to the 9½% superannuation guarantee charge that would be payable by the Shire of Denmark under the *Superannuation Guarantee (Administration) Act* and the *Superannuation Guarantee Charge Act 1992* (Cth).
- 65 Secondly, I am of the opinion that if Mr Whooley's employment had terminated on 19 October 2015, he may have been entitled to be paid pro rata annual leave from 6 June 2015 until 19 October 2015.
- 66 Clause 9.2 of Mr Whooley's contract provided:
- (1) You are entitled to 4 weeks' paid annual leave each year after 12 months completed service.
  - (2) Annual leave may be taken on a pro rata basis.
- 67 Whilst there is nothing expressed in cl 9.2 which provides that an entitlement to annual leave accrues pro rata, cl 17.5(1) provides that the contract is governed by and is to be construed in accordance with the laws in force in Western Australia.
- 68 Pursuant to s 5(1)(c) of the *Minimum Conditions of Employment Act 1993* (WA), the minimum conditions of employment extend to and bind all employees and employers and are taken to be implied in a contract of employment. Section 23 of the *Minimum Conditions of Employment Act* prescribes as a minimum leave condition that an employee is entitled to four weeks' leave a year and their entitlement accrues on a pro rata basis. However, this is not a claim that would be capable of being dealt with by the Commission in an application referred by an employee under s 29(1)(b)(ii) of the IR Act as the effect of s 7(c) of the *Minimum Conditions of Employment Act* is that where a condition is implied in a contract of employment, the matter may be enforced in the Industrial Magistrate's Court, pursuant to s 83 of the IR Act.

**KENNER ASC:**

- 69 Mr Whooley was employed by the Shire of Denmark from in or about October 2005. In early September 2014 Mr Whooley and the Shire entered into a three-year fixed term contract, under which Mr Whooley was employed as the Director of Infrastructure Services. In such position, Mr Whooley was designated as a "senior employee", in accordance with the terms of s 5.37(1) of the *Local Government Act 1995* (WA). The significance of this is a matter I will return to later in these reasons. On 5 June 2015, Mr Whooley's employment was terminated by the Shire on the grounds of misconduct. An unfair dismissal claim was commenced by Mr Whooley in the Fair Work Commission under the *Fair Work Act 2009* (Cth). Settlement discussions took place and the Shire contended that those proceedings were settled on the basis that no further proceedings would be commenced by Mr Whooley arising out of the termination of his employment. This was disputed.
- 70 A little later, on 19 October 2015, despite earlier events, Mr Whooley informed the Shire that he was resigning from his employment with the Shire as he had been elected as a Shire Councillor.
- 71 In April 2016 Mr Whooley commenced proceedings in the Commission alleging that he had been denied contractual entitlements being the balance of his three-year fixed term contract. He maintained that the termination of his employment by the Shire was unlawful and invalid. In the alternative, Mr Whooley maintained that if the termination of his employment was valid then, in reliance on the terms of his contract, he was entitled to one year's remuneration which he had not been paid.
- 72 The learned Commissioner at first instance upheld Mr Whooley's claim that the termination of his employment was invalid. He found that Mr Whooley remained employed until his resignation in October 2015. Accordingly, Mr Whooley was entitled to be paid from the date of his purported termination of employment in June 2015 until his resignation in October 2015. Secondly, the learned Commissioner found that there was no concluded settlement agreement arising from the Fair Work Commission proceedings. This was because, unknown to the parties, Mr Whooley's employment had not in law terminated. As a result, there was a fundamental mistake as to the subject matter of the settlement agreement.
- 73 Two appeals have been brought from the learned Commissioner's decision. The first, FBA 8 of 2017 is by the Shire. The second, FBA 9 of 2017 is brought by Mr Whooley. I will consider the Shire's appeal first.

**FBA 8 of 2017**

- 74 There are two grounds of appeal. The first ground contends that the learned Commissioner erred in his conclusion that the dismissal of Mr Whooley was invalid and ineffective because of s 5.37(2) of the *LG Act*. The second ground contends that the learned Commissioner erred in concluding that the settlement agreement between Mr Whooley and the Shire was void and that he should not have relied on the case of *Galloway v Galloway* (1914) 30 TLR 531. Contrary to the conclusion of the learned Commissioner, the appellant maintained that subject matter of the settlement agreement did exist. In the alternative, the Commission should have held the agreement to be voidable.

**Ground 1**

- 75 As to this ground, in summary, the appellant submitted that whilst the learned Commissioner correctly identified the issue to be determined, it was maintained by the appellant that he erred in deciding that any settlement agreement between the parties was void. Firstly, the argument was that in reliance upon the plain language of s 5.37(2) of the *LG Act*, there is no reference to any contravention of that provision resulting in invalidity. Furthermore, the appellant contended that nothing in the objects or the context of the legislation would alter this outcome. The submission appeared to be that a failure by a CEO to inform a council of a proposal to dismiss or employ a senior employee, would, in effect, constitute a breach by the CEO of his or her employment contract and that would be a sufficient sanction in the circumstances.
- 76 Another argument put by the appellant was that having regard to the terms of s 5.41(g), dealing with the responsibilities of a CEO for staffing matters, the conclusion is open that all s 5.37(2) does is to regulate that function. This is supportive of the appellant's argument that invalidity does not arise from a failure to comply. There are also submissions made as to the practical consequences of holding that any purported employment or dismissal of a senior employee was invalid in law.
- 77 In addressing this ground of appeal, attention needs to be given to the terms of the *LG Act*. As the decision in of the High Court in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 requires, the terms of s 5.37(2) need to be considered in the context of the scope and objects of the statute.
- 78 By s 1.3(1) dealing with context and intent, it is stated that the *LG Act* is to provide for a system of local government by the provision of elected local governments in the State. In s 1.3(2), an express purpose of the legislation is to specifically result in better decision making by a local government; greater community participation in the decisions and affairs of local governments; and greater accountability of local governments to their communities, amongst other things.
- 79 By s 1.4, "CEO" is to be the chief executive officer of a local government. "Employee" is a person who is employed by a local government under s 5.6. The "Council" means the council of a local government. Under s 2.7 of the *LG Act*, the council of a local government is to govern the local government's affairs and to be responsible for the performance of the local government's functions. By s 2.10, the role of a councillor is to ... "participate in the local government's decision-making processes at council and committee meetings". A councillor is also required to "perform such other functions as are given to a councillor by this Act".
- 80 The administration of a local government is dealt with in Part 5 of the *LG Act*. This also deals with the administration of council meetings and the employment of persons by local government and matters relating to local government employees. Specifically, Division 4 of Part 5 deals with local government employees. By s 5.36(1) a local government has the power to employ a CEO and such other persons as may be required. Section 5.36(2) provides that a council must be satisfied (by absolute majority vote) that a person is suitable to be appointed as a CEO. By s 5.36(3), any other person may be employed so long as the CEO is satisfied prior to employment, that a person is suitably qualified and arrangements for a person's employment are satisfactory.
- 81 As mentioned earlier, the legislation provides for a specific category of "senior employees" in s 5.37. It is for a local government to designate such persons as senior employees as it sees fit: s 5.37(1). A key provision in issue in this appeal is s 5.37(2). It is in the following terms:
- 5.37 Senior employees**
- ...
- (2) The CEO is to inform the council of each proposal to employ or dismiss a senior employee, other than a senior employee referred to in section 5.39(1a), and the council may accept or reject the CEO's recommendation but if the council rejects a recommendation, it is to inform the CEO of the reasons for its doing so.
- 82 This provision is subject to s 5.39(1a). It provides that the terms of s 5.37(2) do not apply in the case of an acting CEO employed for a term of one year or less, or to a senior employee employed for up to three months. This did not apply in the circumstances of this case. By s 5.39(2) a contract for a CEO or a senior employee may only be for a maximum of five years. In section 5.39(3) if specified criteria are not met, a contract under s 5.39 is of no effect. This is a statutory qualification in relation to which, no issue of council involvement in decision making arises. This provision is very different to the terms of s 5.37(2), having regard to the intent and objects of the legislation, described earlier.
- 83 Section 5.37(2), requiring a CEO to inform the council of each "proposal" to employ or dismiss a senior employee, and secondly, empowering the council to accept or reject such a "recommendation", reflects the essence of the objects of the *LG Act* to enhance participation of the community through its elected representatives on the council and the accountability and transparency of local government to their communities through better decision making by elected councillors. It is clear from the plain language of s 5.37(2), that a CEO's proposal to employ or dismiss a senior employee, involves deliberation by the council concerned. A decision is to be taken. The provision goes much further than merely imposing an obligation on a CEO to inform a council of a proposed employment or dismissal of a senior employee.
- 84 The language used in s 5.37(2) is instructive as to its construction, in the context of the intent and objects of the *LG Act*. The Shorter Oxford Dictionary defines "proposal" as relevantly "1. The action, or an act, of putting before the mind; setting forth, propounding....3. The action, or an act, of proposing something to be done; an offer to do something; a scheme or plan proposed". Similarly, "propose" is defined to include "1. To put forward for consideration, discussion, solution, etc". A "recommendation" relevantly includes "3. The action of recommending a person or thing as worthy or desirable..." What is therefore intended by s 5.37(2) is that a CEO recommends a course of action to the council in relation to the employment or dismissal of a senior employee. The council, as the ultimate decision-making organ under the *LG Act*, then decides to either accept or reject that recommendation. In my view, it is the council that decides these matters, not the CEO.

