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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2017 WAIRC 00774

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JOHN ALLEN	APPELLANT
	-and- DANNI'S ELITE SERVICES	
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL	RESPONDENT
DATE	MONDAY, 4 SEPTEMBER 2017	
FILE NO.	FBA 11 OF 2017	
CITATION NO.	2017 WAIRC 00774	
Result	Order made	
Appearances		
Appellant	No appearance	

Order

WHEREAS on 5 July 2017 an appeal was lodged in the Commission;

AND WHEREAS on 1 August 2017 the Full Bench listed the appeal on its own motion for the appellant to show cause on 4 September 2017 why the appeal should not be dismissed;

AND WHEREAS on 4 September 2017 there was no appearance on behalf of the appellant before the Full Bench when the matter was called on;

NOW THEREFORE, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby dismissed.

[L.S.]

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

AWARDS/AGREEMENTS—Application for—**2018 WAIRC 00111****WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2017
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2018 WAIRC 00111
CORAM : PUBLIC SERVICE ARBITRATOR
 SENIOR COMMISSIONER S J KENNER
HEARD : WEDNESDAY, 14 FEBRUARY 2018
DELIVERED : WEDNESDAY, 14 FEBRUARY 2018
FILE NO. : PSAAG 2 OF 2018
BETWEEN : COMMISSIONER OF POLICE
 Applicant
 AND
 WESTERN AUSTRALIAN POLICE UNION OF WORKERS
 Respondent

Catchwords : *Industrial Law (WA) – Application to register new industrial agreement – Order issued*
Legislation : *Industrial Relations Act 1979 (WA)*
Result : Agreement registered

Representation:

Applicant : Mr A Chapple and with him Ms D Southcott
Respondent : Ms K Taylor and with her Mr P Hunt

Reasons for Decision

- 1 Given the significance of this application and as a matter of public interest, the Commission publishes the following short reasons for decision.
- 2 The Commission has before it an application to register the Western Australia Police Industrial Agreement 2017 to replace the current 2014 industrial agreement.
- 3 This Agreement, as the parties well know, is the result of a protracted and well publicised enterprise bargaining dispute between the parties in the latter half of 2017. It is a credit to the leadership of the Western Australian Police Union and to the Commissioner of Police, his senior officers and advisers, that common sense has prevailed and the parties have now reached a resolution for which they are to be congratulated.
- 4 Having heard the submissions of the parties and being satisfied that the requirements of ss 41 and 41A of the *Industrial Relations Act 1979 (WA)* are met, an order now issues giving effect to the registration of the new Agreement effective from today's date.

2018 WAIRC 00112**WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2017
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
COMMISSIONER OF POLICE****PARTIES****APPLICANT**

-v-

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
 SENIOR COMMISSIONER S J KENNER

DATE WEDNESDAY, 14 FEBRUARY 2018**FILE NO** PSAAG 2 OF 2018**CITATION NO.** 2018 WAIRC 00112

Result	Agreement registered
Representation	
Applicant	Mr A Chapple and with him Ms D Southcott
Respondent	Ms K Taylor and with her Mr P Hunt

Order

HAVING heard Mr A Chapple and with him Ms D Southcott on behalf of the applicant and Ms K Taylor and with her Mr P Hunt on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the agreement made between the parties filed in the Commission on 8 February 2018 entitled *Western Australia Police Industrial Agreement 2017* attached hereto be registered as an industrial agreement in replacement of the *Western Australia Police Industrial Agreement 2014* (PSAAG 5 of 2014) which by operation of s 41(8) is hereby cancelled.

(Sgd.) S J KENNER,
Senior Commissioner,
Public Service Arbitrator.

[L.S.]

CANCELLATION OF—Awards/Agreements/Respondents—Under Section 47—

2018 WAIRC 00039

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT
DATE FRIDAY, 12 JANUARY 2018
FILE NO/S APPL 3 OF 2018
CITATION NO. 2018 WAIRC 00039

Result	Industrial agreements cancelled
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Order

The Commission gave notice of an intention to make an order cancelling the agreements listed in the Schedule:

- (a) on the Commission's website on 31 October 2017;
- (b) to the Water Corporation on 1 November 2017;
- (c) to The Civil Service Association of Western Australia Incorporated on 1 November 2017;
- (d) to United Voice WA on 2 November 2017;
- (e) to The Australian Workers' Union, West Australian Branch, Industrial Union of Workers on 2 November 2017;
- (f) to the Electrical Trades Union WA on 2 November 2017;
- (g) to The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch on 2 November 2017; and
- (h) in the Western Australian Industrial Gazette on 22 November 2017,

inviting any person with a sufficient interest to object to the cancellation of the agreements in the Schedule within 30 days.

On 24 November 2017, Water Corporation wrote to the Registrar objecting to the cancellation of the industrial agreement corresponding to item 1 of the notice only on the basis that the agreement still applies to some of its employees. The Water Corporation did not believe that any of the agreements in the Schedule to this Order still apply to any of its employees, and did not object to them being cancelled.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

THAT the industrial agreements set out in the attached Schedule be cancelled.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

SCHEDULE

Water Corporation Corporate Affairs Branch Local Agreement 1998
Water Corporation Corporate Information Support Branch Local Agreement 1998
Water Corporation Infrastructure Development Branch Local Agreement 1998
Water Corporation Planning & Development Division Corporate & Regulatory Planning Branch Local Agreement 1998
Water Corporation Human Resources Branch Local Agreement 1998
Water Corporation Environment Branch Local Agreement 1998
Water Corporation Infrastructure Planning Branch Local Agreement 1998
Water Corporation Land Development Branch Local Agreement 1998
Water Corporation Executive Support/Human Resources Planning and Development Division Local Agreement 1998
Water Corporation Revenue Policy Branch Local Agreement 1998
Water Corporation Management Review & Audit Branch Local Agreement 1998
Water Corporation Operations Development Services Branch Local Agreement 1998
Water Corporation Executive Services Branch Local Agreement 1998
Water (Customer Centre, Customer Services Division) Local Agreement 1998
Water Corporation Project Management Branch Local Agreement 1998
Water Corporation Infill Sewerage Program and the Project Management Infill Sewerage Branch Local Agreement 1998
Contracts and Land Management Services Branch Local Agreement 1998
Water Corporation Engineering and Contracts Division Executive Support Branch Local Agreement 1998
Water Corporation Finance and Administration Division Executive Support Team Local Agreement 1998
Water Corporation Commercial Division Local Agreement 1998
Water Corporation Finance & Administration Division, Management Accounting Branch Local Agreement 1998
Water Corporation Finance and Administration Division Facilities Management Branch Local Agreement 1998
Water Corporation Financial Services Branch Local Agreement 1998
Water Corporation Supply Policy Branch Local Agreement 1998
Water Corporation Perth Region Local Agreement 1998
Water Corporation Carnarvon Business Unit Local Agreement 1998
Water Corporation Bulk Water & Wastewater Division Local Agreement 1998
Water Corporation Engineering and Technical Services Branch Local Agreement 1998
Water Corporation Agricultural Region Local Agreement 1998
Water Corporation Goldfields Region Local Agreement 1998
Water Corporation Construction Branch Local Agreement 1998
Water Corporation South West Region Local Agreement 1998
Water Corporation Midwest Region Local Agreement 1998
Water Corporation North West Region Local Agreement 1998
Water Corporation Great Southern Region Local Agreement 1998

INDUSTRIAL MAGISTRATE—Claims before—

2018 WAIRC 00046

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2018 WAIRC 00046
CORAM : INDUSTRIAL MAGISTRATE M FLYNN
HEARD : ON THE PAPERS
DELIVERED : THURSDAY, 18 JANUARY 2018
FILE NO. : M 23 OF 2016
BETWEEN : CHRISTINE DOROTHY ZEEB

CLAIMANT

AND

KALHAVEN HOLDINGS PROPRIETY LIMITED

RESPONDENT

CatchWords : Slip Rule - Effect of taxation upon order - Whether employer obliged to withhold and remit to Commissioner of Taxation any part of an amount that the employer was ordered to pay for contravention of a modern award

Legislation : *Fair Work Act 2009* (Cth)
Civil Judgments Enforcement Act 2004 (WA)
Taxation Administration Act 1953 (Cth)

Case(s) referred to in reasons : *Paul Andrew Bennett and Craig Bradley Dix t/a Fitness Painting & Property Maintenance v Higgins* [2005] WASCA 197
Newmont Yandal Operations Pty Ltd v The J Aron Corporation (2007) 70 NSWLR 411

Result : Rectification of Order

Representation:

Claimant : Not applicable

Respondent : Not applicable

REASONS FOR DECISION

- 1 On 20 April 2017, after a trial, I published reasons for a judgment in favour of the claimant, Ms Zeeb, and made orders that the respondent, Kalhaven Holdings Pty Ltd (the Company), pay to the claimant \$10,361.16 being \$9,441.06 plus interest of \$840.10, plus \$80 disbursement costs (the Orders). Ms Zeeb's claim was made under the *Fair Work Act 2009* (Cth) (the FW Act). The order was made as a result of Ms Zeeb proving a contravention of a 'civil penalty provision' of the FW Act, which provides that the court may make orders for an employer to pay to an employee an amount that the employer was required to pay under a modern award (FW Act, s 545(3)(a)).
- 2 The Company has written to the registry by email on 20 September 2017, 14 December 2017, 20 December 2017 and by letter on 2 January 2017. Ms Zeeb has written to the registry by email on 15 January 2018. The effect of the communications is to suggest that, since the making of the Orders:
 - (a) Ms Zeeb has taken steps to enforce the Orders, including, sometime on or before 6 June 2017, registration of the Orders and the commencement of enforcement proceedings pursuant to the *Civil Judgments Enforcement Act 2004* (WA). Ms Zeeb has paid fees to the Bailiff in connection with the enforcement proceedings.
 - (b) The Company has paid a total of \$10,576.21 in respect of the Orders as follows:
 - (i) On 8 June 2017, \$8,971.21 to Ms Zeeb;
 - (ii) On 8 June 2018, \$1,605 to the Australian Taxation Office (the Remitted Tax). This payment was made on advice to the Company by the Australian Taxation Office of the legal obligations of the Company.
 - (c) The enforcement proceedings has resulted in the Company being contacted by the Bailiff who has made a demand for *further* payments including a demand of:
 - (i) \$1,605 corresponding with the Remitted Tax;
 - (ii) \$642.23 on account of one or more of interest and enforcement fees.

- 3 Ms Zeeb's position is that, within 21 days of the making of the Orders, the Company was required to pay her the full amount set out in the Orders. The Company seeks from this court:
- 'Clarification as to if the full amount of \$10,576.21 should have been paid to Ms Zeeb without any tax deductions' (the Taxation Question);
 - An order that the payment of \$10,576.21 has satisfied the judgment of 20 April 2017;
 - An order that the enforcement proceedings be set aside and that 'the matter be removed from the listings of the Bailiff'.
- 4 This Court has no power to make the orders sought by the Company per (b) and (c). On any view, there was a delay between the pronouncement of the orders and the commencement of enforcement proceedings and payments by the Company on 8 June 2017. Any consequential disputes about whether the judgment has been satisfied and about interest upon the judgment and about the costs of enforcement will be resolved by the application of *Civil Judgments Enforcement Act 2004* (WA) in the relevant forum; the Industrial Magistrates Court is not the relevant forum.
- 5 The resolution of the Taxation Question requires the identification and the interpretation of the relevant provisions of the *Taxation Administration Act 1953* (Cth): *Paul Andrew Bennett and Craig Bradley Dix t/a Fitness Painting & Property Maintenance v Higgins* [2005] WASCA 197. It is convenient to assume, without deciding, that the matters set out in paragraph 2 are correct. I note that the rights and obligations of an employer regarding the withholding of an amount payable to an employee are contained in the *Taxation Administration Act 1953* (Cth), Schedule 1, Division 12, 15 and 16. There is not sufficient material before me to answer the Taxation Question. Finally, (without deciding) I have doubts about whether the Industrial Magistrates Court has the jurisdiction to answer the Taxation Question.
- 6 Although I am unable, in these reasons, to answer the Taxation Question, the Industrial Magistrates Court has an implied power to rectify an order to avoid unintended consequences: *Newmont Yandal Operations Pty Ltd v The J Aron Corporation* (2007) 70 NSWLR 411. What follows in this paragraph is an adaption of relevant statements made by the WA Industrial Appeal Court in *Paul Andrew Bennett and Craig Bradley Dix t/a Fitness Painting & Property Maintenance v Higgins* [2005] WASCA 197 [43]. It is to be presumed that it is the intent of the Commonwealth and State Parliaments that jurisdiction conferred respectively on the Industrial Magistrates Court (under the FW Act) and the Bailiff (under the *Civil Judgments Enforcement Act 2004* (WA)) will be exercised within the context and confines of existing and applicable Commonwealth taxation law. This approach has particular application where s 109 of the Constitution would otherwise render the state law invalid to the extent of any inconsistency. It also has particular application where it is not reasonable or realistic to expect Industrial Magistrates Court to explicitly address all the possible taxation consequences that might flow from an order. Applying this principle, the Orders should be interpreted as operating against the background of compliance with the Commonwealth tax law referred to above. That is, if any amount was required under Schedule 1 of the *Taxation Administration Act 1953* (Cth) to be withheld by the Company from the Orders and was paid to the Commissioner of Taxation it would be regarded as having been paid to Ms Zeeb for the purposes of compliance with the Orders. Such an approach to the interpretation of the Orders does not render the *Civil Judgments Enforcement Act 2004* (WA) ineffective under s 109 of the Constitution, but enables the terms and operation of both the State and Commonwealth laws to co-exist.
- 7 In order to avoid unintended consequences so far as enforcement proceedings are concerned, but without deciding the Taxation Question, it is appropriate to rectify the Orders as follows:
- Subject to the effect of the *Taxation Administration Act 1953* (Cth) (if any), the respondent shall pay to the claimant the sum of \$10,361.16, being \$9,441.06 plus \$840.10 interest, plus \$80 disbursement costs.
- 8 The inclusion of the words '(if any)' makes clear that I am not determining the Taxation Question. That said and assuming that Ms Zeeb has no relevant outstanding taxation liability, it would be surprising if she was not entitled, upon application to the Australian Taxation Office, to have that amount remitted to her. In that event, the amount received by her must be applied to discharge the Orders: *Civil Judgments Enforcement Act 2004* (WA), s 24. She ought consider initiating such an application.