- 85 Also relevant is s 5.41 dealing with the functions of a CEO. By s 5.41(g) a CEO is "responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees) ...". The language of s 5.41(g) makes it clear that in relation to "senior employees", when read with the plain terms of s 5.37(2), that a CEO does not have sole responsibility for the employment or dismissal of a senior employee. The power given to a council to "accept or reject" a CEO's recommendation to employ or dismiss a senior employee, is consistent with the objects and intent of the *LG Act* to give the community a greater say in the governance of their local communities through elected councillors. To construe this provision in this manner, is entirely consistent with the stated objects and purposes of the legislation, referred to earlier.
- 86 When construed in this way, in accordance with the intents and objects of the legislation, it is unnecessary for the *LG Act* to specify invalidity of any appointment or dismissal, where s 5.37(2) is not complied with. This is because, read consistently with the objects and intent of the legislation, on the rejection of such a recommendation of a CEO, any proposed appointment or dismissal of a senior employee cannot occur. It is clearly contemplated that there is no decision until the council acts one way or the other.
- 87 In this context, whilst the appellant sought to obtain some support for its arguments from s 5.39(3), providing that a contract not containing specified matters is of no effect, in my view, this provision is of an entirely different kind to s 5.37(2). The former provision is of a machinery kind, that simply provides that unless a contract specifies certain key provisions, it will be of no effect. In contrast, the terms of s 5.37(2), in accordance with its plain language, read with the objects of the *LG Act*, goes to the heart of local government decision making itself. It is clear from the language used, that Parliament intended that in relation to the appointment and dismissal of senior employees, that process is a joint one to be performed by a CEO and the elected council. Such a decision is not the sole prerogative of the CEO.
- 88 As a matter of construction, it would be curious if Parliament, having enacted s 5.37(2) would intend that a CEO, could simply ignore or alternatively, as the appellant seemed to contend, not pay any regard to the acceptance or rejection of a CEO's "recommendation" to either appoint or dismiss a senior employee. Parliament has sought fit to enact special provisions in the *LG Act* for the appointment of CEOs and senior employees. By the terms of s 5.37(2) the legislature has sought to involve the body politic of a local government in the appointment of both a CEO and senior employee, consistent with the intent and purposes of the legislation, as specified in s 1.32(2). It is inconceivable in my view, that Parliament would have intended that a decision of a CEO, either in ignoring his or her obligations under s 5.37(2), or alternatively, disregarding a response from the elected members of the community, would have no real consequences, as seemed to be the contention of the appellant.
- 89 The appellant's submissions in relation to the construction of s 5.37(2), would have more force if it only required a CEO to inform a council of a proposed employment or dismissal of a senior employee. That is, if after the words "referred to in section 5.39(1a)", there was a full stop. In such cases, where a CEO failed to inform, and in the absence of express language indicating invalidity, it would be more likely that Parliament did not intend there to be an invalid decision in circumstances where the section only imposed an obligation on a CEO to inform and advise. Such a situation may have disciplinary consequences for the CEO concerned. However, s 5.37(2), in accordance with its plain and ordinary language, goes much further and requires the participation by the council in the decision itself, to either employ or dismiss a senior employee. Presumably also, the legislature requires the council to inform a CEO of its reasons for the rejection of a recommendation regarding a senior employee, in order that the senior employee may be informed of the relevant decision.
- 90 Whilst the appellant submitted that a decision by a CEO to appoint or dismiss a senior employee without compliance with s 5.37(2) may have consequences, such as an uncomfortable performance review under s 5.38, I do not consider that could be regarded as a sufficient indication of legislative intent. Furthermore, as to the contention that a senior employee may be invalidly engaged or dismissed for some period, and thus have financial consequences, I do not consider this to be sufficient to overcome the construction that I think should be given to the legislation. Given the no doubt prominent role of a senior employee in the administration of a local government, it would be surprising if either the employment or dismissal of such senior officer, not authorised as required, would go unnoticed for long.
- 91 From its plain language, as the learned Commissioner concluded, the appointment or dismissal of a senior employee requires a "proposal" to that effect to be taken to the council. Given that the council is empowered to accept or reject such a "proposal", the decision is not that of the CEO, and the council decides to affirm or reject the proposal advanced by the CEO. In my view, this construction puts paid to the argument advanced by the appellant that the language in s 5.37(2), to the effect that the council "may" accept or reject such a proposal, means that the council may not be required to have a role to play and in effect, a CEO is merely informing the council of his or her decision. Therefore, to the extent that the appellant contended that the obligation imposed by s 5.37(2) extends only to inform a council of the proposed employment or dismissal of a senior employee, such a contention must be rejected.
- 92 I am not persuaded the learned Commissioner was in error in the conclusion that he reached on this issue. In my view, ground 1 has not been made out.

## Ground 2

- 93 The learned Commissioner found, in applying *Galloway v Galloway* (1914) 30 TLR 531, that the subject matter of the settlement agreement, that being the dismissal of the respondent, was entirely non-existent. This being the case, he held that the agreement was in law of no effect. Therefore, the appellant could not rely on the respondent's undertaking not to commence future proceedings, to defeat the respondent's contractual benefits claim. In the alternative, the learned Commissioner would have found, on the evidence before him, as a matter of fact, that a settlement agreement was reached between the parties, arising from the Fair Work Commission conciliation conference on 15 July 2015.

- 94 The appellant contended that the learned Commissioner was in error in reaching this conclusion. There were two bases to this contention. The first was that *Galloway*, a decision of the King's Bench Division in the United Kingdom, did not represent the current legal position in Australia. The submission was the position in Australia is set out in *Svanosio v McNamara* (1956) 96 CLR 186. In the case of a common mistake, a contract is not void and of no effect. A contract affected by common mistake may be set aside, but until such time, it remains binding. The second argument put by the appellant on this ground was that irrespective of the first point, the subject matter of the settlement agreement was not absent.
- 95 The issue of the effect of mistakes in the law of contract has been a difficult and controversial one on the cases. Difficulties have arisen as to the proper identification of the 'subject matter' of a contract and whether the contract may fail and be unenforceable for other reasons, such as the failure of consideration, or the absence of consideration. In her reasons for decision, Smith AP has referred to the current state of the argument in the Australian cases, which I gratefully adopt. There is some disagreement as to the circumstances in which a contract may be held to be void ab initio, arising from a common mistake.
- 96 In *Svanosio*, there was a contract for the sale of a hotel. It was later discovered that the hotel was located partly on land conveyed to the purchaser and partly on Crown land, not subject to any title by the vendor. Dixon CJ and Fullagar J held that the contract was not void as there was no evidence of fraud and both parties believed the hotel was on the land sold in the transaction. The learned authors Carter JW, Peden E and Tolhurst GJ in *Contract Law in Australia* 5<sup>th</sup> ed refer to *Svanosio* as a case of "partial absence of subject matter" in the following terms:
- [20-19] **Partial absence of subject matter.** *Svanosio v McNamara*<sup>68</sup> illustrates the difficulties which confront a party who argues that a partial absence of subject matter has the effect of rendering the contract void where both parties believed that the entire subject matter existed.<sup>69</sup> Dixon CJ and Fullagar J approved<sup>70</sup> the following passage in the judgment of Denning LJ in *Solle v Butcher*:<sup>71</sup>
- [O]nce a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A fortiori, if the other party did not know of the mistake, but shared it.
- 97 In this case, there was no doubt that the parties were unaware that in law, on the basis that the conclusion above on ground one is correct, the respondent was still employed by the appellant and had not been dismissed. That is, as in *Galloway*, where the parties thought they were married when they were not, in this case, the parties thought they no longer were in an employer-employee relationship when they were. The subject matter of the proceedings in the Fair Work Commission was the respondent's purported dismissal. The only reason the parties proposed settlement was to compromise this claim and agree that no further claim could be made by the respondent, arising from the employment of the respondent and the termination of his employment.
- 98 A copy of the unexecuted deed was exhibit R2 at first instance. It was predicated in cl 2 on the parties' (erroneous) agreement that the respondent's employment was terminated on 5 June 2015. The operative parts of the deed in cls 4, 5 and 6, setting out the obligations of each party to one another, are also based on this assumption, as was the indemnity and bar to future proceedings in cl 10. Whilst the appellant argued, and the learned Commissioner accepted in the alternative, that reliance on the deed was unnecessary as he would have concluded on the evidence that there was an agreement reached at the conciliation conference, the terms of the document prepared later was clear evidence of the parties' (erroneous as it turned out) state of mind at the time.
- 99 I prefer the view that this case is one of the special cases of "res extincta", where the subject matter of the contract does not exist, identified by the learned authors in *Law of Contract* and set out in the reasons of Smith AP at par 53. Reference is made to *Galloway* in the extract, along with other cases. I do not think there was, on the facts of this case, any subject matter on which any settlement agreement could fasten, either at the time of the conciliation conference or up to when the draft deed of settlement was exchanged between the parties. I therefore do not consider that the learned Commissioner was in error in concluding as he did.
- 100 However, in the alternative, if I am incorrect on this point, there is another reason why I consider the respondent should not have been precluded from bringing his contractual benefits claim in this Commission. This is because I do not consider, despite the subject matter issue, that there could be any agreement, binding on the parties, based on the evidence at first instance, justifying the dismissal of the respondent's claim under s 27(1)(a) of the Act. I reach that view for the following reasons.
- 101 It seemed to be common ground at first instance that at the conciliation conference before the Fair Work Commission, some discussion about a settlement of the respondent's claim took place. The long and short of it was, notwithstanding a good deal of evidence on the issue at first instance, that the respondent would not proceed with his Fair Work Commission application in return for the payment by the appellant to him of a sum of money. It appears that the amount in question was, from the evidence, six weeks' salary in the sum of approximately \$15,800 gross. This was to be recorded, and was ultimately recorded in exhibit R2, which was to be signed by the parties in due course. The respondent was represented by an industrial officer from his union.
- 102 Some evidence was given about these matters by the respondent, the industrial officer Ms Nyariel and the CEO of the appellant, Mr Stewart. There was some suggestion on the evidence that the respondent had a change of heart the day after the conciliation conference. The issue at first instance became whether there was any agreement reached or not. The evidence also was that not only was there no formal document signed by the parties as was intended, but the respondent was not paid

anything, in terms of the appellant's end of the bargain. It must be remembered that the alleged agreement to settle and compromise the Fair Work Commission proceedings, was struck in July 2015, some nine months or so prior to the institution of the respondent's denied contractual benefits claim against the appellant. Despite this passage of time and the failure of the appellant to perform its obligations to furnish consideration as a part of the settlement agreement, the appellant still maintained at first instance, that the agreement reached at the Fair Work Commission conciliation conference bound the respondent to his undertaking to the appellant. That being, he would take no further action against the appellant arising out of his employment.

103 I do not consider there was any basis on which the respondent was obliged to maintain his side of a bargain that remained totally unperformed by the appellant. It was not clear from the evidence at first instance as to what exactly occurred after the Fair Work Commission conciliation conference, although it does seem that the respondent did not pursue his unfair dismissal claim. Whether this occurred on the strength of the alleged agreement is not entirely clear, although an inference is open that this was so.

104 Settlement agreements of the kind in question, are common in individual employment disputes. As a compromise of an action, aside from an order of a relevant court or tribunal, to be enforceable such a compromise must be the subject of a valid contract: *Green v Rozen* [1955] 1 WLR 741. The promises of both parties must be supported by consideration; in this case the respondent's promise to discontinue the Fair Work Commission proceedings and take no further action arising from the employment and the appellant's promise in return, to pay the respondent the sum of approximately \$15,800. It was acknowledged on the evidence at first instance (see pages 23, 27, 49, 64 and 92 TFI) that the appellant did not even attempt to perform its core obligation under the settlement to pay the respondent the agreed sum. Furthermore, whilst there seemed to have been reference in the proceedings to exhibit R2, the Deed of Settlement document, it was never signed by the parties.

105 As a matter of equity and good conscience, I do not consider that the respondent could be held to a purported bargain devoid of any contractual effect. Had the appellant made a payment to the respondent in accordance with the terms of the alleged agreement, there would be no question in my mind that his application at first instance should have been dismissed under s 27(1)(a) of the Act. In the absence of such however, the respondent should not be denied the opportunity to pursue his denied contractual benefits claim, as in fact occurred. Despite arguments about which of the situations in *Masters v Cameron* (1954) 91 CLR 53 may have had application, in the circumstance where the respondent never received what he was promised by the appellant under the alleged agreement, it would be quite inequitable to hold him to his side of the bargain only.

106 I do not therefore consider that this ground of appeal has been made out.

#### **FBA 9 of 2017**

107 As to the respondent's appeal, there are three grounds.

#### **Ground 1**

108 This ground contends that the learned Commissioner erred in concluding that the respondent's employment came to an end on 19 October 2015 when he resigned. This was when the respondent was elected to the appellant's council. This ground must fail. The terms of the *LG Act* are clear. By s 2.26, on the election to a council, the employment of a local government employee ends on the commencement of their term as a councillor. It appears common ground that there was an ordinary election on 17 October 2015 and the respondent was elected. As a duly elected councillor, all else being equal, his term of office would have commenced the next day on 18 October 2015 under s 2.28(2) of the *LG Act*. A resignation is unnecessary and in this case, was of no effect as the respondent was in law, no longer an employee from this date. To that extent, the learned Commissioner's finding at par 47 of his reasons for decision was in error but little turns on it in my view.

#### **Ground 2**

109 As to this ground, the respondent contended the learned Commissioner was in error in rejecting his claims for pro-rata annual leave and for superannuation contributions. In this respect, in supplementary reasons for decision, the Commission held that the respondent was unable to point to any contract term to support these claims and they more properly, would fall under legislation or an award.

110 Whilst the respondent's contract of employment did provide for annual leave and that it could be taken on a pro rata basis, there was no provision as to how such pro rata leave may be accrued or paid out on termination of employment. This latter subject is prescribed by the *Minimum Conditions of Employment Act 1993* (WA) in ss 23(2) and 24. However, minimum conditions of this kind are taken to be implied into all contracts of employment under s 5 of the MCE Act and they are to be enforceable, by s 7 of the MCE Act, as if they were an award, industrial agreement or an order of the Commission under s 83 of the Act. This is an exclusive jurisdiction which would arguably prevent the Commission dealing with it as a denied contractual benefit, although in *BGC (Australia) Pty Ltd v Phippard* [2002] WASCA 191; (2002) 82 WAIG 2013 there were obiter observations of Hasluck J (Anderson and Parker JJ agreeing) suggesting the contrary at pars 32-33. It was not apparent in that case however, that the terms of s 83 of the Act were raised or argued. The learned Commissioner referred to these benefits as arising under an award or legislation and there is no error demonstrated.

111 As to the superannuation claim, it was accepted by the appellant that under the respondent's contract of employment he was entitled to an additional amount of 5 % of his salary, in the sum of \$2,086.58, over and above his statutory entitlement. The additional amount, above the statutory contribution, could be claimed as a contractual benefit. Accordingly, to the extent that the learned Commissioner concluded that the issue of superannuation was beyond the Commission's jurisdiction, this was in error. There should be a variation to the order to include this additional amount.

**Ground 3**

112 As to this ground, whilst it was not clear to me the basis of the respondent's contention, as concluded above in relation to ground one, once the respondent was elected as a councillor his employment simply came to an end. No issue of resignation arose or notice of such. This ground is not made out.

**Conclusions**

113 For the above reasons, I would dismiss appeal FBA 8 of 2017. As to FBA 9 of 2017, I would uphold it in part as to ground two and vary the order made by the Commission.

**EMMANUEL C:**

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

		<b>2017 WAIRC 01026</b>
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	SHIRE OF DENMARK	<b>APPELLANT</b>
	<b>-and-</b>	
	ROBERT WHOOLEY	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL	
<b>DATE</b>	WEDNESDAY, 20 DECEMBER 2017	
<b>FILE NO/S</b>	FBA 8 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 01026	
<b>Result</b>	Appeal upheld	
<b>Appearances</b>		
<b>Appellant</b>	Mr J Darams (of counsel)	
<b>Respondent</b>	Mr R Whooley (in person)	

*Order*

This appeal having come on for hearing before the Full Bench on 27 September 2017, and having heard Mr J Darams (of counsel) on behalf of the appellant, and Mr R Whooley on his own behalf as respondent, and reasons for decision having been delivered on 13 December 2017, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is upheld.
2. The order made by the Commission on 26 April 2017 [2017] WAIRC 00232; (2017) 97 WAIG 563 is quashed.
3. B 74 of 2016 is dismissed.
4. The respondent re-pay the appellant the sum of \$43,893.71 forthwith.

By the Full Bench  
(Sgd.) J H SMITH,  
Acting President.

[L.S.]

2017 WAIRC 01007

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ROBERT WHOOLEY	<b>APPELLANT</b>
	<b>-and-</b>	
	SHIRE OF DENMARK	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL	
<b>DATE</b>	WEDNESDAY, 13 DECEMBER 2017	
<b>FILE NO/S</b>	FBA 9 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 01007	
<b>Result</b>	Appeal dismissed	
<b>Appearances</b>		
<b>Appellant</b>	Mr R Whooley (in person)	
<b>Respondent</b>	Mr J Darams (of counsel)	

*Order*

This appeal having come on for hearing before the Full Bench on 27 September 2017, and having heard Mr R Whooley on his own behalf as appellant, and Mr J Darams (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 13 December 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.

[L.S.]

By the Full Bench  
(Sgd.) J H SMITH,  
Acting President.

## FULL BENCH—Appeals against decision of Industrial Magistrate—

2017 WAIRC 01025

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JODIE CHERYL PANNELL	<b>APPELLANT</b>
	<b>-and-</b>	
	DR WILLIAM DAVID PANNELL	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER	
<b>DATE</b>	WEDNESDAY, 20 DECEMBER 2017	
<b>FILE NO/S</b>	FBA 13 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 01025	
<b>Result</b>	Appeal discontinued	

*Order*

WHEREAS on 12 October 2017, the appellant filed a notice of appeal to the Full Bench; and  
 WHEREAS on 13 December 2017, the appellant filed a notice of application for leave to discontinue the appeal;  
 NOW THEREFORE, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and reg 103A of the *Industrial Relations Commission Regulations 2005*, hereby orders —

THAT the appeal be and is hereby discontinued by leave.

By the Full Bench  
 (Sgd.) J H SMITH,  
 Acting President.

[L.S.]

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## UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 01004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MICHELLE BURGERMEISTER

**APPLICANT**

-v-

CHRYSALIS SUPPORT SERVICES INC.

**RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS  
**DATE** WEDNESDAY, 13 DECEMBER 2017  
**FILE NO** U 52 OF 2017  
**CITATION NO.** 2017 WAIRC 01004

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**Result** Order made  
**Representation**  
**Applicant** In person  
**Respondent** Mr A Durack as agent

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*Order*

WHEREAS the applicant filed a notice of claim of harsh, oppressive or unfair dismissal on 31 March 2017;  
 WHEREAS conferences occurred on 31 July 2017, 8 August 2017 and 2 November 2017;  
 WHEREAS at the conference on 2 November 2017 the parties reached an agreement to settle the matter;  
 WHEREAS the settlement agreement was to be reflected in a deed but was not subject to the signing of a deed;  
 WHEREAS the agent for the respondent informed the Western Australian Industrial Relations Commission by letter dated 27 November 2017 that the applicant was not responding to communications from him;  
 WHEREAS the agent for the respondent also informed the Western Australian Industrial Relations Commission that the respondent had complied with all terms of the settlement except payment of the settlement sum to the applicant, and provided evidence of having done so;  
 WHEREAS the agent for the respondent also informed the Western Australian Industrial Relations Commission that the respondent had committed considerable expense and time to the matter and did not wish to incur further expense;  
 WHEREAS it is accepted by me that the matter settled at the conference on 2 November 2017 and that it would be unfair to the respondent to have it do anything further in relation to the matter I hereby order pursuant to the *Industrial Relations Act 1979* that:

- (1) within 14 days the respondent pay to the applicant the settlement sum and provide evidence to the Western Australian Industrial Relations Commission of having done so.

UPON receipt of the evidence referred to in the order above the Western Australian Industrial Relations Commission will forthwith issue a separate order dismissing the claim.

(Sgd.) D J MATTHEWS,  
 Commissioner.

[L.S.]

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2017 WAIRC 01028

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	MICHELLE BURGERMEISTER	<b>APPLICANT</b>
	-v-	
	CHRYSALIS SUPPORT SERVICES INC.	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER D J MATTHEWS	
<b>DATE</b>	THURSDAY, 21 DECEMBER 2017	
<b>FILE NO/S</b>	U 52 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 01028	
<b>Result</b>	Application dismissed	
<b>Representation</b>		
<b>Applicant</b>	In person	
<b>Respondent</b>	Mr A Durack as agent	

*Order*

WHEREAS the respondent has paid the settlement sum to the applicant and provided evidence of paying the settlement sum to the applicant to the Western Australian Industrial Relations Commission in compliance with order 2017 WAIRC 01004 on 20 December 2017;

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

THE application be dismissed.