Order

- 9 The order of the 20 April 2017 is rectified by the addition of the underlined text as follows: 'Subject to the effect of the *Taxation Administration Act 1953* (Cth) (if any), the respondent shall pay to the claimant the sum of \$10,361.16, being \$9,441.06 plus \$840.10 interest, plus \$80 disbursement costs.'

M. FLYNN

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 00947

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00947
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : WEDNESDAY, 15 NOVEMBER 2017
DELIVERED : WEDNESDAY, 15 NOVEMBER 2017
FILE NO. : U 134 OF 2017
BETWEEN : JAMES ANDREWS-COULTER
 Applicant
 AND
 HATCHD DIGITAL
 Respondent

Catchwords : *Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal - Whether it would be unfair not to accept the application out of time - Principles applied - Extension of time granted*
Legislation : *Industrial Relations Act 1979 (WA)*
 Minimum Conditions of Employment Act 1993
Result : Extension of time granted.
Representation:
Applicant : In person
Respondent : Ms M D'Arcy

Case(s) referred to in reasons:

Malik v Paul Albert, Director General, Department of Education of Western Australia (2004) 84 WAIG 683

Reasons for Decision

Ex Tempore

- 1 The application before me is brought by the applicant by which he alleges that on or about 14 September 2017 he was unfairly dismissed by the respondent from his position as a User Experience Planner. The respondent is engaged in the technology industry and provides services for clients in relation to various digital applications.
- 2 The application as filed is outside of the 28-day time limit as prescribed by the *Industrial Relations Act 1979 (WA)*. However, the Commission does have the discretion under s 29(3) to accept an application out of time, if it considers that it would be unfair not to do so. In the circumstances of this case, the application is some five days or thereabouts outside of the 28-day time limit.
- 3 The parties for the purposes of these proceedings were provided with a copy of the decision of the Industrial Appeal Court in the matter of *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683. In that case the Industrial Appeal Court set out what are now well known principles in relation to the exercise of the Commission's discretion to extend time. I simply refer in particular, as an example of the judgement, to the considerations of EM Heenan J at par 73 and 74 and through to 75 and 76 where the relevant principles are set out. In short, they are special circumstances are not necessary, but the court must be positively satisfied that the prescribed time should be extended.
- 4 Prima facie the position is that time limits should be complied with unless there is an acceptable explanation for the delay which makes it equitable to so extend. Secondly, the action taken by an applicant to contest the termination other than applying under the Act will be relevant. It will show the decision to terminate is actively contested. It may favour the party an extension of time. Thirdly, prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time. However, the mere absence of prejudice to the respondent is not a sufficient basis to grant an extension.
- 5 The merits of the case may be considered in determining whether to grant an extension of time. Overall, the consideration of fairness between the applicant and other persons in a like position, are relevant to the exercise of the court's discretion.
- 6 In this case, there was some brief evidence before me both from the applicant and on behalf of the respondent. The applicant informed me that on or about 14 September 2017, he had a discussion with Ms D'Arcy and Mr Bompard of the respondent. He received a letter dated 15 September 2017 (exhibit A1), which informed him that his position as a User Experience Planner was no longer required by the business. Accordingly, his employment was terminated on the grounds of redundancy.

- 7 It was common ground that the applicant left his employment on 15 September 2017. He was paid salary in lieu of notice and his accrued entitlements. The applicant said that other than what was discussed and what was in the letter of termination, he was not offered any other alternative employment by the respondent nor was there any discussion about mitigating the adverse effects of the redundancy on him. The applicant was also not made aware perhaps, of the requirements of the *Minimum Conditions of Employment Act 1993* (WA), which in circumstances of redundancy, enable an employee to receive up to eight hours of paid leave for seeking other employment. But none the less, given that the applicant was paid in lieu, that may or may not be relevant to the merits of the claim.
- 8 Some short time after he was made redundant, the applicant said that on 16 October 2017, he saw an advertisement on the SEEK employment website for a user experience designer to be employed by the respondent. From the description of the advertisement and the job description for the position, the applicant formed the view that this was his former job as the User Experience Planner for the respondent. Immediately on seeing this, the applicant informed the Commission that he sought legal advice and commenced these proceedings, it seems on the next day, which was 17 October 2017.
- 9 The applicant informed the Commission that he is still seeking employment and has been unsuccessful in that endeavour.
- 10 On behalf of the respondent, Ms D'Arcy informed the Commission that after a review of the organisation and its business efficiency, a decision was taken that the position of User Experience Planner would no longer be required. Effectively, the work undertaken by that position, which is a lower level of work according to Ms D'Arcy to the position of director and designer, could be partly absorbed at least into the director position and furthermore, that the planning work was no longer being focussed on by the business It intended to focus more on software development activity.
- 11 Ms D'Arcy tendered copies of the job description for the designer position and also a copy of the SEEK advertisement particulars, specifying the higher level of salary for the designer position. Ms D'Arcy confirmed that there was a discussion on 15 September 2017 and not 14 September 2017, with the applicant at which he was informed of the respondent's decision to make his position redundant. He was provided with a copy of the letter of termination of employment on that day.
- 12 According to Ms D'Arcy, the business employs about 23 employees. Also, the nature of the work for the designer position is of a more technical nature than that of the planner position.
- 13 I do not propose to examine the merits of the application any further than that. Suffice to say from the job descriptions which have been tendered into evidence by both the applicant and the respondent, I think it is fair to say that there are some areas of overlap but there are also some areas of difference. Also, there is a higher level of salary for the designer position. The salary range was advertised at \$75,000 to approximately \$90,000 per annum, compared to \$60,000 per annum which was payable for the applicant's position.
- 14 Applying the principles in the *Malik* case in this matter, I am satisfied that the period of delay in the filing of the application was relatively short. I am also satisfied that the reason for the delay, as outlined by the applicant in his evidence, was a genuine reason. On seeing the advertisement on the SEEK website, he genuinely believed on reasonable grounds, that the position advertised, if not the same, was very similar to the position from which he was made redundant. The applicant then moved promptly, sought legal advice and commenced these proceedings.
- 15 I am also satisfied on the evidence that there is no prejudice demonstrated by the respondent if the Commission was to accept the application out of time. It is not necessary for me to examine the merits of the matter in any further detail other than to indicate I am satisfied that the claim is not entirely without merit. None the less, I do not need to go any further than that for present purposes.
- 16 Having regard to these considerations and applying the principles in *Malik*, I am satisfied in this case that the application should be accepted out of time. In doing so however, I should emphasise that an acceptance of a claim out of time does not mean and should not be taken to mean, anything on the merits as to whether the claim will ultimately succeed or not.
- 17 The Commission will make an order that the application be and is hereby accepted out of time and the date for filing the application be extended to 17 October 2017.

2017 WAIRC 00951

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JAMES ANDREWS-COULTER

APPLICANT

-v-

HATCHD DIGITAL

RESPONDENT**CORAM**

SENIOR COMMISSIONER S J KENNER

DATE

TUESDAY, 21 NOVEMBER 2017

FILE NO/S

U 134 OF 2017

CITATION NO.

2017 WAIRC 00951

Result	Extension of time granted
Representation	
Applicant	In person
Respondent	Ms M D'Arcy

Order

HAVING heard the applicant on his own behalf and Ms M D'Arcy on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the time for the filing of the notice of application in the herein proceedings be and is hereby extended to 17 October 2017.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.**2018 WAIRC 00047**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JAMES ANDREWS-COULTER	APPLICANT
	-v-	
	HATCHD DIGITAL	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 19 JANUARY 2018	
FILE NO/S	U 134 OF 2017	
CITATION NO.	2018 WAIRC 00047	

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Ms M D'Arcy

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.**2018 WAIRC 00056**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SANDRA CHURCHES	APPLICANT
	-v-	
	THE TRUSTEE FOR COALCLIFF PLANT HIRE UNIT TRUST T/A COALCLIFF PLANT HIRE & CIVIL CONTRACTING ABN 11 202 533 991	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	MONDAY, 29 JANUARY 2018	
FILE NO/S	B 190 OF 2016	
CITATION NO.	2018 WAIRC 00056	

Result Application dismissed
Representation (by correspondence)
Applicant Mr Ken Trainer (as agent)
Respondent Ms Evelyn Yuen (of counsel)

Order

WHEREAS on 19 December 2017 a Form 14 – Notice of withdrawal or discontinuance was received in the Registry from the applicant;

AND WHEREAS on 19 December 2017 the Registrar was informed by the respondent that pursuant to the terms of a deed of settlement this application was to have been dismissed by way of filing a minute of consent orders;

AND WHEREAS on 16 January 2018 the applicant confirmed that she did not object to the Commission dismissing the application;

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

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

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2017 WAIRC 00885

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00885
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : WEDNESDAY, 2 AUGUST 2017, THURSDAY, 14 SEPTEMBER 2017
DELIVERED : TUESDAY, 24 OCTOBER 2017
FILE NO. : B 56 OF 2017
BETWEEN : ASHLEY DUDDINGTON
Applicant
AND
MARIO AND CLARA ENTERPRISES PTY LTD AND MORGAN TRADING PTY LTD
Respondents

Catchwords : *Industrial Relations Law (WA) - Contractual benefits claim - Claim for pay in lieu of notice and accrued annual leave - Principles applied - Application upheld - Declaration and order issued*

Legislation : *Industrial Relations Act 1979 (WA)*
Minimum Conditions of Employment Act 1993 (WA)
Fair Work Act 2009 (Cth)

Result : Application upheld

Representation:

Applicant : In person
Respondents : Mr N Morgan

Case(s) referred to in reasons:

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

Christos Triantopoulos v Shell Company of Australia Ltd (2011) 91 WAIG 67

Jenny Roberts v Peter Groom trading as Country Stud Tavern (1984) 64 WAIG 774

Klara Margarette Stylianou v Country Realty Pty Ltd as trustee for the Marcelli Family Trust (2011) 91 WAIG 2029

Pamela Mason v Peter Dean Bastow (1990) 70 WAIG 19

Reasons for Decision

- 1 The applicant brings a claim against the respondents for denied contractual benefits. The applicant claims two weeks' pay in lieu of notice and four weeks' annual leave accrued but not taken.

Proper name of respondents

- 2 A preliminary issue arises as to the proper name of the respondents. The application as filed cites the "Morgan and Mansour Family Trust and Morgan Family Trust ABN 31 378 377 138". As a trust is not a legal person, the applicant's employer at the time must have been either an individual or corporate trustee. Information provided to my Associate after the hearing by the parties, and a decision of the Fair Work Commission in an unfair dismissal claim brought by the applicant against the respondents, dated 13 June 2017, reveals that the applicant's employer, as corporate trustee for the named trusts, was "Mario and Clara Enterprises Pty Ltd and Morgan Trading Pty Ltd", operating as a partnership. It is important that the proper entity be named as the respondents. The Commission will make an order properly identifying the respondents.

Factual background

- 3 The applicant was employed by the respondents as the restaurant manager of the "Oscars" restaurant located in the northern suburbs of Perth. The applicant was employed in this position from 1 May 2015 to 13 December 2016, when he says his employment was terminated summarily by Mr Morgan of the respondents. Prior to his employment by the respondents, the applicant was employed at a city hotel as a food and beverage supervisor. In his position at the respondents, the applicant said he was responsible for the day to day operations of the restaurant; rostering; staff training and cash receipts etc. The applicant maintained that he was employed at a rate of salary of \$1,200 net per week and worked approximately 45 to 50 hours per week.
- 4 The applicant gave evidence that the respondents had wanted him to work at Oscars for some time. He said there were several meetings with Mr Morgan, the principal of the respondents. A meeting took place where Mr Morgan offered the applicant a position at the respondents as the restaurant manager of Oscars. He said they agreed on a salary of \$1,200 net per week with other conditions as agreed, being those "standard" for the hospitality industry. They were four weeks' annual leave, two days off per week, staff meals and two weeks' notice to be given on either side.
- 5 The applicant testified that he agreed to make the move to the respondents because of the better salary. Whilst the applicant referred to an award as covering his employment, as the respondents are constitutional corporations, the relevant federal award is the Restaurant Industry Award 2010 (Cth). From its terms, it is doubtful that its scope extended to the applicant as the restaurant manager. In any event, I am satisfied that the salary paid to the applicant was very substantially more than that prescribed by the award and to that extent, the whole sum may be claimed as a contractual debt: *Jenny Roberts v Peter Groom trading as Country Stud Tavern* (1984) 64 WAIG 774; *Pamela Mason v Peter Dean Bastow* (1990) 70 WAIG 19. There is also no doubt that the Commission may enforce a contract of employment, as a denied contractual benefit, against a constitutional corporation or national system employer: *Klara Margarette Stylianou v Country Realty Pty Ltd as trustee for the Marcelli Family Trust* (2011) 91 WAIG 2029; *Christos Triantopoulos v Shell Company of Australia Ltd* (2011) 91 WAIG 67.
- 6 The applicant testified that in the first 18 months or so of his employment, he had to work to re-establish the restaurant. He said that this was because in the time prior to his employment, it had become somewhat run down. The applicant testified he worked hard to raise the profile of the restaurant in the local area, revamped the menu, the wine and beer list and changed the layout of the restaurant. The applicant said that over this period, he sometimes worked seven days per week and took no leave in the first year of his employment. In 2016 the applicant testified that he took one week off work to travel to Broome with his partner in August. Later, in November 2016, the applicant said he took a further weeks' leave to go to Margaret River in the Southwest of the State.
- 7 In terms of his taking annual leave, the applicant produced a document he said he obtained from the respondents, following a request for his employment records. This was a partial employment record. This document, tendered as exhibit A1 and entitled "Leave Register" was said by the applicant to be a false record, as it purported to show that the applicant had periods of leave when he was at work. This document purported to show that the applicant had taken six weeks' leave of one week's interval each, over the year and a half of his employment. As to its accuracy, the applicant referred to exhibit A1 which purported to record him taking one weeks' annual leave from 10 October 2016. However, the applicant testified that he was at work at the restaurant over that week. He said that he had a specific recollection of this week at work, because 11 October 2016, which was a Tuesday, was his birthday. The applicant testified that a friend, who also worked at the restaurant, Ms Woodward, came to visit him and brought him a present.
- 8 Additionally, in this respect, the applicant produced a work roster from the restaurant for the period Monday, 10 October 2016 to Sunday, 16 October 2016. This roster listed the staff working at the restaurant for this week. The name at the top of the list of names on the left-hand side was "Ash", which the applicant identified as his name. The roster showed that the applicant was at work for Monday to Friday and Sunday of that week. This is the same week that the respondents' "Leave Register", recorded that the applicant took one week's leave.
- 9 Ms Woodward, also gave evidence. She confirmed that she did go to the restaurant on 11 October 2016 at about 3pm in the afternoon. Ms Woodward testified that she took a plant with her, as a present for the applicant as it was his birthday. She gave it to him. Ms Woodward testified that she told the applicant that he should have had the day off and not be working on his birthday. Ms Woodward also said that she recalled that the applicant did take some leave to go to Broome in August 2016, which she recalled because that was the month of her birthday. She also recalled that the applicant did take a trip to Margaret River before the summer, when the restaurant got very busy. Ms Woodward thought that this was in about November 2016.