(Sgd.) D J MATTHEWS,  
Commissioner.

[L.S.]

2018 WAIRC 00037

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	JANET EVANS	<b>APPLICANT</b>
	-v-	
	SPURRYS TRANSPORT	<b>RESPONDENT</b>
<b>CORAM</b>	CHIEF COMMISSIONER P E SCOTT	
<b>DATE</b>	WEDNESDAY, 10 JANUARY 2018	
<b>FILE NO/S</b>	U 149 OF 2017	
<b>CITATION NO.</b>	2018 WAIRC 00037	

<b>Result</b>	Application dismissed
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*Order*

This matter is a claim for unfair dismissal referred to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* on 4 December 2017.

The matter has been resolved and on 9 January 2018, the applicant advised by email that she wished to discontinue her claim.

The Commission is satisfied that further proceedings are not necessary or desirable in the public interest and orders –

THAT this matter be, and is hereby dismissed.

(Sgd.) P E SCOTT,  
Chief Commissioner.

[L.S.]

**2018 WAIRC 00038**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** CHRIS FIELD **APPLICANT**

-v-

LK & LG BEURTEAUX **RESPONDENT**

**CORAM** COMMISSIONER T EMMANUEL

**DATE** WEDNESDAY, 10 JANUARY 2018

**FILE NO/S** U&B 127 OF 2017

**CITATION NO.** 2018 WAIRC 00038

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**Result** Application discontinued

**Representation (by correspondence)**

**Applicant** In person

**Respondent** In person

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*Order*

WHEREAS these are applications under s 29(1)(b)(i) and s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);  
 AND WHEREAS on 18 December 2017, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*;  
 NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –  
 THAT these applications be, and by this order are, discontinued.

[L.S.]

(Sgd.) T EMMANUEL,  
 Commissioner.

**2017 WAIRC 00249**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** MR. CHRIS KIOSSES **CLAIMANT**

-v-

MCMILLAN SHAKESPEARE GROUP **RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS

**DATE** WEDNESDAY, 3 MAY 2017

**FILE NO/S** B 211 OF 2016

**CITATION NO.** 2017 WAIRC 00249

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**Result** Order made

**Representation**

**Claimant** In person

**Respondent** Ms S Burn of counsel

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*Order*

HAVING heard the claimant on his own behalf and Ms S Burn, of counsel, on behalf of the respondent on 20 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 211 of 2016 be changed to “Presidian Management Services Pty Ltd”.

[L.S.]

(Sgd.) D J MATTHEWS,  
 Commissioner.

2017 WAIRC 00250

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2017 WAIRC 00250  
**CORAM** : COMMISSIONER D J MATTHEWS  
**HEARD** : THURSDAY, 20 APRIL 2017  
**DELIVERED** : THURSDAY, 4 MAY 2017  
**FILE NO.** : B 211 OF 2016  
**BETWEEN** : MR. CHRIS KIOSSES  
 Claimant  
 AND  
 PRESIDIAN MANAGEMENT SERVICES PTY LTD  
 Respondent

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**CatchWords** : Jurisdictional objection - Respondent contends Commission has no jurisdiction to hear claim as claimant's annual salary exceeds prescribed amount - Respondent contends commission payments should be included in salary - Principles applied - Jurisdiction found

**Legislation** : *Industrial Relations Act 1979* sections 29AA(4)(a), 29AA(4)(b)

**Result** : Jurisdiction found

**Representation:**

**Claimant** : In person

**Respondent** : Ms S Burn of counsel

**Solicitors:**

**Respondent** : Rigby Cooke Lawyers

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**Case referred to in reasons:***TAB v Fisher* (1997) 77 WAIG 1889**Case also cited:***Rowley v BHP Billiton Iron Ore* (2014) 94 WAIG 539*Reasons for Decision*

- 1 The respondent contends that the Western Australian Industrial Relations Commission does not have jurisdiction to hear and determine the claimant's claim that he has not been allowed a benefit to which he is entitled under his contract of employment because the claimant's contract of employment provides for a salary exceeding the prescribed amount.
- 2 The current prescribed amount is \$155,800.
- 3 I have before me a copy of the claimant's contract of employment which provides that his "Base Annual Salary" is \$43,000.
- 4 The respondent says, however, that the contract of employment also provides for the payment of commission under its "Commission Plan" and that in the year prior to 9 December 2016 (this date having been chosen because it is the date of the last payment by the respondent to the claimant) the claimant received \$135,540.22 by way of commission payments.
- 5 The respondent says the "Commission Plan" relevantly provides as follows:
 

You will be entitled to the following commission, paid on a fortnightly basis: 10% for new business, 5% for existing/handed business. Policies must be paid within 60 days to receive commission. Please note: the business reserves the right to review/amend this at any time.
- 6 The respondent says in the year 9 December 2015 to 9 December 2016, if commission payments are included, the claimant received remuneration in excess of \$155,800 and therefore the Western Australian Industrial Relations Commission does not have jurisdiction to hear and determine the claim.
- 7 The respondent's argument is entirely misconceived.
- 8 Section 29AA(4)(b) *Industrial Relations Act 1979* says that a claim will not be within jurisdiction, if section 29AA(4)(a) is met, if "the employees contract of employment provides for a salary exceeding the prescribed amount."
- 9 The contract of employment provides for a salary of \$43,000.00. The contract of employment does not provide for a salary exceeding \$155,800. That there is, under the contract of employment, a facility by which the employee may add to that salary by way of other remuneration and thereby earn more than \$43,000, or even more than \$155,800, is entirely beside the point. The contract does not provide for a salary exceeding \$155,800.

- 10 That the claimant may have been remunerated in excess of \$155,800 in any 12 month period, such as the 12 months between 9 December 2015 and 9 December 2016, is also entirely beside the point. The enquiry is not what the claimant earns but what the contract of employment provides by way of salary.
- 11 Section 29AA(4)(b) *Industrial Relations Act 1979* focuses attention entirely on what is provided for in terms of salary by the contract of employment. Understandably, given the subsection may determine the crucial question of jurisdiction, it directs attention to a certain matter, the provisions of the contract, and not to contingent matters such as what might be earned or what was paid in any randomly chosen 12 month period.
- 12 That such an interpretation is squarely within established precedent I need go no further than the decision of the Industrial Appeal Court in *TAB v Fisher* (1997) 77 WAIG 1889 which decided that commission payments are different from, and not within, the concept of salary.
- 13 Section 29AA(4) *Industrial Relations Act 1979* does not apply and my finding is that the claim may be determined by the Western Australian Industrial Relations Commission.

2018 WAIRC 00005

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2018 WAIRC 00005

**CORAM** : COMMISSIONER D J MATTHEWS

**HEARD** : THURSDAY, 23 NOVEMBER 2017

**DELIVERED** : THURSDAY, 4 JANUARY 2018

**FILE NO.** : B 211 OF 2016

**BETWEEN** : MR. CHRIS KIOSSES  
Claimant  
AND  
PRESIDIAN MANAGEMENT SERVICES PTY LTD  
Respondent

**CatchWords** : Claim for commission payment as component of annual leave payout at ending of employment - Entitlement not found in written contract of employment - Contention that entitlement arises from verbal discussion - Principles applied - No contract between claimant and respondent in terms contended for by claimant - Claim dismissed

**Legislation** : *Fair Work Act 2009* (Cth)

**Result** : Claim dismissed

**Representation:**

**Claimant** : In person

**Respondent** : Mr D McLaughlin of counsel

**Solicitors:**

**Respondent** : Rigby Cooke Lawyers

*Reasons for Decision*

- 1 The other claims in the claimant's Notice of Claim having been compromised during the course of the hearing, the only claim remaining for determination is that the claimant had a contractual entitlement to inclusion of a commission component in the payout of his accrued annual leave upon the ending of his employment.
- 2 Sections 90(1) and (2) *Fair Work Act 2009* (Cth), which applied given that the respondent is a trading corporation, provide, when read together, that when the employment of an employee ends accrued annual leave is paid out at the base rate of pay. Under the *Fair Work Act 2009* (Cth) no commission component is payable.
- 3 The claimant however says that he had a contractual entitlement superior to what is provided for in the *Fair Work Act 2009* (Cth) in that it was a term of his contract of employment that he would receive in the payout of his accrued annual leave entitlement the base rate of pay plus an amount relating to commission.
- 4 The claimant says the amount was agreed to be calculated by determining an average daily amount of commission earned by him, based on commission earned over the previous 12 months of employment, and multiplying that figure by the number of days of outstanding annual leave at the time he was paid out.
- 5 The claimant says the average daily commission amount was \$503.84 and that he had 29.7 days of outstanding annual leave when his employment ended. The claimant claims the sum arrived at by multiplying the one by the other, \$14,964.05.

- 6 The claimant was employed to sell what I think can be described as “wholesale” insurance packages to car dealers and finance brokers who then “retailed” the insurance to their customers.
- 7 During the course of his employment the claimant had taken periods of annual leave and during those periods had been paid at the base rate of pay but had also received normal commission payments as and when they became payable by the respondent to him in the ordinary course of business. Accordingly, the claimant did receive commission payments during periods of annual leave but these were actual commissions owing and the amounts were not arrived at by way of the averaging basis the claimant asserts is applicable as a component of the payout of his accrued annual leave entitlement.
- 8 The claimant resigned by letter dated 2 November 2016. He gave evidence that he resigned to take up new employment.
- 9 The claimant’s written contract of employment did not provide for the entitlement he says existed and which he seeks to enforce.
- 10 The claimant says the entitlement arose out of a conversation he had with Peter Lester Fowler, the respondent’s “Group Executive – Risk”, about a week after he had resigned.
- 11 The claimant in his evidence in chief described the material part of the conversation in these terms:  
 “Ah, and then because I knew I had quite a bit of, ah, annual leave accrued I said, “Okay what happens with that?” He said, “Well, you know, we’ll - we’ll work that out, you’ll get paid that”. And I said, “What about all the commission that I’m due?” And he said, “Well, we’ll just average it out over your past 12 months””  
 (ts 80)
- 12 In response to questions from me the claimant said that what Mr Fowler said was “The average commission would be paid over your annual leave.” (ts 80)
- 13 Under cross-examination the claimant gave the following evidence about the conversation:  
 “I didn’t ask for average commissions. I had asked his advice because of his position in the company - because his previous position with a major organisation that was the same, ah, position that he held was similar so I asked in innocence his advice, and his advice was what was discussed.”  
 (ts 89)
- 14 And later:  
 “Yes. Okay. And so what was the advice you received?---The advice was thinking - what - I - I asked him, “What happens now?”  
 Okay. Now, as I had your initial evidence, there was - you said, “I have a significant amount of annual leave accrued”. And you asked what would happen to that annual leave given that you were being put on garden leave?---Correct.  
 And Mr Fowler said, “We’ll work it out”?---We’ll work it out.  
 Yes, “You will get paid your annual leave”?---Correct.  
 Yes. And you said “What about commission? Will it be averaged over 12 months”?---No, I didn’t. No, I said, “What about all my commission that is owing?”  
 All your commission that is owing?---Mm hmm.  
 Okay. And he said that would be paid?---He said, “We’ll work it out. We’ll average it out over your past 12 months”.  
 Okay. So that’s how that conversation went?---To the best of my knowledge.”  
 (ts 90)
- 15 Soon after the conversation referred to in evidence there was an email exchange between Mr Fowler and the claimant.
- 16 Mr Fowler emailed the claimant attaching an email he had received from another senior manager of the respondent. The email from the other senior manager said nothing about the issue of the accrued annual leave payout including a commission component.
- 17 The claimant emailed Mr Fowler later that day and relevantly wrote:  
 “...I’ve noticed that there is no mention of a 12 month pay base + commission average being applied for the balance of the annual leave period owing.”  
 Exhibit 5
- 18 Mr Fowler relevantly responded later that day as follows:  
 “In relation to the holiday pay I stated that I would absolutely push for that to happen and that is what I am doing and is what I have represented to Stuart [the other senior manager] and whilst I don’t want to get into semantics I did not promise this. I will reiterate though it is my absolute intent to ensure the right thing happens.”  
 Exhibit 5
- 19 Mr Fowler gave evidence. He explained that when he spoke to the claimant he had been employed by the respondent for about six weeks. He gave evidence that he had never been employed in a company where commission payments were the main source of income paid to employees. Mr Fowler gave this evidence in chief about the relevant part of the conversation he had with the claimant:  
 “I had a meeting with Chris, ah, by - Mr Kiosses by himself, um, and that’s when it - he - it, ah, come to light that he was talking about the - the commission factor. And I said well if we had paid that in the past that - as part of your annual

leave, we would absolutely do that again. Um, we - this is not about, um, trying to, ah, short change anyone. Um, not really understanding I - I guess, given my, ah, short tenure there that - that - how we had treated that in the past but I said we would absolutely - if that's the way it's been done, that's the way we'll represent it. Um, for which, ah - and there was a - a number of other discussions but, um, I at the time wasn't aware of how we treated that.

So you - when you said - I'll just take you back - we would pay it out as normal, did you have - what was your understanding at that stage?---Well, um, my - well, I - I to be honest I didn't have an understanding of how we paid out annual leave. I assumed annual leave is accrued, we would pay it out how we would normally pay out accrued leave."

(ts 99)

20 Under cross-examination Mr Fowler maintained that all he had relevantly said was that if annual leave in the past had included an average commission payment he would represent that it be included in the payout of accrued annual leave.

21 I asked Mr Fowler about what he meant by writing in the email referred to above, "In relation to holiday pay I stated that I would absolutely push for that to happen" and Mr Fowler answered:

"...what I mean by that was if we had paid commissions as part of base - um, annual leave in the past, that's what I would represent."

(ts 102)

22 It seems that the issue of the payment of commission during periods of annual leave was a subject of the conversation between the claimant and Mr Fowler. It seems also the issue of whether what had happened in the past would impact upon the accrued annual leave payout to the claimant was also discussed. However, it is difficult to work out exactly what was discussed and on what basis the parties left the issue at the end of the meeting. Neither party took contemporaneous notes and as the claimant said in evidence his recall was affected by the passage of time.

23 Ultimately, for reasons that follow, I do not consider that I need to resolve exactly what happened at the meeting.

24 However, if I had to resolve this question the email exchange which took place soon after the meeting does suggest there was discussion about the claimant receiving by way of the payout of his accrued annual leave entitlement the base rate of pay and a "commission average".

25 The claimant mentions it in his email to Mr Fowler and Mr Fowler does not respond denying that there was any such discussion at a time when he certainly would have recalled the conversation.

26 The version of events which I consider has a ring of truth about it, and especially so in light of the email exchange referred to above, is that the claimant brought up the issue of the commissions that might have been paid to him if he had not resigned and also mentioned that he had received commission payments during periods of annual leave in the past, without knowing or explaining the basis for those payments. It appears likely that Mr Fowler sought to deal with the issue of commission that might have otherwise been payable, in light of what he had been told about previous periods of annual leave, by talking about such commissions being incorporated or reflected in some way in the accrued annual leave entitlement payout.

27 The commission payment plan (part of Exhibit 2 in these proceedings) was probably the place to look to deal with the issue, as informed by contractual interpretation of the plan. It provided that "policies must be paid for within 60 days to receive commission." It is silent on what happens if policies are paid within 60 days but the employee is no longer employed but this is not the issue to be determined by me. This was probably, however, the matter which should have been discussed by the claimant and Mr Fowler. However, neither party to the conversation had the plan in their mind when they were talking.

28 I think the conversation was one between two people who did not really know what they were talking about, both in terms of the facts or the legalities. Several issues - whether commissions would be payable following the end of the claimant's employment, what had happened in the past during annual leave, the claimant's accrued annual leave entitlement - became entangled in a way it is not now possible, if it ever was, to disentangle.

29 Mr Fowler later sought advice about the issues, received clear advice, and wrote to the claimant in the email referred to above.

30 However, as I say, I do not need to resolve the factual dispute because even if I were to take the claimant's case at its highest, that Mr Fowler volunteered a promise that the claimant's annual leave payout would include a commission component calculated by an average daily commission figure, there was clearly no contract entered into between the claimant and the respondent at the meeting with Mr Fowler having such a term.

31 For a contractual entitlement to arise I have to find the following:

- (1) the claimant and Mr Fowler were parties capable of making a contract;
- (2) the claimant and Mr Fowler had an intention to enter into contractual relations;
- (3) there was a valid offer and acceptance; and
- (4) there was consideration in the form of mutual promises by the parties.

32 There is little difficulty for the claimant in relation to (1) above. Mr Fowler had, as a senior manager of the respondent, actual or ostensible authority to agree to pay the claimant a commission payment as part of his accrued annual leave payout.

33 The claimant however has resoundingly failed to establish (2), (3) and (4) above.

34 There was nothing "contractual" about the discussions between the claimant and Mr Fowler.

35 The claimant had a written contract of employment which made specific reference to the National Employment Standards and which in no way improved upon section 90 *Fair Work Act 2009* (Cth).

- 36 By letter dated 2 November 2016 the claimant resigned from his employment with the respondent.
- 37 Mr Fowler travelled to Perth and spoke with the claimant about, as the claimant said in evidence in chief, “what happens now” (ts 79). It was agreed that the main action taken by Mr Fowler was to inform the claimant that he was not required to attend work for the period of notice he had given.
- 38 As the claimant put it, what Mr Fowler did was “essentially...relieve (me) of duties and, um, that’s it, more or less down tools.” (ts 80).
- 39 The claimant was more or less happy to comply with that direction and did so.
- 40 The claimant says himself that he went into the meeting with Mr Fowler seeking “advice” as to what happens next. This is hardly consistent with entering the discussion viewing it as a contractual negotiation where he had things to trade to achieve an outcome he wanted.
- 41 Frankly, it is not believable that in those circumstances the claimant and Mr Fowler would both intend to make further and different agreements to those in the written contract of employment. In circumstances where the claimant was leaving the respondent’s employment and was not even being required to provide any further service to the respondent it is objectively unbelievable that the claimant and Mr Fowler had an intention in the discussion to come to a new legally binding contractual agreement.
- 42 It is not surprising then that even on the claimant’s version of the discussion it is difficult to discern within it a clear offer and acceptance. The claimant raised the issue of “what would happen next” in relation to his annual leave entitlement. Even if Mr Fowler said that it would include commission in some way this was not an “offer”. It was, taking the claimant’s case at its highest, something that Mr Fowler was saying would happen, not an offer which, in the course of negotiations, he put to the claimant for response. The claimant did not give evidence consistent with him having “accepted an offer”. The claimant gave evidence consistent with being provided with information and being content with it.
- 43 The hopeless nature of the claimant’s case becomes particularly clear when I turn to the issue of consideration.
- 44 It is necessary, for there to be consideration, for the respondent to have made a promise to benefit the claimant and the claimant to have promised in some way, as a quid pro quo, to benefit the respondent or to forego some detriment or loss he could otherwise cause the respondent to suffer. There has to be mutuality of obligation.
- 45 The claimant was unable to point to anything he did or did not do as a result of what he says was promised by Mr Fowler, let alone something that conferred a benefit upon or avoided or potentially avoided a detriment to the respondent.
- 46 The best the claimant could do was say that if the promise had not been made he may have sought to rescind his resignation or have sought to rescind his resignation and then take his annual leave.
- 47 Giving up or not taking the opportunity to seek an indulgence from another is not consideration.
- 48 On any version of events there was no contract between the claimant and the respondent to the effect the claimant claims. The claim is dismissed.

2018 WAIRC 00007

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MR. CHRIS KIOSSES

**CLAIMANT**

-v-

PRESIDIAN MANAGEMENT SERVICES PTY LTD

**RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS  
**DATE** THURSDAY, 4 JANUARY 2018  
**FILE NO/S** B 211 OF 2016  
**CITATION NO.** 2018 WAIRC 00007

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**Result** Claim dismissed  
**Representation**  
**Claimant** In person  
**Respondent** Mr D McLaughlin of counsel

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*Order*

HAVING heard the claimant on his own behalf and Mr D McLaughlin of counsel for the respondent; and  
 HAVING given reasons for decision in which I determined to dismiss the claim;  
 NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby order:

The claim be dismissed.

[L.S.]