She also thought that the applicant may have gone to Melbourne for a couple of days, on his rostered days off, after working two to three weeks straight, seven days each week.

- 10 As to the circumstances of the termination of his employment, the applicant testified that he received a message from other staff at the restaurant that his name was not on the roster for the working week commencing Monday, 13 December 2016. The applicant testified that he telephoned Mr Morgan to discuss the matter. They met on Monday, 13 December in the morning. The applicant was due to work from Tuesday that week. He said that he asked Mr Morgan why he was not on the roster for the week. Mr Morgan complained about the takings in the restaurant and that they were down, over the prior weekend. The applicant said he informed Mr Morgan that the reason for this and the lower than normal level of takings, was that customers used "Entertainment Book" vouchers. The applicant told Mr Morgan that he could check the till for himself as the records were there.
- 11 According to the applicant, Mr Morgan told him that he did not believe this and the upshot of the conversation was that the applicant was told that he was "not working here anymore". The applicant also testified that Mr Morgan told him that he would not pay him for his accrued annual leave because it did not carry over from one year to the next. Also, the respondents would not pay him for any period of notice. The applicant confirmed that he left the respondents' employment on that day and was not paid any further money for annual leave accrued or for pay in lieu of notice. This is despite his requests that he be so paid.
- 12 Whilst Mr Morgan did not give evidence nor call any other evidence, he did put to the applicant that a reason for his loss of employment was the overall impact of the economy on the restaurant's performance. Another matter raised by Mr Morgan was that the applicant on some occasions, requested Mr Morgan to leave the restaurant because he got in the way. The applicant agreed that he did do this sometimes, but explained why. He testified that before starting his employment as the restaurant manager, he and Mr Morgan agreed that Mr Morgan would not come on to the premises at busy times and would leave it to him to get on with managing the operation. The applicant also said that Mr Morgan announced to staff that he was retiring and that the applicant would "look after everything". Despite this, the applicant testified that Mr Morgan would come to the restaurant on a busy Saturday night, and stand at the bar. The applicant said he did ask Mr Morgan to at least sit at a small table outside or away from the bar, so as not to get in the way of staff.

Consideration

- 13 As noted, the respondents did not call any evidence to contradict the evidence of the applicant. To this extent, unless I find the applicant's evidence to be inherently incredible, which I do not, the Commission is bound to accept it. Also, in relation to the annual leave claim, the applicant's evidence was supported by the evidence of Ms Woodward. Further, the applicant's evidence as to the timing of his taking of leave was also consistent with the respondents' own work roster record, tendered into evidence. I do not accept as an accurate record, the respondents' purported "Leave Register" document. Where it was inconsistent with the oral and documentary evidence adduced by the applicant, without hesitation, I prefer the applicant's evidence.
- 14 As to the applicant's claim for four weeks' annual leave, I am satisfied on the evidence and I find that the applicant took two weeks' annual leave during his employment. The applicant was employed for just over 18 months. It was a term of the applicant's employment that he be provided with four weeks' annual leave per annum. There was no dispute that the applicant's terms of employment were also subject to what he described as "standard" conditions for the hospitality industry. It is well established that under both statutory and minimum conditions of employment, both State and federal, and awards applicable to the hospitality industry, that annual leave accrues on a pro rata basis and the value of any untaken leave is to be paid on the lawful termination of an employee's employment, unless the employee is dismissed for misconduct. I am not to any extent persuaded that grounds for the latter, the burden being on the respondents to establish it, existed in this case.
- 15 Unlike s 5 of the *Minimum Conditions of Employment Act 1993* (WA), the National Employment Standards under the *Fair Work Act 2009* (Cth) are not implied into all contracts of employment. However, given that the accrual and paying out of annual leave should be regarded now as a notoriously well-known condition of employment, I am prepared to imply it as a term of the applicant's contract in this case. I am prepared to do so as a matter of law, on the basis that it is a term consistent with fairness and justice, as a feature of employment contracts generally.
- 16 Alternatively, I would be prepared to imply the term as a matter of fact, in accordance with the well-known principles discussed in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at 376. Such a term would be clearly reasonable and equitable; it would be regarded as necessary to give business efficacy to the contract; it would be so obvious as to go without saying; it would be capable of clear expression; and it would not be inconsistent with any express term of the contract.
- 17 In relation to the pay in lieu of notice claim, the applicant is entitled to be compensated for his loss of two weeks' pay, that being the period of notice he should have been given. Alternatively, given my findings as to the terms of the employment being based on "standard hospitality industry" terms, it is strongly arguable that payment in lieu of notice, would have applied as a term of employment in any event.

Conclusion

- 18 In the circumstance of this case, I am satisfied that the applicant has established that he is entitled to be paid four weeks' annual leave accrued but not taken, at his agreed rate of salary of \$1,200 net per week. I am also satisfied that the applicant was entitled to be paid, but was denied, a contractual benefit by way of two weeks' pay, in terms of notice denied by the respondents. The contractual benefits denied are in the total sum of \$7,200 net. The Commission will order accordingly.
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2017 WAIRC 00904

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ASHLEY DUDDINGTON	APPLICANT
	-v- MORGAN AND MANSOUR FAMILY TRUST AND MORGAN FAMILY TRUST ABN 31 378 377 138	
		RESPONDENTS
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	THURSDAY, 26 OCTOBER 2017	
FILE NO/S	B 56 OF 2017	
CITATION NO.	2017 WAIRC 00904	

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr N Morgan

Order

HAVING heard the applicant on his own behalf and Mr N Morgan on behalf of the respondents the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the name of the respondents be amended by deleting the name “Morgan and Mansour Family Trust and Morgan Family Trust ABN 31 378 377 138” and inserting in lieu thereof the name “Mario and Clara Enterprises Pty Ltd and Morgan Trading Pty Ltd”.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00905

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ASHLEY DUDDINGTON	APPLICANT
	-v- MARIO AND CLARA ENTERPRISES PTY LTD AND MORGAN TRADING PTY LTD	
		RESPONDENTS
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	THURSDAY, 26 OCTOBER 2017	
FILE NO/S	B 56 OF 2017	
CITATION NO.	2017 WAIRC 00905	

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr N Morgan

Declaration and Order

HAVING heard the applicant on his own behalf and Mr N Morgan on behalf of the respondents the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

- (1) DECLARES that the respondents have denied to the applicant contractual benefits by failing to pay to the applicant two weeks' salary and four weeks' annual leave accrued but not taken on the termination of the applicant's employment.
- (2) ORDERS the respondents pay to the applicant as denied contractual benefits the sum of \$7,200 net.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.**2017 WAIRC 00924****WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2017 WAIRC 00924
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : FRIDAY, 3 NOVEMBER 2017
DELIVERED : FRIDAY, 3 NOVEMBER 2017
FILE NO. : U 112 OF 2017
BETWEEN : TRENT GRAHAM
 Applicant
 AND
 DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
 Respondent

Catchwords : *Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal - Whether it would be unfair not to accept the application out of time - Principles applied - Commission not persuaded that the applicant was dismissed, to attract the Commission's jurisdiction - Appeal dismissed*

Legislation : *Industrial Relations Act 1979 (WA)*

Result : Application dismissed

Representation:

Counsel:

Applicant : In person

Respondent : Ms S Young

Case(s) referred to in reasons:*Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298**Malik -v- Paul Albert, Director General, Department of Education of Western Australia (2004) 84 WAIG 683**Reasons for Decision**Ex Tempore*

- 1 This application U 112 of 2017 as brought by the applicant, alleges that on or about 9 January 2017 he was harshly, oppressively and unfairly dismissed by the respondent, the Director General, the Department of Education.
- 2 It now emerges from what is before the Commission that the applicant was employed based on a fixed term contract between the parties, to run from approximately 15 August 2016 through to and including 29 January 2017.
- 3 A copy of that fixed term contract is exhibit R1 before the Commission. This was signed by the applicant Mr Graham on 8 August 2016 and provided for his limited term appointment as a teacher at Churchlands Senior High School. The terms of that contract were in my view, manifestly clear. It was provided that the commencement and termination dates would be 15 August 2016 through to 29 January 2017. Also, important to note are cls 12 and 14 of the contract. Clause 12 provided that the "employment will cease at the close of business on the expiry date as contained in paragraph 4 without further notice from this office". Secondly, paragraph 14 provided that "this offer of fixed term employment in no way implies the expectation or otherwise of continued employment beyond the period described and there is no obligation upon either party to enter into a further contract of employment".

- 4 The notice of application alleging unfair dismissal was filed in this Commission on 6 September 2017, which obviously, is many months after the termination of employment, indeed in excess of seven months it would appear.
 - 5 The applicant maintains in his submissions to the Commission that he feels aggrieved as to the conduct of the respondent in a number of respects. Firstly, and most importantly it seems, was his complaint that as a result of certain allegations made against him in the workplace, he has received what is described as a “red flag” on his personnel file, to the effect he not be re-employed by the respondent in another teaching position. There were further allegations made by the applicant against the principal of Churchlands Senior High School and others, in connection with these matters.
 - 6 The applicant informed the Commission that these issues had been ongoing during the course of this year. The Commission understands the applicant’s sense of grievance however, he accepts also that his employment was subject to a fixed term contract and it was not in dispute that the terms of exhibit R1, set out the terms of his contract with his employer at the material time.
 - 7 There is some issue as to the circumstances of the final weeks of the applicant’s employment. It was maintained by the applicant that he was directed to leave the workplace for a period of time prior to the expiry of the contract. That is disputed by the respondent. The respondent maintains that the applicant was, in any event, paid for the remainder of his contract through accrued leave entitlements and “student leave” pay. This is the custom and practice of the respondent in relation to contracts of this kind. This was not seriously contested by the applicant in this matter.
 - 8 The relevant principles in relation to an extension of time are well known. They are set out in the decision of the Industrial Appeal Court in *Malik -v- Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683. A copy of that decision has been provided to the parties for the purposes of these proceedings.
 - 9 Suffice to say that the Commission does have a broad discretion under s 29(3) of the Act to determine whether it would be unfair to not accept an application of this kind out of time. The relevant considerations are set out in the judgements of the members of the Court. I refer to the observations of EM Heenan J at pars 73 and 74 of his judgement. His Honour refers to the relevant principles set out in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298. EM Heenan J at par 73, refers to the notion of unfairness in extension of time applications and his Honour said as follows:

Hence, unfairness must involve, as a minimum at least, the Commission being satisfied that some prospect of success would be denied to the applicant if he could not pursue his late claim. If there is some prospect of success to be lost by denying an extension of time, it would then become necessary to evaluate the position having regard to the length of the delay, its effects upon the respondent and the public interest in the due expedition and finalisation within an acceptable period of legal and industrial processes. Fairness, in this sphere, has a legislative starting point in the choice by Parliament that 28 days is a sufficient period in the public interest for the commencement of such a claim. The longer the delay the more difficult it will be to show unfairness, but even in instances of long delay there may be particular circumstances which reveal that it would be unfair not to accept a late referral.
 - 10 It is well established in this jurisdiction in relation to unfair dismissal claims brought under s 29(1)(b)(i) of the Act, that the establishment in fact and law of a dismissal, is a jurisdictional prerequisite to matters of this kind having any prospect of success. From the material before me in this case, I simply cannot be persuaded that it has been established that the applicant was dismissed, to attract the Commission’s jurisdiction.
 - 11 The relevant contract set out in exhibit R1 which the applicant does not challenge, makes it very clear that the contract of employment between the parties was to end and did end on 29 January 2017. Furthermore, that the fixed term contract did not imply any expectation or otherwise, any obligation, on either party to enter into a further contract of employment.
 - 12 I am aware that the applicant has had an extensive history of service on various short term and fixed term contracts. That is set out in exhibit R2. Those contracts first commenced in July 2003 and continued up until the final contract with Churchlands Senior High School. However, those contracts were interspersed on some occasions, by lengthy breaks for periods of study and other reasons. But despite this, the terms of exhibit R1, that is the final contract, were clear. Neither party as a matter of law, could have any expectation of ongoing employment after the expiry of the final contract of employment on 29 January 2017.
 - 13 It seems to me from all of what is before the Commission, that the applicant’s real grievance in this matter is what has occurred after the cessation of his employment contract, arising from the allegations made against him in the workplace and the “red flagging” of his employment record. That issue seemed to me to loom large amongst the applicant’s grievances. However, that and those other matters, are not issues that can be dealt with in the context of an unfair dismissal proceeding. Those issues must be dealt with separately under other avenues provided by the Act. The Commission has suggested to the applicant in the hearing, that he seek some advice in relation to those issues.
 - 14 Having considered all the material and having regard to the very extensive delay, which is now over seven months since the contract of employment came to an end, even if it could be established that the applicant was dismissed, I simply cannot conclude in the circumstances of this case, that it would be unfair not to extend the time to accept the application.
 - 15 I intend to dismiss the application.
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2017 WAIRC 00923

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
TRENT GRAHAM **APPLICANT**

-v-
NEIL HUNT, PRINCIPAL
CHURCHLANDS SHS **RESPONDENT**

CORAM SENIOR COMMISSIONER S J KENNER
DATE WEDNESDAY, 8 NOVEMBER 2017
FILE NO/S U 112 OF 2017
CITATION NO. 2017 WAIRC 00923

Result Order issued
Representation
Applicant In person
Respondent Ms S Young

Order

HAVING heard the applicant on his own behalf and Ms S Young on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the name of the respondent be amended by deleting the name “Neil Hunt, Principal Churchlands SHS” and inserting in lieu thereof the name “Director General, Department of Education”.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.**2017 WAIRC 00925**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
TRENT GRAHAM **APPLICANT**

-v-
DIRECTOR GENERAL, DEPARTMENT OF EDUCATION **RESPONDENT**

CORAM SENIOR COMMISSIONER S J KENNER
DATE WEDNESDAY, 8 NOVEMBER 2017
FILE NO/S U 112 OF 2017
CITATION NO. 2017 WAIRC 00925

Result Application dismissed
Representation
Applicant In person
Respondent Mr S Young

Order

HAVING heard the applicant on his own behalf and Ms S Young on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00968
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : MONDAY, 2 OCTOBER 2017
DELIVERED : WEDNESDAY, 29 NOVEMBER 2017
FILE NO. : U 93 OF 2017
BETWEEN : KENNETH DANIEL KELLY
 Applicant
 AND
 GREAT SOUTHERN EMPLOYMENT DEVELOPMENT SERVICE COMMITTEE
 INCORPORATED
 Respondent

Catchwords : *Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal - Whether the Commission has jurisdiction - Whether respondent is a trading corporation - Principles applied - Jurisdiction found*

Legislation : *Industrial Relations Act 1979 (WA)*
Fair Work Act 2009 (Cth)
Associations Incorporation Act 1997 (WA)
Associations Incorporation Act 2015 (WA)

Result : Jurisdiction found

Representation:

Applicant : In person
 Respondent : Mr S Edwards as agent and with him Mr R Tozer of counsel
 Solicitors:
 Respondent : Gilchrist Connell

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2] [2008] WASCA 254; (2008) 89 WAIG 243
Bankstown Handicapped Children's Centre Association Inc v Hillman [2010] FCAFC 11; (2010) 182 FCR 483
United Firefighters Union of Australia v Country Fire Authority [2015] FCAFC 1; (2015) 228 FLR 497

Case(s) also cited:

Application by Ms Marie Pasalskyj [2015] FWC 7309
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail (2015) CLR 171
Edmonds v Telethon Speech & Hearing Centre for Children WA (INC) [2014] FWC 1037
Fair Work Ombudsman v Priority Matters Pty Ltd [2017] FCA 833
Fowler v Syd West Personnel Ltd (1998) 44 AILR 3-386
Heather Boyd and Ross Theedom v Shire of Yalgoo [2016] FWC 2190
Lim v Trade & Investment Queensland [2016] FWCFB 6615
Phillip Digney v The Black Cockatoo Preservation Society of Australia (2014) WAIRC 01285
R v Federal Court of Australia; Ex parte WA National Football League ("Western Australia Football case") [1979] HCA 6; (1979) 143 CLR 190
Re E v Australian Red Cross Society; Australian Red Cross Society New South Wales Division and Central Sydney Area Health Service [1991] FCA 20
Re Ku-ring-gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134

Reasons for Decision

- 1 The issue of whether a corporation is a trading corporation is one of impression and judgment, having regard to a range of factors. On the decided cases, no one factor is conclusive and there is no 'bright line' of delineation: *Bankstown Handicapped Children's Centre Association Inc v Hillman* [2010] FCAFC 11; (2010) 182 FCR 483).

- 2 In this matter, which involves a claim by the applicant that he was unfairly dismissed by the respondent, the respondent maintains that it is a national system employer for the purposes of the *Fair Work Act 2009* (Cth) and therefore this Commission lacks jurisdiction to hear the applicant's claim. As this matter has been raised by the respondent, it is incumbent on the Commission to determine the issue prior to enquiring into and dealing with the substance of the applicant's claim.
- 3 Relevant principles in relation to the determination of whether a corporation is a trading corporation, were discussed and set out in the decision of the Industrial Appeal Court in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* [2008] WASCA 254; (2008) 89 WAIG 243. In this case, in holding that the ALS in Western Australia was not a trading corporation, Steytler P (Pullin J agreeing) summarised the law as follows at par 68:

The more relevant (for present purposes) principles that might be drawn from these and other cases are as follows:

- (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* (239); *State Superannuation Board* (303 - 304); *Tasmanian Dam case* (156, 240, 293); *Quickenden* [49] - [51], [101]; *Hardeman* [18].
 - (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* (208, 234, 239); *State Superannuation Board* (303 - 304); *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10, 20; *Fencott* (622); *Tasmanian Dam case* (156, 240, 293); *Mid Density* (584); *Hardeman* [22].
 - (3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* (139, 159 - 160); *Adamson* (235); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 184 - 185, 203; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330; *Quickenden* [101].
 - (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* (539, 563, 569); *Ku-ring-gai* (140, 167); *Adamson* (219); *E* (343, 345); *Pellow* [28].
 - (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* (543, 569); *Ku-ring-gai* (160); *State Superannuation Board* (304 - 306); *E* (343). Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': *St George County Council* (543) (Barwick CJ); *Tasmanian Dam case* (156) (Mason J).
 - (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: *Adamson* (234) (Mason J); *State Superannuation Board* (304); *Fencott* (589); *Quickenden* [52], [101]; *Mid Density* (584).
 - (7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* (294 - 295, 304 - 305); *Fencott* (588 - 589, 602, 611, 622 - 624); *Hughes* (20); *Quickenden* [101]; *E* (344); *Hardeman* [18].
 - (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* (209, 211); *Ku-ring-gai* (139, 142, 160, 167); *Bevanere* (330); *Hughes* (19 - 20); *E* (343); *Fowler*; *Hardeman* [26].
- 4 The decision of the Court in *ALS* has been cited with approval in superior appellate court decisions (see for example *United Firefighters Union of Australia v Country Fire Authority* [2015] FCAFC 1; (2015) 228 FLR 497; *Bankstown*).
- 5 The issue of whether the respondent is a trading corporation, as with consideration of whether the *ALS* was also so characterised, requires consideration of the respondent's Constitution and rules; its day-to-day activities, the nature of its funding and the arrangements with the Commonwealth for the provision of its services. I will deal with each of these issues in turn.

Constitution and rules

- 6 The respondent is incorporated under the *Associations Incorporation Act 1987* (now the *Associations Incorporation Act 2015*) (WA). Rule 3 of the Constitution sets out the objects of the respondent. It is in the following terms:
- (1) The objects of the Association are-
 - (a) To facilitate the development of employment opportunities.
 - (b) To collect relevant strategic information to assist in making informed decisions about the allocation of resources to meet identified needs.
 - (c) To design, develop and implement employment and skills' development initiatives for the benefit of the community.
 - (d) To network and engage cooperatively with stakeholders and in particular with those based in regional communities.
 - (e) To inform government policy through evidence based research.
 - (f) To address social inclusion including but not limited to intergenerational poverty and Indigenous social and economic exclusion that pose as barriers to employment.
 - (2) The property and income of the Association shall be applied solely towards the promotion of the objects of the Association and no part of that property or income may be paid or otherwise distributed, directly or indirectly, to

members, except in good faith in the promotion of those objects. This rule does not prevent the investment or acquisition of assets in order to further the Objects of the Association as detailed in rule 4.

- 7 In rule 4, dealing with the powers of the respondent, it is provided that the respondent may 'do all things necessary or convenient for carrying out its objects and purposes'. Specific powers set out in this rule include the power for the respondent to enter into any contract that the respondent considers necessary or desirable.
- 8 By rule 5, dealing with membership, membership of the respondent is open to not for profit agencies, including those from local, state and federal government; education, training and employment services, the employer and industry sector and the community sector.
- 9 Under rule 25, if the respondent is wound up or dissolved, any property remaining, after the discharge of debts and liabilities, is not to be distributed to members. It is to be transferred to another not for profit association incorporated under the AI Act, with similar objects to the respondent.

The activities of the respondent

- 10 The activities of the respondent were set out in the evidence of Ms Price, its chief executive officer. Ms Price has been in the position of CEO of the respondent since 2015.
- 11 The respondent is registered with the Australian Charities and Not-for-profits Commission. Ms Price outlined that the respondent replied to a request for tender by the Commonwealth Department of Employment for the provision of services to address long term unemployment of young people aged 15 to 24. Ms Price said that the Commonwealth did not specify the services required, but left it for tenderers to develop proposals. She prepared the respondent's proposal which was called the "Young Harvest", costed it and submitted it. The tender was prepared in accordance with a document prepared by the Department of Employment called "Grant Guidelines". The respondent's tender contained a budget prepared by Ms Price, as was required. The tender process was national and according to Ms Price, some 1000 tenders were lodged. There were 19 successful applicants, including the respondent, which was informed of the success of its grant in March 2016. To undertake the proposal, the respondent employs a staff of 11 FTE's and some casual staff. Prior to winning the tender, Ms Price described the respondent being in a form of "hiatus", which I understood to mean it was largely inactive.
- 12 Ms Price testified that the primary, indeed the only document to establish the funding arrangements between the respondent and the Commonwealth, is the "Empowering Youth Initiatives Round 1 2016-2018" funding agreement. This document, a copy of which was annexure JMP1 to Ms Price's witness statement, set out, in detail, the terms of the provision of services by the respondent to the Commonwealth. The Commonwealth funding provided to the respondent under the Agreement is the sum of \$1,363,000 over a two-year period to June 2018. The funding is provided by the Commonwealth in instalments, based on the submission of interim reports and the achievement of "milestones" by the respondent, as specified in the Agreement. The first payment, being 40% of the total funding provided by the Commonwealth, was, according to Ms Price, used to set up the Young Harvest program. Procedurally under the Agreement, the respondent is required to submit an invoice for the payment of each instalment of Commonwealth funding, once the Commonwealth is satisfied that the respondent has met its obligations under the Agreement. The respondent is registered for GST purposes. Participants in the programs run by the respondent, do not pay for services provided to them. The bulk of the respondent's revenue comes from the Agreement.
- 13 As a part of its Young Harvest project, Ms Price said that the respondent has also set up initiatives to assist youth to find employment opportunities. One of these is the setting up of a bee-keeping activity, where participants are trained in the skills of an apiarist. Once the beehives are established, the harvest of honey is marketed to and sold to local businesses. Another venture set up is to grow garlic, process it and sell it into the local market also. A small amount of income is derived from these enterprises, represented as "other income" in the respondent's Income and Expenditure Statement.
- 14 Under the terms of the Agreement, the respondent is to deliver four programs to a target of 215 participants. The four programs are the Social Enterprise Interventions Programme; the Intensive Development Programme ("Way With Words"); the Youth Focus Forum; and the Great Southern Institute of Technology. The bee-keeping and garlic growing enterprises operate under the Social Enterprise Interventions Programme.
- 15 Ms Price testified that the funding for the respondent under the Agreement, comprised approximately 60% of its income for the 2016-17 financial year. She said that such funding is essential for the respondent's survival. The respondent pays approximately \$23,000 per annum to rent premises. The respondent also charges a "contract management fee", which was a part of its budget submission to the Commonwealth in its tender. Ms Price described this money as used to help the respondent survive in between funding agreements, and to assist in the delivery of other services. This fee was \$46,400 for 2016 and \$102,803 for 2017. Ms Price's evidence was that this fee normally comprises about 12% of the value of any funding agreement.
- 16 In addition to commercial rental costs and the payment of wages and salaries to staff, the respondent also incurs promotion and marketing expenses which Ms Price said was spent by the organisation on marketing and "re-branding" itself. Promotion activities for the EYI projects are paid for separately to the Agreement funding. It is also part of the arrangement with the Commonwealth, that the respondent collect data as part of a research report to be submitted to the Commonwealth on the completion of the Agreement. This is in order that evidence based research may be provided to the Commonwealth, in relation to the effectiveness of the various EYI programs.
- 17 In terms of other activities, Ms Price referred to working with other organisations from time to time, to assist them in seeking funding for an activity. The respondent then receives a fee, via a separate arrangement with that other organisation, for the assistance provided by the respondent.
- 18 Annexed to Ms Price's witness statement were various financial documents. The Special Purpose Financial Report for the year to 30 June 2017 was included in annexure JMP5. The income and expenditure of the respondent over this period was as follows:

GREAT SOUTHERN EMPLOYMENT DEVELOPMENT COMMITTEE INC		
Income and Expenditure		
For Period 1 July 2016 to 30 June 2017		
	2017	2016
Income		
Government Grants	1,046,493	785,636
Interest	20,655	27,216
Other Income	8,907	0
Contract Management Fee	102,803	46,400
Total Income	1,178,858	859,252
Expenses		
Employee Expenses	842,694	332,685
Operating Expenses	56,061	54,257
Committee Expenses	12,543	1,591
Office Expenses	57,123	26,812
Vehicle Expenses	44,365	15,315
Workshops/Seminar/Meetings	31	2,008
Promotion and Marketing	11,297	21,327
Project Expenses	358,079	565,748
Total Expenses	1,382,193	1,019,743
Operating Surplus/(Shortfall)	-203,335	-160,491

19 The respondent's Balance Sheet for the same period is as follows:

GREAT SOUTHERN EMPLOYMENT DEVELOPMENT COMMITTEE INC		
Balance Sheet		
As At 30 June 2017		
	2017	2016
Assets		
<u>Bank Accounts</u>		
Bendigo Bank Cheque Account	9,114	107,044
Bendigo EY Account	328,528	457,318
Bendigo Bank Term Deposit	786,990	898,822
Petty Cash	292	0
Total Bank Accounts	1,124,924	1,463,184
Sundry Debtors	80	185
Staff Debtor	623	0
Prepayments and Deposits	2,688	12,474
Inventory	13,976	0
<u>Fixed Assets</u>		
Motor Vehicle	122,447	90,222
Accum Dep Moto Vehicles	-37,721	-20,907
Office Equipment	56,709	66,895
Accum Dep Office Equipment	-18,622	-16,830
Fixture and Fittings	4,894	4,894
Accum Dep Fixture and Fittings	-489	0
Total Fixed Assets	127,218	124,274
Total Assets	1,269,509	1,600,117

GREAT SOUTHERN EMPLOYMENT DEVELOPMENT COMMITTEE INC		
Balance Sheet		
As At 30 June 2017		
	2017	2016
Liabilities		
Trade Creditors	10,339	12,216
Accrued Expenses	5,007	16,059
Credit Card	5,292	11,409
GST Liabilities	26,478	37,888
PAYG Payable	8,504	8,956
Superannuation Payable	7,932	
FBT Payable	1,308	5,791
Funding in Advance		
Empowering Youth Initiative	326,434	416,471
Indigenous Advancement Strategy	40,658	73,300
Youth Engagement	10,000	0
Total Funding in Advance	377,092	489,771
Provision for Annual Leave	22,606	9,741
Long Service Leave	0	0
Total Liabilities	464,558	591,831
Net Assets		
Equity		
Retained Earnings	1,008,286	1,168,777
Current Earnings	-203,335	-160,491
Total Equity	804,951	1,008,286

20 Ms Price also added in her evidence, that in its former iterations, the respondent derived most of its income from the Commonwealth Department of Employment.