(Sgd.) D J MATTHEWS,  
 Commissioner.

2017 WAIRC 01024

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WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2017 WAIRC 01024  
**CORAM** : COMMISSIONER T EMMANUEL  
**HEARD** : TUESDAY, 5 DECEMBER 2017  
**DELIVERED** : WEDNESDAY, 20 DECEMBER 2017  
**FILE NO.** : B 74 OF 2017  
**BETWEEN** : EMANUELE LIVIGNI  
 Applicant  
 AND  
 JOSH GIBBENS  
 Respondent

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CatchWords : Industrial law (WA) - denial of contractual benefits claims - whether the respondent was duly served with notice of the proceedings - claim for wages, unpaid additional hours, notice, holiday pay and a TAFE donation  
 Legislation : *Industrial Relations Act 1979* (WA) s 7(1), s 26(1)(a), s 27(1)(d), s 29(1)(b)(ii)  
*Industrial Relations Commission Regulations 2005* (WA) reg 24(2)(d)(iii)  
 Result : Application upheld in part  
**Representation:**  
 Applicant : In person  
 Respondent : No appearance

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**Cases referred to in reasons:**

*BGC (Australia) Pty Ltd v Phippard* [2002] WASCA 191, (2002) 82 WAIG 2013  
*Hotcopper Australia Ltd v Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704  
*Matthews v Cool or Cosy* [2004] WASCA 114; (2004) 136 IR 156

*Reasons for Decision*

- 1 Mr Livigni worked as a full-time bricklayer for Mr Gibbens from 13 October 2014 to 7 February 2017. He has made a claim against Mr Gibbens for wages, unpaid additional hours, notice, holiday pay and a TAFE donation.
- 2 Mr Gibbens did not file an answer denying Mr Livigni's claim. He did not comply with the Commission's direction to file an answer to Mr Livigni's particulars of claim. Although Mr Gibbens filed a warrant authorising an agent to act on his behalf, neither Mr Gibbens nor his agent appeared at the conciliation conference, the directions hearing or the substantive hearing.
- 3 The Commission has power under s 27(1)(d) of the *Industrial Relations Act 1979* (WA) (**IR Act**) to hear and determine a matter in the absence of a party who has been duly served with notice of the proceedings. Service of a document on an individual who is a principal of a business, such as Mr Gibbens, may be effected by sending it by pre-paid post to the person's usual or last known place of business: reg 24(2)(d)(iii) *Industrial Relations Commission Regulations 2005* (WA) (**Regulations**). Mr Livigni's employment contract with Mr Gibbens shows the employer's address to be '1100 Progress Drive, WA 6556'. This address is missing the suburb. Mr Gibbens' agent is his partner Ms Saunders. On the *Form 18 – Warrant to appear as agent*, her address is '1100 Progress Drive, Chidlow'. On 17 November 2017 a hearing was listed. That day, my Associate posted a notice of hearing to Mr Gibbens, care of Ms Saunders, at 1100 Progress Drive, Chidlow WA 6556. She also sent the notice of hearing to the email address provided by Ms Saunders. On that basis, I am satisfied Mr Gibbens has been duly served with notice of these proceedings in accordance with the Regulations.

- 4 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].
- 5 To resolve this matter, I must decide whether Mr Gibbens employed Mr Livigni and owes him wages, unpaid additional hours, notice, holiday pay and a TAFE donation under his contract of service.

**Mr Livigni's evidence**

- 6 Mr Livigni gave evidence that he started to work for Mr Gibbens as a contractor in July 2012. To secure a 457 visa he needed to be employed. For that reason, Mr Livigni and Mr Gibbens signed an employment contract in July 2014 (**Employment Contract**). Mr Livigni tendered the Employment Contract in evidence. It sets out his terms and conditions of employment.
- 7 The Employment Contract is a short document. Relevantly, it states:

<b>SALARY</b>	You will be paid a base salary of \$55,000 per annum plus 9.5% superannuation. Your gross salary amounts to \$60,225 including super.
<b>EMPLOYMENT</b>	Your employment will commence from the date of approval of your visa. You will be expected to well and faithfully serve the organisation under this role for which you have presently been appointed and with such other duties relevant to your work as may from time to time be assigned to you.  In accepting the above position, you acknowledge that due to the organisation's need for continuing growth and structural change to remain an effective provider of services to its members and stakeholders, you may be transferred to other positions within the organisation, in consultation with you and commensurate with your skills and abilities.
<b>PERIOD OF EMPLOYMENT</b>	The period of your employment will be for an <b>initial period of four years</b> . (original emphasis)
<b>HOURS OF WORK</b>	You will be required to work for 38 hours per week. Where work is performed for less than 38 hours [per] week, you would still be paid the full minimum salary of \$55,000 + super and not a proportionate amount.  However, if the situation arises where you might be required for more than 38 hours then you shall be compensated according to the formula outlined in the gazette which states that:  "Where the subclass 457 Business (Long Stay) visa holder works an average of more than 38 hours per week in a given period:  Minimum salary level = applicable base salary X number of hours worked in the given period / number of hours in an average year".  (\$55,000 X no. of hours worked in a given period / 1982.745)
<b>LEAVE</b>	You will be entitled to 4 weeks' paid holiday after the successful completion of 1 year with the organisation. You will also be entitled to 10 days' sick leave each year.
<b>TERMINATION</b>	Either party may terminate your employment by one month's notice in writing to the other. The association may terminate your employment at any time for fraud, dishonesty without prior notice. Your employment may also be terminated without notice should you be misusing your position and use of indecent and vulgar usage.

- 8 On 13 October 2014, Mr Livigni's 457 visa was granted. Mr Livigni gave evidence that he understood Mr Gibbens would continue to sponsor him so that Mr Livigni could become a permanent resident.
- 9 Mr Livigni's evidence is that he worked on a full-time, permanent basis in accordance with the Employment Contract. Mr Gibbens did not pay Mr Livigni on public holidays and he did not pay Mr Livigni for any other days off work, such as annual leave. Mr Gibbens did not allow Mr Livigni to take a paid holiday.
- 10 Mr Livigni says he took the first few working days of this year off work. When he returned to work on 8 January 2017, he realised Mr Gibbens had not completed a building job and had not spoken to the project supervisor. As a result, it was necessary for Mr Livigni and a labourer to work 12 hours each day from 8 to 18 January 2017 inclusive to complete the job.
- 11 Mr Livigni continued to work until Mr Gibbens dismissed him by text message on 7 February 2017. Mr Livigni was not given any notice of his dismissal and was not paid in lieu of notice. Because of his visa arrangements, which require him to secure a new sponsor, Mr Livigni has not been able to find other work until last month.

- 12 Part of Mr Livigni's claim is for unpaid wages. His evidence is that he was paid \$500 on 24 October 2016, \$1,000 on 28 November 2016, \$1,080 on 16 December 2016 and \$810 on 30 December 2016. On each of those occasions he should have been paid his usual fortnightly wage of \$2,115.38.
- 13 Further, Mr Livigni was paid \$1,800 on 26 February 2017 instead of being paid his usual fortnightly wage, additional hours for the period between 8 and 18 January and an amount in lieu of notice.
- 14 Mr Livigni gave evidence that the only leave he took while employed was the first week of January 2017. I understand Mr Livigni's evidence to be that he did not receive holiday pay and he was not allowed to take a paid holiday.
- 15 The final part of Mr Livigni's claim is for \$2,652.20. He gave evidence that Mr Gibbens had to pay that amount to TAFE NSW – Sydney Institute (**TAFE NSW**) because his apprentice left employment after one year. Mr Gibbens told Mr Livigni that he could not afford to make the payment. Mr Gibbens asked Mr Livigni to pay TAFE NSW instead and said that he would pay Mr Livigni back. Mr Livigni produced invoices from TAFE NSW showing payments he says he made in February 2016 and December 2016 for a total of \$2,652.20.

### **Consideration**

- 16 Mr Livigni impressed me as a reliable witness. His oral evidence was supported by documentary evidence. Further, without any evidence or argument from the respondent to contradict Mr Livigni, there is no reason for me to doubt Mr Livigni. I accept his evidence.
- 17 I have no difficulty finding that Mr Livigni was employed by Mr Gibbens under the Employment Contract from 13 October 2014.

### **Wages and additional hours**

- 18 I find that Mr Livigni had a contractual benefit to be paid wages and for additional hours worked under the Employment Contract. Mr Gibbens denied Mr Livigni those contractual benefits.
- 19 Mr Gibbens owes Mr Livigni unpaid wages for the period between 10 October 2016 up until his employment ended on 7 February 2017.
- 20 Mr Livigni's usual fortnightly pay was \$2,115.38 (gross) and his hourly rate was \$27.74. Therefore on 24 October 2016 he was underpaid by \$1,615.38, on 28 November 2016 he was underpaid by \$1,115.38, on 16 December 2016 he was underpaid by \$1,035.38 and on 30 December 2016 he was underpaid by \$1,305.38. That amounts to \$5,071.52.
- 21 Mr Livigni then worked during a period of five weeks and three days. Mr Livigni took four working days in the first week of January off work. He was not paid annual leave for this period. Mr Livigni worked 120 hours between 8 and 18 January 2017, for which he was entitled to be paid in accordance with the formula set out in the Employment Contract because he worked more than 38 hours per week. The effect of this formula is that Mr Livigni is entitled to be paid \$27.74 per hour for each additional hour he works.
- 22 Based on Mr Livigni's evidence, I find as follows. Mr Livigni was paid in arrears every two weeks. His last regular pay period ended on Friday 30 December 2016.
- 23 On 13 January 2017, Mr Livigni should have been paid for one usual week of work, because under the Employment Contract he is entitled to be paid for 38 hours per week even if he works fewer hours, and 72 additional hours for the six 12-hour days that he worked up until Friday 13 January 2017. That is 110 hours at his hourly rate of \$27.74, which equates to \$3,051.40.
- 24 On 27 January 2017, Mr Livigni should have been paid for 53.2 usual hours and 60 additional hours for the five 12-hour days. That is 113.2 hours at his hourly rate of \$27.74 which equates to \$3,140.17.
- 25 On 10 February 2017, Mr Livigni should have been paid for one usual week of work plus two days up until 7 February when he was dismissed. That is 53.2 hours at his hourly rate of \$27.74, which equates to \$1,475.77.
- 26 Mr Livigni should have been paid \$7,667.34 for the period between 31 December 2016 and 7 February 2017. Instead, on 26 February 2017 he was paid \$1,800. He was underpaid by \$5,867.34.
- 27 Mr Livigni is entitled to be paid \$5,071.52 for unpaid wages between 24 October and 30 December 2016. He is also entitled to be paid \$5,867.34 for unpaid wages and additional hours between 31 December 2016 and 7 February 2017. That amounts to \$10,938.86 in unpaid wages and additional hours.