Funding of the respondent - grant guidelines

- 21 The funding provided to the respondent by the Commonwealth was made in accordance with the “Grant Guidelines for Empowering Youth Initiatives Round 1”. The Guidelines are very detailed and set out the requirements for applicants seeking grant funding from the Commonwealth for EYI programs, as not for profit or non-government organisations. The EYI is described as part of the Commonwealth Government’s commitment to assisting young people at risk of long term unemployment and to improve the opportunities of young people to stay in employment. The funding for EYI is part of the Commonwealth Government 2015 – 16 budget commitments of \$55,000,000 to be available over four years. This funding is to establish the EYI, to assist young people at risk of long term unemployment and those experiencing entrenched disadvantage. These are all plainly social welfare objectives.
- 22 Under the Guidelines, three categories of grant funding are available. They are up to \$500,000; \$500,001-\$1,000,000; and \$1,000,001-\$2,000,000. There are specified funding priorities, by which preference is to be given to proposals to prevent unemployment or to reduce the risk of long term unemployment of young people, in the regions or amongst groups, including indigenous young people. Those organisations already providing employment services to the Commonwealth, are not eligible to apply for grant funding. An applicant for grant funding is required to submit a detailed proposal for consideration and for funding, in one or more of the funding categories set out above. A proposed budget for the project is to be concluded. That is, the applicants for funding devise their own proposed project, which is then evaluated by the Department.
- 23 In the sense outlined above, as confirmed in Ms Price’s evidence, the respondent did not tender for grant funding based on price. The successful tenders were selected based on the nature and merits of their proposed EYI projects, assessed against the objectives of the EYI programs, as set out in the Guidelines. The grant application made by the respondent, in the third category of funding, was based on its budgeted cost. Therefore, whilst the respondent emphasised that it obtained its grant funding from the Commonwealth by a competitive tender, the competitive element was the nature of the project itself, and not the tendered cost of providing the services. The cost to the Commonwealth, in terms of the delivery of the projects, is not one of the assessment criteria for grant funding, as set out in the Guidelines.

Funding of the respondent - EYI funding agreement

- 24 The Agreement with the Commonwealth is dated 1 June 2016. The term of the agreement is two years to June 2018. Under the heading “Context” it is provided that the Commonwealth administers the “Empowering YOUth Initiatives” with the stated aims to:

- a) help more young people at risk of long-term unemployment to find and keep a job;
 - b) identify innovative approaches that have the greatest potential to improve employment outcomes for young people at risk of long-term unemployment and prevent long-term welfare dependency; and
 - c) promote learnings from the Empowering YOUth Initiatives to assist government and organisations working with young people to enhance current and future service delivery.
- 25 It is then recorded that the respondent is “committed to helping achieve the Objectives of the Empowering YOUth Initiatives through Your Conduct of Your Initiative”. It is further provided in the context that “as a result of this commitment, We agree to support Your Initiative by providing the Funding to You, subject to the terms and conditions of this Agreement”.
- 26 Clause 2 Initiative obliges the respondent to carry out its Young Harvest Initiative in accordance with the objectives recorded in item A of Schedule 1 to the Agreement. This part of the Agreement repeats the objectives of the Commonwealth or EYI program and sets out the specific objects of the respondent’s initiative. These include providing youth in regional Australia with opportunities to participate in social enterprises to develop skills and experience; to support youth on their education and/or employment pathway through intensive individual case management and group development sessions, amongst other objectives.
- 27 Part A.2 of the Schedule specifies that 215 participants are to be involved in the respondent’s Young Harvest and a minimum number of those in certain specified and identified programs. The respondent is required to use its networks to promote the recruitment of participants into its programs. There are specified minimum numbers of hours of required involvement in each of the several programs.
- 28 In Part A 2.15 of the Schedule, are specified “milestones” to be achieved by the respondent. These include the submission of progress reports, data and information required to be provided to the Commonwealth, and progress towards the engagement of 215 participants in the respondent’s initiatives. A final report is to be provided at the end of the term of the Agreement.
- 29 Clause 3 and Part B of Schedule 1 deal with the payment of grant funding under the Agreement. Payment of funds to the respondent is dependent on the completion of the milestones set out in the Agreement. Of the total funding of \$1,363,000, \$545,200 was the initial payment. After six months and subject to the completion of milestones, a further payment was to be made of \$272,600. This same amount was payable a further six months later, again on the same terms. Following a further six months, the sum of \$204,450 is payable with a final payment of \$68,150. Invoices are required to be submitted for payment of the instalments of funds.
- 30 Under cl 3 also, the funding may only be spent on the respondent’s Initiative and tight controls are imposed on the respondent’s own budget that it submitted with its proposal. The Commonwealth can recover from the respondent funds not spent in accordance with the terms of the Agreement. Other provisions of the Agreement provide for extensive controls on staffing of the respondent; its use of subcontractors; the assets of the respondent and its intellectual property; provision is made for the auditing of the respondent’s performance; and access to the respondent’s premises and records. Additionally, the Commonwealth has the right to terminate the Agreement at any time or to reduce its scope. Furthermore, the respondent is not to be an employee, agent, partner or other officer of the Commonwealth and may not bind or exercise any authority to represent the Commonwealth.

Consideration

- 31 The objects of the respondent can be clearly viewed as having a social welfare focus. The promotion of employment opportunities, particularly in regional communities is of such character. Furthermore, the promotion of social inclusion, including overcoming inter-generational poverty and indigenous social and economic exclusion, are plainly such social welfare objectives. Having these objects does not, of course, mean that a corporation may not be a trading corporation.
- 32 Those objects are consistent with the relevant provisions of the Guidelines, referred to above, setting out the Commonwealth Government’s EYI program. That is, the Commonwealth’s objective in this respect, and the relevant objects of the respondent, are directed towards overcoming barriers to employment and the promotion of opportunities for employment for groups, in this case, young people. The fact that the objects of the respondent do not refer specifically to young people, does not limit the scope of activities that the respondent may be engaged in.
- 33 As with the *ALS* case, the property and income of the respondent, which in this case is mainly the grant funding from the Commonwealth, and presumably also, retained earnings from earlier funding agreements, is to be applied solely towards the attainment of the respondent’s objects. No property or income of the respondent may be applied for the benefit of any individual member of the respondent. The respondent does not seek to derive a profit from its activities and nor can it seek to do so under the AI Act. The only additional revenue sources for the respondent, other than from the Commonwealth grant funding, and the contract management fee, is a very small sum from the sale of some products to local businesses, arising from the social enterprise program. The contract management fee is something that was specified in the budget submitted to the Commonwealth in the respondent’s tender. It forms part of the respondent’s retained earnings, which have been built up over previous years. As mentioned above, this seems to be a source of funds to tide the respondent over between government funded programs.
- 34 As with the *ALS* case too, although the respondent did tender for the award of funding, the tender was not a competitive price based tender. There are separate funding ranges available. Bidders were to submit projects for one or more allocated grant funding ranges. Price was not a criterion for the selection of successful projects in the Guidelines. This stands in contrast to the circumstances for example, in *Bankstown*, where the Association in that case offered its services to the State Government agencies, at prices determined by it. The Government agencies were free to accept or reject the price for the services offered. As part of their consideration, the Government agencies had regard to prices charged by other organisations offering similar services in the marketplace: *Bankstown* at pars 33-37. That is not the case here. Furthermore, in some instances in *Bankstown*, the Association provided quotes for the provision of some services, for which invoices were sent: at par 41.

- 35 Importantly also in *Bankstown*, in concluding that the activities of the Association in that case were trading activities and had a commercial character, the Full Court noted the description of the relationship between the parties in the relevant contract. In the header agreement between the parties, the language used was that the Association was selling its services to the State and the State was purchasing them. This was in the important context of the parties negotiating on price, with the State having regard to the price of the provision of those same services by others in the marketplace. It was these aspects, along with the overall activities of the Association, that persuaded the Full Court as to its commercial character. There was also no obligation on the parties to buy and sell services to and from one another. If they did, the terms of the contract had application: pars 54-55. Also, the Association in *Bankstown* received a substantial amount in fees directly from users of some of its services, such as day care and other community services provided. That is not the case here. Participants are not required to financially contribute to the programs that they may ultimately be a beneficiary of. In that sense, the respondent gratuitously provides employment skills and assistance to youth at risk of long term unemployment.
- 36 In this case, the position is more like the situation applying in *ALS*. Here, as confirmed by Ms Price, the respondent is reliant on the Commonwealth grant for its survival. The grant funding is provided on the terms determined by the Commonwealth, as set out in the Guidelines and the Agreement. There was nothing before the Commission to support the conclusion that the Agreement resulted from commercial negotiations between the respondent and the Commonwealth. Apart from the provision of the grant funding by the Commonwealth, most of the obligations under the Agreement are imposed on the respondent. These matters specifically relate to the details of the programs to be conducted by the respondent, the objectives to be achieved by them, and reporting, data research and other detailed compliance obligations. In this case, it seems that the intent and scope of the obligations imposed on the respondent in the Agreement, reflected the intent and purposes of the Commonwealth set out in the Guidelines, in return for which, the grant funding is provided by the Commonwealth.
- 37 Whilst it is the case that the respondent rents premises and employs staff etc, so did the *ALS*. The *ALS*, at least in 2005, had a significant funding budget of some \$23,000,000. Many organisations need to be run professionally and structure themselves accordingly to do so. In my opinion, this is not an indicia of trading activity per se. Similarly, too, the spending of money on the marketing of an organisation does not, of itself, indicate trading. Some government agencies promote themselves and their missions, in this way.
- 38 As to the contract management fee, on the evidence, this is a sum of money normally derived as a percentage of the government grant or other funding provided to the respondent. This sum of money was not received for any independent trading activities of the respondent, by way of the sale of goods or services. Rather, it seemed to be a loading or additional payment, made by the Commonwealth to the respondent, as a function of receiving the grant funding itself. Without the receipt of the grant, the fee would not be paid. This money seems to have accumulated over the years and is accounted as retained earnings in the respondent's balance sheet. But for the grant from the Commonwealth in this case, the fee would not exist. In my view, this fee cannot be characterised as revenue resulting from any independent trading activity.
- 39 As to what Ms Price referred to as other fees paid to the respondent to assist other organisations to obtain funding, this was not identified in the income and expenditure statements. It may well be that there was no such revenue for 2016 and 2017. From the income expenditure statement, despite what Ms Price mentioned in her evidence, it appears that the Commonwealth grant funding represented nearly 89% of the respondent's income for 2017 and approximately 91.5% for 2016. This excludes the contract management fee of \$102,803 for 2017 and \$46,400 for 2016. The "other" 2016 income, which was said by Ms Price to be from the sale of honey and garlic from the social enterprises program was \$8,907 for 2017 and there was no income from this source for 2016. This was an insignificant sum as a proportion of the organisation's overall revenue. The respondent earned interest of \$20,655 in 2017 and \$27,216 in 2016. It was not clear whether the interest figure is simply bank interest, or resulted from other investment activities of the respondent. Given the funds in bank accounts, I assume it is the former.
- 40 As noted, I have considered the Commonwealth grant funding exclusive of the contract management fee. If one was to include the fee as a payment by the Commonwealth, contingent upon the payment of the grant funding, then the total Commonwealth payments to the respondent are approximately 97.5% of its total income for 2017 and 96.8% of its total income for 2016.
- 41 It is not any one of these various characteristics, that defines the character of the respondent's operations. Whether a corporation is a trading corporation is a question of impression and judgement. In this case, when one compares the activities of the respondent and its funding arrangements, to cases such as *Bankstown* for example, there are stark differences. Looking at the factors together, and not in isolation, I am not able to conclude that the activities of the respondent have a commercial character, to constitute the respondent as a trading corporation. It provides a social welfare service, by way of support for young people at risk of long term unemployment, for the Commonwealth. It does so in accordance with programs it has developed under the Guidelines, reflecting Commonwealth government policy and in accordance with a detailed agreement, specifying how the social policy objective is to be delivered. This activity reflects the bulk of the respondent's activities and revenue source. There are no other activities engaged in by the respondent that could be characterised as substantial or significant independent trading activities.