### **Notice**

- 28 I find Mr Livigni had a contractual benefit to be given one month's notice of termination. Mr Gibbens dismissed Mr Livigni by text message on 7 February 2017 without giving him notice or making a payment in lieu of notice.
- 29 Mr Livigni's contractual benefit to be given one month's 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: *EM Heenan J in Matthews v Cool or Cosy* [2004] WASCA 114; (2004) 136 IR 156. The Commission can make orders to deal with the industrial matter by awarding damages for breach of contract. 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.
- 30 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 Mr Gibbens has not done.
- 31 I find that there are no avoided or avoidable losses. Mr Livigni acted reasonably. He was not able to mitigate his loss during the one-month notice period because of visa constraints. The appropriate award is \$4,230.76, being the amount Mr Livigni would have received had Mr Gibbens not denied him his contractual benefit to one month's notice.

**Paid holiday**

- 32 I find that Mr Gibbens did not pay Mr Livigni when Mr Livigni took time off while he was employed. Further, Mr Livigni was not allowed to take a paid holiday. Under the Employment Contract, Mr Livigni is entitled to '4 weeks' paid holiday' which is a contractual benefit that has been denied.
- 33 Taking into account my obligation under s 26(1)(a) of the IR Act to act according to equity, good conscience, and the substantial merits of the case, and consistent with the reasoning at [29], I consider it appropriate to deal with this aspect of the industrial matter by awarding Mr Livigni \$4,230.76. That is the amount Mr Livigni would have received had Mr Gibbens not denied him this contractual benefit.

**TAFE NSW donation**

- 34 I find Mr Livigni and Mr Gibbens reached a verbal agreement that Mr Gibbens would pay Mr Livigni \$2,652.20 for the TAFE NSW donation that Mr Livigni paid. Mr Gibbens has not complied with that agreement. But I am not satisfied that this part of Mr Livigni's claim is within the Commission's jurisdiction because I am not persuaded that it should be characterised as an industrial matter.
- 35 'Industrial matter' is defined broadly in s 7(1) of the IR Act to mean any matter affecting or relating to the work, privileges, rights or duties of employers or employees in any industry. But as Hasluck J stated in *BGC (Australia) Pty Ltd v Phippard* [2002] WASCA 191, (2002) 82 WAIG 2013 [54], 'where the matter in issue is essentially a claim for indebtedness which lacks any ingredient of industrial relations, then it cannot be characterised as an industrial matter. It must be dealt with elsewhere by a court of law exercising judicial power.'

**Conclusion**

- 36 For these reasons, I find Mr Gibbens denied Mr Livigni his contractual benefits to:
- a. unpaid wages and additional hours of work, which equates to \$10,938.86 (gross);
  - b. one month's notice, which equates to \$4,230.76 (gross); and
  - c. four weeks' paid holiday, which equates to \$4,230.76 (gross).
- 37 I will order that Mr Gibbens pay Mr Livigni \$19,400.38 (gross).

2017 WAIRC 01023

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	EMANUELE LIVIGNI	<b>APPLICANT</b>
	-v-	
	JOSH GIBBENS	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER T EMMANUEL	
<b>DATE</b>	WEDNESDAY, 20 DECEMBER 2017	
<b>FILE NO/S</b>	B 74 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 01023	

<b>Result</b>	Application upheld in part
<b>Representation</b>	
<b>Applicant</b>	In person
<b>Respondent</b>	No appearance

*Declaration and order*

HAVING heard from Mr E Livigni on his 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 unpaid wages and additional hours of work, one month's notice and four weeks' paid holiday.
2. ORDERS that the respondent pay the applicant \$19,400.38 (gross), being the total of the denied contractual benefits, within 14 days of the date of this order.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

2018 WAIRC 00003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
DAVID DOUGLAS RIVETT;

PARTIES

APPLICANT

-v-

RICHMOND WELLBEING INC. ABN 36658041325;

RESPONDENT

**CORAM** COMMISSIONER T EMMANUEL  
**DATE** WEDNESDAY, 3 JANUARY 2018  
**FILE NO/S** U & B 47 OF 2017  
**CITATION NO.** 2018 WAIRC 00003

**Result** Applications discontinued**Representation****Applicant** Mr T Hoffman (as agent)**Respondent** Mr S Mar (as agent)*Order*

WHEREAS these are applications under s 29(1)(b)(i) and s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);  
AND WHEREAS on 21 December 2017, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*;  
NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –  
THAT these applications be, and by this order are, discontinued.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

**SECTION 29(1)(b)—Notation of—**

Parties		Number	Commissioner	Result
Christopher Victor Godwin	RMTP Enterprises Pty Ltd trading as Scorpion Training Solutions	B 119/2017	Commissioner T Emmanuel	Discontinued
Coral Middleton	Zil Enterprise ABN: 60337007328	U 46/2017	Commissioner T Emmanuel	Discontinued
Linda Joan Bell	The Western Australian Table Tennis Association	B 29/2017	Commissioner T Emmanuel	Discontinued
Meghan Elizabeth Smook	RSPCA Western Australia (Inc.)	U 20/2017	Commissioner T Emmanuel	Discontinued
Mr Michael Cooling	Mr Mark Thomas Pilbara Infrastructure Pty Ltd c/o Fortescue Metals Group	B 78/2017	Commissioner T Emmanuel	Discontinued
Paul Merenda	Ajilon Australia	B 186/2016	Commissioner T Emmanuel	Discontinued
Peter Matthiessen	Politis Central Services Group Pty Ltd	U 26/2017	Commissioner T Emmanuel	Discontinued
Robert Grove	Andrew Grove Indian Ocean Hotel	B 206/2016	Commissioner T Emmanuel	Discontinued
Stephen Cannell	Ms Sharyn O'Neill Director General, Department of Education	U 59/2016	Commissioner T Emmanuel	Discontinued
Tamara Maree Morgan	Suzanne Maree Flanders T/A Simply Beautiful Hair and Beauty	B 34/2017	Commissioner T Emmanuel	Discontinued
Tamara Maree Morgan	Suzanne Maree Flanders T/A Simply Beautiful Hair and Beauty	U 34/2017	Commissioner T Emmanuel	Discontinued

**CONFERENCES—Notation of—**

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation Industrial Union of Workers Perth	North Metropolitan Health Service	Emmanuel C	C 28/2016	07/02/2017	Dispute re claim for transition payment	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Chief Executive East Metropolitan Health Service	Emmanuel C	PSAC 6/2017	08/02/2017 10/11/2017	Dispute re alleged unfair disciplinary process	Discontinued
The Australian Nursing Federation Industrial Union of Workers Perth	Child and Adolescent Health Service	Emmanuel C	C 11/2017	09/03/2017	Dispute re return to work of union member	Concluded
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	The Public Transport Authority of Western Australia	Emmanuel C	C 16/2016	06/09/2016	Dispute re alleged unfair dismissal of union member	Discontinued
The Civil Service Association of Western Australia (Inc)	The Director General Department for Child Protection and Family Support	Emmanuel C	PSAC 2/2017	11/01/2017 09/03/2017	Dispute re leave entitlements	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Education	Emmanuel C	PSACR 12/2016	19/10/2016 10/02/2017	Dispute re change to prescribed hours of duty and flexible working arrangements	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of the Attorney General, The Commissioner for Corrections, Department of Corrective Services	Emmanuel C	PSAC 7/2016	14/04/2016 12/05/2016	Dispute re decommissioning process of shared service arrangement	Discontinued

**PROCEDURAL DIRECTIONS AND ORDERS—**

2017 WAIRC 01035

**WESTERN AUSTRALIAN PHARMACY ASSISTANTS AWARD 2014**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**THE PHARMACY GUILD OF WESTERN AUSTRALIA (ORGANISATION OF EMPLOYERS),  
ROYAL STREET COMMUNITY PHARMACY, KOJONUP PHARMACY**APPLICANTS**

-v-

THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

**RESPONDENT****CORAM**

COMMISSIONER T EMMANUEL

**DATE**

FRIDAY, 22 DECEMBER 2017

**FILE NO/S**

A 1 OF 2014

**CITATION NO.**

2017 WAIRC 01035

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<b>Result</b>	Order issued
<b>Representation (by correspondence)</b>	
<b>Applicants</b>	Mr A Drake-Brockman (as agent)
<b>Respondent</b>	Mr D Rafferty
<b>Samuel Gance</b> (ABN 50 577 312 446) T/A Chemist Warehouse Perth	Ms B Lewis (as agent)

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*Order*

WHEREAS the Pharmacy Guild of Western Australia (**PGWA**), Royal Street Community Pharmacy and Kojonup Pharmacy filed a notice of application on 2 May 2014 for a new award to be known as the 'Western Australian Pharmacy Assistants Award 2014' which would cover pharmacy assistants in the community pharmacy industry in Western Australia (**proposed award**);

AND WHEREAS the Shop, Distributive and Allied Employees' Association of WA (**SDA**) filed a notice of answer opposing the application on 5 June 2014 because it says the 'Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977' already covers pharmacy assistants;

AND WHEREAS the PGWA and the SDA have been negotiating about the proposed award since 2014;

AND WHEREAS on 21 November 2017, Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth (**Mr Gance**) filed a notice of application for an order under s 27(1)(j) of the *Industrial Relations Act 1979* (WA) to be joined as a party to application A 1/2014 because he has a significant interest in this matter;

AND WHEREAS Mr Gance says he has a significant interest in this matter because he employs 29 employees who would be covered by the proposed award and he is not a member of the PGWA. Additionally, Mr Gance says he is part of a franchise group of 21 stores in Western Australia, which employs a total of 616 employees who would be covered by the proposed award. Mr Gance says he is representative of the franchisees of the franchise group;

AND WHEREAS the parties do not oppose Mr Gance's application;

AND WHEREAS a person whose rights will be directly affected by an order made by a court must be given a full and fair opportunity to be heard: *Re Ludeke; Ex parte the Customs Officers' Association of Australia, Fourth Division* [1985] HCA 31; (1985) 155 CLR 513 (520) (Gibbs CJ);

AND WHEREAS the Commission considers that making the proposed award would directly affect Mr Gance's legal rights and obligations;

AND WHEREAS the Commission is satisfied that joining Mr Gance as a party to this application is unlikely to result in unfairness to any party;

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

THAT Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth be joined as a party to application A 1/2014.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

**2017 WAIRC 01034**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KATRINA MACEWAN	<b>APPLICANT</b>
	-v-	
	OLU HAIR AND BEAUTY STUDIO	<b>RESPONDENT</b>
<b>CORAM</b>	CHIEF COMMISSIONER P E SCOTT	
<b>DATE</b>	FRIDAY, 22 DECEMBER 2017	
<b>FILE NO/S</b>	B 109 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 01034	

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<b>Result</b>	Application for substituted service granted
<b>Representation</b>	
<b>Applicant</b>	Ms D Oman of counsel
<b>Respondent</b>	Not applicable

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*Order*

This application is a claim for denied contractual entitlements referred to the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* on 29 August 2017. The applicant, through her solicitor, has applied for an order for substituted service in respect of her claim.