Conclusions

- 42 Therefore, in view of the foregoing, I consider that the Commission has jurisdiction to hear the applicant's claim. A declaration will be made accordingly.
-

2017 WAIRC 00973

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	KENNETH DANIEL KELLY	
	-v-	
	GREAT SOUTHERN EMPLOYMENT DEVELOPMENT SERVICE COMMITTEE INCORPORATED	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 1 DECEMBER 2017	
FILE NO.	U 93 OF 2017	
CITATION NO.	2017 WAIRC 00973	

Result	Jurisdiction found
Representation	
Applicant	In person
Respondent	Ms S Edwards as agent and with him Mr R Tozer of counsel

Declaration

HAVING heard the applicant on his own behalf and Mr S Edwards as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby declares –

THAT the Commission has jurisdiction to enquire into and deal with the herein application.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00371

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	PRASHANT KOTHARI	
	-v-	
	THIVAAGARA MURTHY AND KANAGA SOLAMUTHU	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 28 JUNE 2017	
FILE NO.	B 62 OF 2017	
CITATION NO.	2017 WAIRC 00371	

Result	Direction issued
Representation	
Applicant	In person
Respondent	Ms K Solamuthu

Direction

HAVING heard Mr P Kothari on his own behalf and Ms K Solamuthu on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

THAT the respondent do file and serve a notice of answer and counter proposal with full particulars in answer to the herein application by no later than 19 July 2017.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00755

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	PRASHANT KOTHARI	
	-v-	
	THIVAAGARA MURTHY AND KANAGA SOLAMUTHU	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 25 AUGUST 2017	
FILE NO/S	B 62 OF 2017	
CITATION NO.	2017 WAIRC 00755	

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance required

Order

HAVING heard the applicant on his own behalf and Ms K Solamuthu on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the applicant be and is hereby granted leave to appear by video link subject to the venue being approved by the Commission.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00768

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	PRASHANT KOTHARI	
	-v-	
	THIVAAGARA MURTHY AND KANAGA SOLAMUTHU	RESPONDENTS
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	THURSDAY, 31 AUGUST 2017	
FILE NO/S	B 62 OF 2017	
CITATION NO.	2017 WAIRC 00768	

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms K Solamuthu

Order

HAVING heard the applicant on his own behalf and Ms K Solamuthu on behalf of the respondents the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders -

THAT the name of the respondents be amended by deleting the name "Thivaagara Murthy and Kanaga Solamuthu" and inserting in lieu thereof the name "Thivaagara Murthy Ponnampalam and Kanaga Malar Solamuthu".

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00853

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PRASHANT KOTHARI

APPLICANT

-v-

THIVAAGARA MURTHY PONNAMPALAM AND KANAGA MALAR SOLAMUTHU

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE THURSDAY, 5 OCTOBER 2017
FILE NO/S B 62 OF 2017
CITATION NO. 2017 WAIRC 00853

Result Order issued
Representation
Applicant In person
Respondent Ms K Solamuthu

Order

HAVING heard the applicant on his own behalf and Ms K Solamuthu on behalf of the respondents the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the name of the respondents be amended by deleting the name “Thivaagara Murthy Ponnampalam and Kanaga Malar Solamuthu” and inserting in lieu thereof the name “Holy Holdings Pty Ltd”.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00854

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PRASHANT KOTHARI

APPLICANT

-v-

HOLY HOLDINGS PTY LTD

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE THURSDAY, 5 OCTOBER 2017
FILE NO/S B 62 OF 2017
CITATION NO. 2017 WAIRC 00854

Result Order issued
Representation
Applicant In person
Respondent Ms K Solamuthu

Order

WHEREAS the respondent is being wound up in insolvency pursuant to the *Corporations Act 2001* (Cth);
AND WHEREAS pursuant to s 471B of the *Corporations Act 2001* (Cth) proceedings cannot be commenced or proceeded with against a company while it is being wound up in insolvency, except with leave of the Court;
NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby orders –

THAT subject to further order of the Commission this application be and is hereby stayed.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00941

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	PRASHANT KOTHARI	APPLICANT
	-v-	
	HOLY HOLDINGS PTY LTD	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 15 NOVEMBER 2017	
FILE NO/S	B 62 OF 2017	
CITATION NO.	2017 WAIRC 00941	
Result	Discontinued by leave	
Representation		
Applicant	In person	
Respondent	Ms K Solamuthu	

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00104

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	EMILY MACKINTOSH	APPLICANT
	-v-	
	BELL CHARTERED ACCOUNTANTS	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	TUESDAY, 13 FEBRUARY 2018	
FILE NO/S	U 157 OF 2017	
CITATION NO.	2018 WAIRC 00104	
Result	Application dismissed	

Order

1. 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 13 December 2017.
2. The Commission convened a conciliation conference on 31 January 2018. At the conference on 31 January 2018, the parties reached agreement to resolve the matter. In accordance with that agreement, on 9 February 2018, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*.

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.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2018 WAIRC 00050

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GARY MITCHUM STEVENS

APPLICANT

-v-
WASTE STEAM MANAGEMENT
ABN 79 637 108 704

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT
DATE MONDAY, 22 JANUARY 2018
FILE NO/S U 103 OF 2017
CITATION NO. 2018 WAIRC 00050

Result Application dismissed

Order

1. This matter is a claim of unfair dismissal referred to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* on 15 August 2017.
2. On 1 December 2017, by telephone, the applicant advised that he believes the respondent is a trading corporation. On 12 December 2017, by telephone, the applicant advised that he would pursue his claim in the Fair Work Commission, and that he would confirm this in writing.
3. On 2 January 2018, the Commission wrote to the applicant noting that he indicated he intended to pursue his application in the Fair Work Commission, and requesting that he provide a status update on the matter by 4.30 pm on Wednesday, 17 January 2018. The Commission said that it intended to issue an order dismissing the application if nothing was heard from the applicant.
4. By 19 January 2018, the Commission had received no further correspondence from the applicant.

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.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2018 WAIRC 00043

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
DENNIS VALENTA

APPLICANT

-v-
KONDININ SHIRE

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE MONDAY, 15 JANUARY 2018
FILE NO/S U 36 OF 2017
CITATION NO. 2018 WAIRC 00043

Result Discontinued by leave

Representation

Applicant In person

Respondent Mr A Sinanovic of counsel

Order

HAVING heard the applicant on his own behalf and Mr A Sinanovic of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Adin Robert Jones	D&L Lintels David Mikaere	U 78/2016	Commissioner D J Matthews	Discontinued
Anthony Michael Hines	North Metropolitan Tafe	U 158/2017	Commissioner D J Matthews	Discontinued
Brett Allan Marks	Andrew Green	U 135/2016	Commissioner D J Matthews	Discontinued
Cheryl Harman	Owners of Warren River Resort SP36329 T/A Warren River Resort	U 116/2017	Commissioner D J Matthews	Discontinued
Christopher Holt	Paupiyala Tjarutja Aboriginal Corporation	U 168/2016	Commissioner T Emmanuel	Discontinued
Corey Moore	Department of Agriculture and Food	U 6/2017	Commissioner T Emmanuel	Discontinued
Dr Barry Jones	Child and Adolescent Health Service	U 173/2016	Commissioner T Emmanuel	Discontinued
Emma Kate MchHugh	The Morgan Family Trust, trading as Mulberry Tree Childcare and Kindy ABN 8282 4632520	U 143/2017	Commissioner T Emmanuel	Discontinued
Gavin John Currie	Avon Youth Community and Family Services	U 108/2017	Commissioner D J Matthews	Discontinued
Huiqiao (Alison) Fu	Christopher Branchi	U 125/2017	Commissioner T Emmanuel	Discontinued
Janice Hope Page	Enviromental Forest Farm Managment	B 70/2016	Commissioner D J Matthews	Discontinued
John Stephen Bates	Team Roof - C.O Donnell	B 139/2017	Senior Commissioner S J Kenner	Discontinued
Kaine Frunks	The Department of Corrective Services	U 187/2016	Commissioner D J Matthews	Discontinued
Karl Howard	LTT Group Pty Ltd	B 178/2016	Commissioner T Emmanuel	Discontinued
Kenneth Daniel Kelly	Great Southern Employment Development Service Committee Incorporated	U 93/2017	Senior Commissioner S J Kenner	Discontinued
Krisanda Elizabeth Chappell	The Trustee for Simpson Family Trust Miracle Recreation Equipment	U 131/2017	Senior Commissioner S J Kenner	Discontinued
Michelle Webb	West Greenwood Primary School Parents and Citizens' Association Incorporated	U 161/2016	Commissioner D J Matthews	Consent
Mr Pascal Blampain	Mr Michael Fotios (Director of Eastern Goldfields)	B 142/2017	Commissioner T Emmanuel	Discontinued
Stuart John Graham	Eastern Goldfields Ltd	B 152/2017	Commissioner T Emmanuel	Discontinued
Susan Margaret Wiener	Iona Presentation College	B 195/2016	Commissioner T Emmanuel	Discontinued
Tanya Glamuzina	Lachlan McIntosh - Onterran	B 104/2017	Senior Commissioner S J Kenner	Discontinued
Trevor Harman	Owners of Warren River Resort SP36329 T/A Warren River Resort	U 117/2017	Commissioner D J Matthews	Discontinued
Victoria Amey	Carers Association of Western Australia Incorporated	U 133/2017	Senior Commissioner S J Kenner	Discontinued
Victoria Amey	Carers Association of Western Australia Incorporated	B 133/2017	Senior Commissioner S J Kenner	Discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Civil Service Association of Western Australia Incorporated	Commissioner of Police in his capacity as the employing authority	Emmanuel C	PSAC 4/2017	16/01/2017 10/03/2017	Dispute re procedural fairness	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	Director General of Health as delegate of The Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the WA Country Health Service	Emmanuel C	PSAC 10/2016	15/06/2016 01/08/2016	Dispute re employment status	Discontinued
Health Services Union of Western Australia (Union of Workers)	Director General of Health as delegate of The Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the WA Country Health Service	Emmanuel C	PSAC 10/2015	23/04/2015 07/05/2015 28/05/2015	Dispute re criteria progression	Discontinued
The Civil Service Association of Western Australia	Lisa Harvey, Deputy Premier and Minister for Training and Workforce Development and Director General, Department for Training and Workforce Development, Central Institute of Technology, Challenger Institute of Technology	Emmanuel C	PSAC 4/2016	16/03/2016 23/03/2016 07/04/2016 20/04/2016 18/05/2016	Dispute re change proposals	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Corrective Services	Emmanuel C	PSAC 3/2017	16/01/2017	Dispute re alleged suspected breach of discipline	Discontinued
The Civil Service Association of Western Australia Incorporated	Commissioner of Main Roads Western Australia	Emmanuel C	PSACR 30/2015	11/08/2016 18/10/2016	Dispute re alleged breach of discipline	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Communities	Matthews C	PSAC 17/2017	02/08/2017	Dispute re union member's shift roster	Discontinued
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Sandstone	Matthews C	C 30/2017	N/A	Dispute re reduction of salary of union member	Discontinued
Western Australian Police Union of Workers	Commissioner of Police	Kenner SC	PSACR 15/2017	N/A	Dispute re clause 32 of Western Australia Police Industrial Agreement 2003	Discontinued
Western Australian Police Union of Workers	Commissioner of Police	Kenner SC	PSAC 15/2017	09/08/2017	Dispute re clause 32 of Western Australia Police Industrial Agreement 2003	Referred
Western Australian Police Union of Workers	Commissioner of Police Western Australia Police	Emmanuel C	PSAC 1/2017	10/01/2017 18/01/2017	Dispute re employment status	Discontinued

CORRECTIONS—

2018 WAIRC 00103

SHIRE OF KONDININ MUNICIPAL COLLECTIVE ENTERPRISE AGREEMENT 2017

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES	APPLICANT
	-v- SHIRE OF KONDININ	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	TUESDAY, 13 FEBRUARY 2018	
FILE NO.	AG 15 OF 2017	
CITATION NO.	2018 WAIRC 00103	

Result	Correction made
Representation (by correspondence)	
Applicant	Mr G Upham
Respondent	Mr J Read

Corrigendum

WHEREAS on 20 December 2017, 2017 WAIRC 01022 was deposited in the Office of the Registrar; and

WHEREAS the Commission was informed there was an error in the document;

WHEREAS all parties have in writing agreed the error was made;

NOW THEREFORE I, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby substitute the words

“*Shire of Kondinin Municipal Collective Enterprise Agreement 2014*” for the words “*Shire of Kondinin Municipal Collective Enterprise Agreement 2011*” in 2017 WAIRC 01022.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00052

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

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MARIO GEORGIOU	APPELLANT
	-v- THE COMMISSIONER OF POLICE	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 24 JANUARY 2018	
FILE NO.	APPL 4 OF 2017	
CITATION NO.	2018 WAIRC 00052	

Result	Direction and Order issued
Representation	
Appellant	No appearance
Respondent	Mr N van Hattem of counsel

Direction and Order

1. The WAIRC listed this matter for mention on 24 January 2018, for the appellant to show good reason why his appeal should proceed in circumstances where he had not complied with directions issued on 11 October 2017 ([2017] WAIRC 00863), which required him to comply with regulation 92 of the *Industrial Relations Commission Regulations 2005* by 2 January 2018, and to apply for any further extension of time by 21 December 2017.
2. On 23 January 2018, the appellant emailed the WAIRC requesting a further extension of time to file a regulation 92 bundle. The appellant told the WAIRC that he intended to appear at the hearing. However, at the hearing, there was no appearance for or on behalf of the appellant.
3. At the hearing, the Commissioner of Police indicated that he did not oppose a further extension of one week for the appellant to file a regulation 92 bundle.

Having taken account of all of the circumstances, the WAIRC is of the opinion that a further extension of time ought to be granted for one week for the appellant to comply with regulation 92 of the *Industrial Relations Commission Regulations 2005*. However, should the appellant not comply with this direction, the WAIRC is of the opinion that the appellant should be taken to have withdrawn his appeal and will order accordingly without further notice.

Therefore, the WAIRC –

1. DIRECTS THAT the appellant is to comply with regulation 92 of the *Industrial Relations Commission Regulations 2005* by no later than **4.30 pm on Wednesday, 31 January 2018**.
2. ORDERS THAT if the appellant does not comply with regulation 92 by 4.30 pm on Wednesday, 31 January 2018, the appeal be, and is thereby taken to have been withdrawn.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.]

For and On behalf of the Western Australian Industrial Relations Commission.

2018 WAIRC 00087

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MARIO GEORGIU

APPELLANT

-v-

THE COMMISSIONER OF POLICE

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER
COMMISSIONER T EMMANUEL

DATE

WEDNESDAY, 7 FEBRUARY 2018

FILE NO/S

APPL 4 OF 2017

CITATION NO.

2018 WAIRC 00087

Result Direction and order issued

Representation

Appellant The appellant on his own behalf

Respondent Mr T Pontre of counsel

Directions and Order

1. Mr Georgiou appeals to the Western Australian Industrial Relations Commission (the WAIRC) against his removal as a police officer.
2. According to regulation 92 of the *Industrial Relations Commission Regulations 2005*, an appellant is required to file documents relating to their appeal (the Regulation 92 documents). In Mr Georgiou's case, he was due to file by 1 March 2017.
3. Mr Georgiou has been granted six formal extensions of time and then been given a further week in which to comply with regulation 92. His requested extensions of time have been for a range of reasons, including ill health and difficult personal circumstances. However, his reasons for seeking extensions of time, for failing to comply with times in which to request an extension of time and for failing to attend two previous interlocutory hearings have included:
 - (a) not receiving emails due to not having paid his Optus bill;
 - (b) that he has not received notifications sent by post;
 - (c) that he did not read the terms of a direction properly; and

- (d) that there was heavy traffic in the city due to a car accident and difficulty finding parking.
4. The WAIRC issued a direction on 24 January 2018, after Mr Georgiou failed to comply with the previous directions or to seek an extension of time or to attend the hearing that day. It provided that he was to comply with regulation 92 by 4.30 pm on Wednesday, 31 January 2018, and an order that if he did not comply by that time, then the appeal would be taken to have been discontinued.
 5. At 4.25 pm on 31 January 2018, Mr Georgiou attended the Registry with a bundle of documents. The bundle contained no identifying number or parties' name, nor any indication of what the documents were. Normally, such a bundle of documents would not be received for filing. However, the Registry Officer was familiar with Mr Georgiou and his appeal, and his documents were received.
 6. Mr Georgiou has advised that this bundle is only part of his Regulation 92 documents and therefore he has not complied with the direction issued.
 7. Later on 31 January 2018, Mr Georgiou sent an email requesting a further extension of time to file the remainder of the documents. The reason for filing only part of the bundle was that his printer had run out of ink.
 8. The WAIRC notes that at least one of the documents appears to be new evidence or a submission, not a document in compliance with regulation 92.
 9. The WAIRC convened on Wednesday, 7 February 2018 for the purpose of considering the future of the appeal in light of Mr Georgiou's history of failure to comply with the regulations and directions issued to him.
 10. The hearing was convened. However, Mr Georgiou was not present. After a few minutes, his daughter advised that he was stuck in traffic. The hearing was adjourned to enable Mr Georgiou to attend.
 11. When Mr Georgiou attended the hearing, he commented about his personal circumstances, including that he is suffering from depression and that this affects his ability to meet timeframes. He also produced a medical certificate from his doctor which records only his unfitness for work for a specified period. However, Mr Georgiou also commented that he could provide a report from his doctor or psychiatrist, but did not want the Commissioner of Police to know the details of his condition.
 12. Taking account of all of the circumstances, the WAIRC has decided that Mr Georgiou ought to provide to it a report from his psychiatrist as to his fitness to pursue his appeal. Should Mr Georgiou fail to provide the report as required, within the timeframe required, then the appeal will be treated as being discontinued without further notice.

Therefore, the WAIRC, having heard from Mr M Georgiou on his own behalf and Mr T Pontre of counsel for the Commissioner of Police, pursuant to the power conferred under the *Industrial Relations Act 1979* and the *Police Act 1892*, hereby –

DIRECTS –

1. THAT the appellant is to obtain a report from his treating psychiatrist as to whether he is fit to pursue his appeal.
2. THAT if the appellant's treating psychiatrist is of the opinion that the appellant is presently not fit to pursue his appeal, the treating psychiatrist's report should include an opinion as to whether and when the appellant is likely to be fit to pursue his appeal.
3. THAT the appellant is to provide a copy of the report of his treating psychiatrist to the WAIRC no later than **4.30 pm on Thursday, 8 March 2018**.
4. THAT the appellant need not provide a copy of the report from his treating psychiatrist to the respondent.

ORDERS –

5. THAT if the appellant does not comply with Directions 1 to 3 above by **4.30 pm on Thursday, 8 March 2018**, the appeal will be taken to have been discontinued without further notice.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.]

For and On behalf of the Western Australian Industrial Relations Commission.

2018 WAIRC 00041

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ADIB ABDENNABI

APPLICANT

-v-

THE COMMISSIONER OF POLICE
WA POLICE

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER
COMMISSIONER D J MATTHEWS

DATE

FRIDAY, 12 JANUARY 2018

FILE NO/S

APPL 42 OF 2016

CITATION NO.

2018 WAIRC 00041

Result	Appeal adjourned
Representation	(by correspondence)
Applicant	Mr R Yates of counsel
Respondent	Mr N Barron of counsel

Order

This is an appeal filed on 13 July 2016 pursuant to s 33P of the *Police Act 1892* against a decision by the Commissioner of Police to take removal action.

On 30 June 2017, the WAIRC issued an order ([2017] WAIRC 00379; (2017) 97 WAIG 963) adjourning the appellant's appeal for six months and that the Commissioner of Police need not comply with regulation 91 of the *Industrial Relations Commission Regulations 2005* until further order.

On 9 January 2018, the appellant wrote to the WAIRC requesting a further adjournment of six months. The appellant attached evidence that the Commissioner of Police does not object to the further adjournment.

Having considered the circumstances of this matter and in accordance with s 33T(6) of the *Police Act 1892*, the WAIRC will grant a further adjournment as it is in the interests of justice to do so. The WAIRC is also of the opinion that it is appropriate that the Commissioner of Police not be required to file documents in relation to the appeal at this stage.

Accordingly, the WAIRC hereby orders –

1. THAT the orders issued on Friday, 30 June 2017 in this appeal ([2017] WAIRC 00379) cease to have effect on and from the date of this Order.
2. THAT the hearing of the appeal be adjourned until 10 July 2018.
3. THAT the appeal be listed for mention at 10.30 am on 10 July 2018.
4. THAT compliance with regulation 91 of the *Industrial Relations Commission Regulations 2005* by the Commissioner of Police need not occur until further order.
5. THAT either party may apply to vary the terms of this order.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

2018 WAIRC 00110

THE SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH, PHARMACY GUILD OF WESTERN AUSTRALIA ORGANISATION OF EMPLOYERS

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE WEDNESDAY, 14 FEBRUARY 2018
FILE NO. APPL 86 OF 2017
CITATION NO. 2018 WAIRC 00110

Result	Direction issued
Representation	
Applicant	Mr D Rafferty
Respondent	Mr N Tindley (of counsel)
Intervenor	Mr Drake-Brockman (as agent)

Direction

HAVING heard Mr D Rafferty on behalf of the applicant, Mr N Tindley (of counsel) on behalf of the respondent and Mr A Drake-Brockman (as agent) on behalf of the intervenor, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the applicant file and serve an amended notice of application by 23 February 2018;
2. THAT the intervenor file and serve a notice of answer by 9 March 2018;
3. THAT the respondent file and serve an amended notice of answer, if any, by 9 March 2018;
4. THAT the parties file a statement of agreed facts and bundle of agreed documents by 4 May 2018;
5. THAT the applicant file and serve outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 1 June 2018;
6. THAT the respondent and intervenor each file and serve outlines of evidence and documents, other than the agreed documents, on which they intend to rely by 29 June 2018;
7. THAT the applicant file and serve written submissions by 27 July 2018;
8. THAT the respondent and intervenor file written submissions by 24 August 2018;
9. THAT this matter be listed for hearing after 7 September 2018.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2017 WAIRC 00899

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TANYA GLAMUZINA

APPLICANT

-v-

PIVOT WAY PTY LTD

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER

DATE WEDNESDAY, 25 OCTOBER 2017

FILE NO/S B 104 OF 2017

CITATION NO. 2017 WAIRC 00899

Result Order issued

Representation

Applicant In person

Respondent Mr D White of counsel

Order

HAVING heard the applicant on her own behalf and Mr D White of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders –

THAT the name of the respondent be amended by deleting the name “Lachlan McIntosh – Onterran” and inserting in lieu thereof the name “Pivot Way Pty Ltd”.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2018 WAIRC 00089

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	GEORGE TILBURY	
	-and-	
	WESTERN AUSTRALIAN POLICE UNION OF WORKERS	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
DATE	FRIDAY, 9 FEBRUARY 2018	
FILE NO/S	PRES 1 OF 2018	
CITATION NO.	2018 WAIRC 00089	

Result Order made

Appearances

Applicant Mr P Hunt, as agent

Respondent Mr P Hunt

Order

WHEREAS an interim order was made on 19 May 2015, wherein Order 1 of the interim order established an Interim Board of Directors pending the making of an application to the Full Bench for a declaration pursuant to s 71 of the *Industrial Relations Act 1979*: [2015] WAIRC 00390; (2015) 95 WAIG 708;

AND WHEREAS Order 8 of the interim order provided that there be liberty to the parties to apply to vary the terms of the order;

AND WHEREAS Order 9 of the interim order provided that unless the operative effect of the order is varied, the order ceases to have effect on 20 May 2016;

AND WHEREAS on 11 June 2015, Order 1 of the interim order was amended to add two additional Directors to the Interim Board of Directors: [2015] WAIRC 00436; (2015) 95 WAIG 710;

AND WHEREAS on 23 October 2015, following the results for contested and uncontested offices of offices of the respondent's counterpart Federal body, the Police Federation of Australia – Western Australia Police Branch (PFA Branch) on 7 October 2015 and 16 October 2015, Order 1 of the interim order was re-amended to substitute the names of the holders of the Interim Board of Directors to take effect on and from 24 November 2015: [2015] WAIRC 00957; (2015) 95 WAIG 1689;

AND WHEREAS no application was made by the parties to vary Order 9 of the interim order prior to 20 May 2016;

AND WHEREAS on 20 May 2016, the interim order establishing an Interim Board of Directors ceased to have effect;

AND WHEREAS I am satisfied that the parties to the interim order acted under an honest but mistaken belief that the Interim Board of Directors continued to be constituted in accordance with the terms of the interim order after the interim order ceased to have effect;

AND WHEREAS I am satisfied that an Interim Board of Directors should be re-established until the Full Bench has heard and determined the respondent's application in FBM 1 of 2018 for a declaration which, if successful, will enable the respondent to obtain a s 71 certificate enabling the officers of the PFA Branch to be the officers of the respondent.

This matter having come on for hearing before me on Thursday, 8 February 2018, and having heard Mr P Hunt on behalf of the applicant and the respondent, pursuant to the powers conferred under the *Industrial Relations Act*, by consent, I hereby order that until further order –

1. An Interim Board of Directors is established constituted as follows:

1. President
George Bradley Tilbury
2. Senior Vice President
Brandon Chad Shortland
3. Vice President
Harry Sean Arnott
4. Treasurer
Michael Craig Kelly
5. Metropolitan Region Director
Ward Adamson

6. Metropolitan Region Director
Lindsay Bryan Garratt
 7. Metropolitan Region Director
Mark Wayne Johnson
 8. Metropolitan Region Director
Anntoinette Cashmore
 9. Metropolitan Region Director
Kevin McDonald
 10. Metropolitan Region Director
Peter McGee
 11. Metropolitan Region Director
Peter John Potthoff
 12. Metropolitan Region Director
Harry Anthony Russell
 13. Central (Midwest/Gascoyne) Region Director
Michael Robert Gill
 14. East (Goldfields/Esperance) Region Director
David Harold Wright Curtis
 15. North (Kimberley/Pilbara) Region Director
Michael Joseph Henderson
2. The definitions of 'Board', 'Director', 'President', 'Senior Vice President', 'Vice President' and 'Treasurer' in r 3 of the rules of the Western Australian Police Union of Workers (the rules) shall be interpreted as the Board, offices and officers holding office in the Interim Board of Directors.
 3. Save and except for r 6.1(a), r 6.1(b) and r 6.1(j), r 6.1 is waived.
 4. Rule 6.2(a) and r 6.2(b) of the rules are waived.
 5. Rule 6.3 of the rules is waived.
 6. Rule 12 of the rules is waived.
 7. The Interim Board of Directors shall have the authority to exercise all of the powers, duties and functions of the Board of Directors and each of the members of the Interim Board of Directors shall have the authority to exercise all of the powers, duties and functions of the office held by each of them.
 8. There be liberty to the parties to apply to vary the terms of this order.
 9. Unless the operative effect of this order is varied, this order ceases to have effect from the date on which a certificate is issued by the Registrar pursuant to s 71(5) of the *Industrial Relations Act* or on 8 July 2018, whichever date comes first.
 10. The application be otherwise adjourned sine die.

[L.S.]

(Sgd.) J H SMITH,
Acting President.

2018 WAIRC 00064

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MRS KATHLEEN POSKITT AND OTHERS

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN
HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES
ACT 1927 AS THE EMPLOYER**RESPONDENT****CORAM**

COMMISSIONER T EMMANUEL

DATE

FRIDAY, 2 FEBRUARY 2018

FILE NO.

PSA 94-97 OF 2013

CITATION NO.