Having heard from the applicant's solicitors, and noting the difficulties the Commission's records indicate the Commission has experienced in attempting to contact the respondent, the Commission is satisfied that the applicant has made all reasonable attempts to locate the respondent, advise the respondent of the existence of the applicant's claim, or serve the claim.

The Commission concludes that it is just in the circumstances that service of the applicant's claim on the respondent be effected by substituted or other service, in the following manner:

1. THAT the applicant serve a copy of this Order and the claim filed on 29 August 2017 on the respondent via:
  - a) the respondent's Facebook account under the pseudonym 'Sau Mi'; and
  - b) personally or by registered post to 33 Bronzewing Crescent, Djugun WA 6725.
2. THAT the applicant advertise a notice in the 'Public Notices' section of *The Broome Advertiser* newspaper that:  
 Katrina MacEwan has referred to the Western Australian Industrial Relations Commission a claim against Saumya de Alwis (Olu Hair and Beauty Studio) (WAIRC Matter No B 109 of 2017) alleging that contractual benefits under her contract of employment have been denied her. A Notice of answer must be filed in the Western Australian Industrial Relations Commission within 21 days.
3. THAT the applicant provide a copy of the advertisement published in accordance with Order 2 to the Commission by email.
4. THAT the applicant file an affidavit confirming that each of the steps in Orders 1 to 3 has been taken.

(Sgd.) P E SCOTT,  
Chief Commissioner.

[L.S.]

## INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Communities (Family Resource Employees) CSA General Agreement 2017 PSAAG 10/2017	01/05/2018	Department of Communities	(Not applicable)	Commissioner D J Matthews	Agreement registered
Department of Justice (Youth Custodial Officers) CSA General Agreement 2017 PSAAG 7/2017	01/05/2018	Department of JUSTICE	(Not applicable)	Commissioner D J Matthews	Agreement registered
Disability Services Commission (Social Trainers) CSA General Agreement 2017 PSAAG 8/2017	01/05/2018	Disability services commission	(Not applicable)	Commissioner D J Matthews	Agreement registered
Greens (WA) Inc. Staff Agreement 2017 - The AG 17/2017	12/15/2017	Western Australian Administration, Clerical and Services Union of Employees	The Greens (WA) Inc	Commissioner D J Matthews	Agreement registered
Public Transport Authority/ ARTBIU (Transit Officers) Industrial Agreement 2017 AG 21/2017	12/19/2017	The Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner D J Matthews	Agreement registered
Shire of Harvey Enterprise Agreement 2017 AG 16/2017	12/15/2017	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Harvey	Commissioner D J Matthews	Agreement registered
Shire of Kondinin Municipal Collective Enterprise Agreement 2017 AG 15/2017	12/20/2017	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Kondinin	Commissioner D J Matthews	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Shire of Laverton Enterprise Bargaining Agreement 2017 AG 19/2017	12/21/2017	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Laverton	Commissioner D J Matthews	Agreement registered
Shire of Narembeen Works Staff Enterprise Bargaining Agreement 2017 AG 14/2017	12/15/2017	Western Australian Municipal Administrative, Clerical and Services Union of Employees	Shire of Narembeen	Commissioner D J Matthews	Agreement registered

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## NOTICES—Union Matters—

2018 WAIRC 00048

### NOTICE

#### FBM No. 1 of 2017

NOTICE is given of an application by the United Firefighters Union of Australia West Australian Branch to the Full Bench of the Western Australian Industrial Relations Commission (WAIRC) for an alteration to Rule 1 – Name, of its registered rules.

The matter has been listed for hearing before the Full Bench on Monday, 26 February 2018 at 2.15pm on Level 18, 111 St Georges Terrace, Perth. A copy of the Rules of the organisation and the proposed rule alterations may be inspected in the Registry on Level 17.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005* (WA). A Form 13 is available on the WAIRC website at [www.wairc.wa.gov.au](http://www.wairc.wa.gov.au) under Applications & Forms.

S. KEMP  
DEPUTY REGISTRAR

18 January 2018

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## PUBLIC SERVICE APPEAL BOARD—

2018 WAIRC 00004

### APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 31 JULY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MISS DEIRDRE MCQUILLAN

**APPELLANT**

-v-

THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY

**RESPONDENT**

**CORAM**

PUBLIC SERVICE APPEAL BOARD  
COMMISSIONER T EMMANUEL - CHAIR  
MR G LEE - BOARD MEMBER  
MS T WILLIAMS - BOARD MEMBER

**DATE**

WEDNESDAY, 3 JANUARY 2018

**FILE NO**

PSAB 15 OF 2017

**CITATION NO.**

2018 WAIRC 00004

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**Result** Application dismissed

**Representation (by correspondence)**

**Appellant** In person

**Respondent** Mr E Fearis

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*Order*

WHEREAS on 17 August 2017 the appellant filed a *Form 11- Notice of appeal to Public Service Appeal Board* to appeal against the respondent's decision to terminate her employment;

AND WHEREAS on 17 October 2017 the Board directed the appellant to file and serve further and better particulars of claim on the respondent by 24 October 2017;

AND WHEREAS the respondent was directed to file and serve a notice of answer with full particulars no later than 14 days from service of the appellant's further and better particulars of claim;

AND WHEREAS on 24 October 2017 the appellant filed further and better particulars of claim;

AND WHEREAS on 4 December 2017 the respondent was granted an extension of time until 12 December 2017 to file and serve the notice of answer;

AND WHEREAS the respondent filed a *Form 5 – Notice of answer* at 11:45 am on 13 December 2017;

AND WHEREAS at 12:30 pm on 13 December 2017 the appellant filed a *Form 1 – Notice of application* to apply for an order that her appeal be upheld on the ground that the respondent failed to lodge a response;

AND WHEREAS, notwithstanding the *Form 5 – Notice of answer* filed by the respondent, the applicant informed the Board that she wished to proceed with her application because "in the Commission's role as being the only forum where a public servant can be heard on fairness matters, I have no other method of voicing my concern that the respondent has continually not fallen within ordered rules. Justice delayed is justice denied."

AND WHEREAS the respondent wrote to the Board and the appellant on 22 December 2017 apologising for the delay, and stating that it had now filed a notice of answer and would not oppose rescheduling the hearing to a later date if the late notice of answer had caused the appellant prejudice;

AND WHEREAS the Board gave the parties an opportunity to provide written submissions about this application by 2 January 2017. The respondent provided written submissions and the applicant did not;

AND WHEREAS in its written submissions, the respondent reiterates the response it provided on 22 December 2017 and says as follows. The ground for the applicant's application has fallen away because the respondent has lodged a notice of answer. Further, the order issued by the Board with which the respondent did not comply was not a springing order and non-compliance should not, in the circumstances, mean a matter will be summarily determined. The respondent says to uphold the appeal in the circumstances would be contrary to s 6(c) and s 26(1)(a) of the *Industrial Relations Act 1979 (WA)*;

AND WHEREAS in the Board's view, that the respondent filed its notice of answer one day late is not a reason to uphold the appeal and the Board cannot order that the appeal be upheld before it is heard;

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

THAT the appellant's application that her appeal be upheld because the respondent failed to lodge a response is dismissed.

(Sgd.) T EMMANUEL,  
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

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## PUBLIC SERVICE APPEAL BOARD—Notation of—

The following were matters before the Commission under the Public Service Appeal Board.

Application Number	Parties		Commissioner	Matter	Dates	Result
PSAB 7/2017	Cade Brown	Director General, Department of Fisheries	Emmanuel C	Appeal against the decision to take disciplinary action on 6 April 2017	N/A	Discontinued
PSAB 24/2016	Ron Gidgup	Chief Executive, South Metropolitan Health Service	Emmanuel C	Appeal against the finding of allegations of misconduct on 13 December 2016	28/02/2017	Discontinued

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## 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 71/2016	N/A	N/A	Emmanuel C	Request for mediation	23/01/2017	Concluded
APPL 62/2017	N/A	N/A	Emmanuel C	Request for mediation	N/A	Concluded
APPL 60/2017	N/A	N/A	Emmanuel C	Request for mediation	26/05/2017	Concluded
APPL 15/2017	N/A	N/A	Emmanuel C	Request for mediation	26/04/2017 03/05/2017	Concluded

## VOCATIONAL EDUCATION AND TRAINING ACT 1996—Notation of—

The following were matters before the Commission under the Vocational Education and Training Act 1996.

Application Number	Parties		Commissioner	Matter	Dates	Result
APA 10/2016	Jake Pickles	Department of Training and Workforce Development	Emmanuel C	Appeal against the decision to terminate training contract	N/A	Discontinued
APA 2/2017	Kiaran Crocker	Government of Western Australia Department of Training and Workforce Development	Emmanuel C	Appeal against the decision to terminate training contract	28/04/2017 28/04/2017	Discontinued