2018 WAIRC 00064

Result Direction issued
Representation (by correspondence)
Applicant Mr C Studsor (as agent)
Respondent Mr J Ross (as agent)

Direction

HAVING heard Mr C Studsor (as agent) on behalf of the applicant and Mr J Ross (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 23 February 2018.
2. THAT the applicant file and serve a written statement of facts on which the applicant relies and witness statements by 9 March 2018.
3. THAT the respondent file and serve a written statement of facts on which the respondent relies and witness statements by 23 March 2018.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2017 WAIRC 00806

DISPUTE RE CLAUSE 32 OF WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

APPLICANT

-v-

COMMISSIONER OF POLICE

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE MONDAY, 18 SEPTEMBER 2017
FILE NO. PSACR 15 OF 2017
CITATION NO. 2017 WAIRC 00806

Result Direction issued
Representation
Applicant Mr R Yates of counsel
Respondent Ms D Hopkinson

Direction

HAVING heard Mr R Yates of counsel on behalf of the applicant and Ms D Hopkinson on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* and by consent, hereby directs –

- (1) THAT the respondent do file and serve a notice of answer with full particulars in answer to the herein application by no later than 25 September 2017.
- (2) THAT each party shall give an informal discovery by serving its list of documents by no later than 2 October 2017.
- (3) THAT inspection of documents shall be completed by 9 October 2017.
- (4) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker.
- (5) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than seven days prior to the date of hearing.
- (6) THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than three days prior to the date of hearing.
- (7) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.
- (8) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2018 WAIRC 00063

DISPUTE RE UNION MEMBER'S EMPLOYMENT STATUS
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED

PARTIES**APPLICANT**

-v-

THE EAST METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE FRIDAY, 2 FEBRUARY 2018
FILE NO. PSACR 16 OF 2017
CITATION NO. 2018 WAIRC 00063

Result Direction issued
Representation (by correspondence)
Applicant Ms Josephine Auerbach
Respondent Mr David Anderson (of counsel)

Direction

HAVING heard Ms J Auerbach on behalf of the applicant and Mr D Anderson (of counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the respondent file and serve outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 8 February 2018.
2. THAT the applicant file and serve written submissions by 21 February 2018.
3. THAT the respondent file and serve written submissions by 7 March 2018.
4. THAT this matter remain listed for a two-day hearing on 20 and 21 March 2018.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2018 WAIRC 00091

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MICHAEL MIROSEVICH

PARTIES**APPLICANT**

-v-

EAST METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE FRIDAY, 9 FEBRUARY 2018
FILE NO. U 111 OF 2017
CITATION NO. 2018 WAIRC 00091

Result Direction issued
Representation (by correspondence)
Applicant Ms K Jones (of counsel)
Respondent Mr P Heslewood (as agent)

Direction

HAVING heard Ms K Jones (of counsel) on behalf of the applicant and Mr P Heslewood (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the respondent file and serve written submissions about jurisdiction by 14 February 2018.
2. THAT the applicant file and serve written submissions about jurisdiction by 6 March 2018.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Botanic Gardens and Parks Authority (Operations) General Agreement 2018 AG 5/2018	02/14/2018	Botanic Gardens and Parks Authority	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Commissioner D J Matthews	Agreement registered
Dental Health Services - Dental Officers - CSA Industrial Agreement 2017 PSAAG 3/2017	02/09/2018	North Metropolitan Health Service	Civil Service Association	Commissioner T Emmanuel	Order issued
Disability Services Commission - United Voice - Disability Support Workers Industrial Agreement 2017 AG 4/2018	02/14/2018	The Director General of the Disability Services Commission	United Voice WA	Commissioner D J Matthews	Agreement registered
Identitywa Administrative/ Professional Staff Certified Agreement 2017 AG 13/2017	02/09/2018	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Identitywa	Commissioner D J Matthews	Agreement registered
Insurance Commission of Western Australia (Government Officers) CSA General Agreement 2017 PSAAG 9/2017	01/24/2018	Insurance Commission of Western Australia, The Civil Service Association of Western Australia Incorporated	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Perth Theatre Trust Venues Management Agreement 2018 AG 3/2018	02/01/2018	General Manager, Perth Theatre Trust	Media, Entertainment and Arts Alliance	Senior Commissioner S J Kenner	Agreement registered
Shire of Harvey (Meat Inspectors) Union Collective Agreement 2017 AG 1/2018	01/18/2018	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Harvey	Commissioner D J Matthews	Agreement registered
Shire of Harvey Leschenault Leisure Centre Enterprise Agreement 2017 AG 2/2018	02/14/2018	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Harvey	Commissioner D J Matthews	Agreement registered
Shire of Yalgoo Employees Comprehensive Enterprise Agreement 2017 - The AG 18/2017	12/22/2017	Shire of Yalgoo	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth (LGRCEU)	Commissioner D J Matthews	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2017 WAIRC 00303

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 10 APRIL 2017

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR OWEN DOUGLAS DEAS	APPLICANT
	-v- DIRECTOR GENERAL, DEPARTMENT OF THE ATTORNEY GENERAL	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN MR G RICHARDS - BOARD MEMBER MR N CINQUINA - BOARD MEMBER	
DATE	TUESDAY, 30 MAY 2017	
FILE NO.	PSAB 6 OF 2017	
CITATION NO.	2017 WAIRC 00303	

Result	Directions issued by consent
Representation	
Applicant	Ms K Hagan of counsel
Respondent	Mr R Andretich of counsel

Directions

HAVING heard Ms K Hagan of counsel on behalf of the appellant and Mr R Andretich of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and by consent, hereby directs –

- (1) THAT each party shall give informal discovery by serving its list of documents by 7 June 2017.
- (2) THAT evidence in chief in this matter be adduced by signed witness statements which will stand as evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Appeal Board.
- (3) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely by no later than 30 June 2017 and any documents referred to in the statements should be attached.
- (4) THAT the appeal be listed for hearing for four days on dates to be fixed.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner,
On behalf of the Public Service Appeal Board.

2018 WAIRC 00042

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 10 APRIL 2017

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR OWEN DOUGLAS DEAS	APPELLANT
	-v- DIRECTOR GENERAL, DEPARTMENT OF THE ATTORNEY GENERAL	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN MR G RICHARDS - BOARD MEMBER MR N CINQUINA - BOARD MEMBER	
DATE	MONDAY, 15 JANUARY 2018	
FILE NO	PSAB 6 OF 2017	
CITATION NO.	2018 WAIRC 00042	

Result	Discontinued by leave
Representation	
Appellant	Ms J Moore of counsel
Respondent	Ms S Teoh of counsel

Order

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

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Senior Commissioner,
On behalf of the Public Service Appeal Board.

[L.S.]

2018 WAIRC 00055

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 9 OCTOBER 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MR ANDREW JOHN MOSELEY

APPELLANT

-v-

COMMISSIONER, WESTERN AUSTRALIA POLICE FORCE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MS B CONWAY - BOARD MEMBER
MS E McADAM - BOARD MEMBER

DATE

THURSDAY, 25 JANUARY 2018

FILE NO

PSAB 22 OF 2017

CITATION NO.

2018 WAIRC 00055

Result	Discontinued by leave
Representation	
Appellant	Ms A Wallish as agent
Respondent	Mr D Anderson of counsel

Order

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

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Senior Commissioner,
On behalf of the Public Service Appeal Board.

[L.S.]

2017 WAIRC 00929

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 6 JULY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2017 WAIRC 00929
CORAM	:	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER- CHAIRMAN MR G SUTHERLAND - BOARD MEMBER MS S KANNIS - BOARD MEMBER
HEARD	:	WEDNESDAY, 1 NOVEMBER 2017
DELIVERED	:	THURSDAY, 9 NOVEMBER 2017
FILE NO.	:	PSAB 19 OF 2017
BETWEEN	:	JUDY SETHI Appellant AND DEPARTMENT OF FINANCE, BUILDING MANAGEMENT & WORKS Respondent

Catchwords	:	<i>Industrial Law (WA) - Public Service Appeal Board - Termination of employment - Harsh, oppressive or unfair dismissal - Whether application should be accepted out of time - Principles applied - Appeal dismissed</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA)</i> <i>Industrial Relations Commission Regulations 2005 (WA)</i> <i>Public Sector Management Act 1994 (WA)</i>
Result	:	Appeal dismissed
Representation:		
Counsel:		
Appellant	:	In person
Respondent	:	Mr R Andretich of counsel and with him Ms D Krestelica
Solicitors:		
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:*Michael Christian Nicholas v Department Education and Training* [2008] WAIRC 01645; (2009) 89 WAIG 817*State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169*Reasons for Decision*

- 1 The appellant maintains that she was unfairly dismissed from her employment by the respondent on or about 7 July 2017. The termination of the appellant's employment followed the institution of substandard performance procedures by the respondent, under the *Public Sector Management Act 1994* (WA). In support of her appeal, the appellant made several allegations as grounds for her appeal, including "unfair dismissal, bullying harassment after nearly 10 years of service". The appellant further maintained that following some restructuring in 2015, she was assigned a higher level of work than should have been performed by a Level 3 officer and she was set unrealistic deadlines and "targeted" by her supervisor.
- 2 The appellant, in terms of the relief sought, maintained in her appeal that "I want them to offer me the redundancy for 10 years of service". At the time of the institution of the appeal, which was outside the 21 day time limit prescribed by reg 107(2) of the *Industrial Relations Commission Regulations 2005* (WA), the appellant was and remains working in local government, in accordance with an earlier agreement with the respondent, that she be granted leave without pay until March 2018.
- 3 As the appeal is out of time, the Appeal Board listed the appeal for hearing as to whether it would exercise its discretion to extend the time for the filing of the appeal. After hearing from the parties, the Appeal Board declined to extend the time for filing the appeal, with reasons to be published. These are our reasons.

Relevant principles

- 4 The relevant principles in relation to matters such as this are not controversial. In *Michael Christian Nicholas v Department Education and Training* [2008] WAIRC 01645; (2009) 89 WAIG 817, the Appeal Board set out applicable principles in relation to the exercise of discretion to extend the time in which such an appeal may be brought. At pars 10–14 the Appeal Board observed as follows:

10. The jurisdiction and power to grant an extension of time for the institution of an appeal is a discretionary decision. In extensions of time applications generally, courts and tribunals are to consider the justice of the particular case in terms of the relative prejudice to the parties. The onus is on the appellant to establish that the discretion should be exercised in his or her favour. Generally, some consideration of the merits of the appeal is to be undertaken.
11. Whilst the representatives of the appellant and respondent made some reference to relevant principles for extensions of time in unfair dismissal proceedings before the Commission pursuant to s 29(3) of the Act, as considered in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, it is important to observe that that case turned substantially upon the particular statutory framework prescribed under s 29 of the Act and in particular s 29(3), which provides that “*The Commission may except (sic) a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so*”.
12. Whilst the principles in *Malik* may be of some assistance in the present context, a more apposite approach in our view, given the range of different decisions from which persons may commence appeal proceedings under s 80I of the Act, and where the exercise of the statutory power to extend any prescribed time by s 27(1)(n) of the Act is under consideration, is that applicable to extensions of time to appeal and institute proceedings generally.
13. In *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, the Full Court of the Supreme Court of Western Australia considered general principles applicable to extensions of time for the institution appeals against primary decisions. In that case, Kennedy J at 198, considered that four relevant factors to take into account include the length of the delay, reasons for the delay, whether the appellant has an arguable case and any prejudice to the respondent.
14. In *Chan v The Nurses Board of Western Australia* [2007] WASCCA 123, the Court of Appeal (WA) considered and applied the principles discussed in *Esther Investments*. In particular, in relation to consideration of the relevant principles, Buss JA observed at pars 12-14 as follows:

“Application for an extension of time: principles

[12] *In Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, Kennedy J said, at 198:

In Palata Investments Ltd v Burt & Sinfield Ltd [1985] 1 WLR 942 at 946; [1985] 2 All ER 517 at 520, the Court of Appeal accepted that, in relation to an application for an extension of time for appealing, there are four major factors to be considered in the exercise of the discretion which is conferred upon the court. They are, first, the length of the delay, secondly, the reasons for the delay, thirdly, whether there is an arguable case and, fourthly, the extent of any prejudice to the respondent. There may in a particular case be additional factors, but I accept that the foregoing are the major factors in the present case.

[13] Where the failure to appeal within time is attributable to the act or default of the applicant's solicitor (and not the applicant), that is a material consideration in the exercise of the Court's discretion. See *Esther Investments per Kennedy J* at 199 and per Rowland J at 204.

[14] *In Gallo v Dawson* (1990) 64 ALJR 458, McHugh J examined the applicable principles in relation to an application to extend time to appeal to the High Court. The relevant provision in the rules of the High Court empowered the Court to extend time upon such terms “as the justice of the case may require”. His Honour said, at 459:

The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the court or Justice to do justice between the parties: see Hughes v National Trustees Executors & Agency Co of Australasia Ltd [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 92; *Jess v Scott* (1986) 12 FCR 187 at 194–195. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872; *Hughes* (at 263–264); *Mitchelson v Mitchelson* (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has ‘a vested right to retain the judgment’ unless the application is granted: *Vilenius v Heinagar* (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice. As the Judicial Committee of the Privy Council pointed out in *Ratnam v Cumarasamy* [1965] 1 WLR 8 at 12; [1964] 3 All ER 933 at 935:

The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.

Also see Jackamarra v Krakouer (1998) 195 CLR 516. “

- 5 We adopt and apply those principles for the purposes of considering the present matter.
- 6 The respondent neither consented to nor opposed the extension of time, leaving the matter for the Appeal Board to determine.

Length of the delay

- 7 The appellant’s employment was terminated effective on 7 July 2017. Therefore, her notice of appeal was required to be filed by no later than 29 July 2017. The notice of appeal was filed on 13 September 2017, thus making the appeal some 46 days out of time. Whilst the period of delay is not inordinate, it is substantial.

Reason for the delay

- 8 The appellant explained that even before the termination of her employment, she had sought advice from the Public Sector Commission and other bodies, about events in her workplace. This contact appeared, from what we were informed by the appellant, to have also continued after the termination of the appellant’s employment. The appellant also informed the Appeal Board that she corresponded with the “Minister’s office” (which Minister was not clear) and it was that correspondence which alerted her to the ability to challenge the termination of her employment by the commencement of an appeal to the Appeal Board. It was also not clear to us as to when the appellant became aware of this, as she informed the Appeal Board that she had emails and other documents, but did not produce them at the hearing.
- 9 It was apparent however, that at some point, not determined with any certainty, the appellant became aware of the 21 day time limit for the filing of an appeal. We note that the notice of appeal is signed and dated 28 August 2017, but despite this, the notice of appeal was still not filed until 13 September 2017. Based on these submissions of the appellant, given the fact that she was informed of her right to challenge the termination of her employment and became aware of the 21 day time limit for doing so, we considerate is open to infer, and we do infer, from what was put to us, that at the time of the signing and dating of the notice of appeal, that the appellant would have been aware of this time limit at least by that time, if not before. There was no explanation by the appellant for this additional delay. The appeal could and should have been filed then, although still out of time. The appellant appeared to have been under the impression from information she had received, that despite her appeal being late, an extension of time would be granted. Of course, that is not so. Time limits under the Act and the Regulations are to be observed, unless there is good reason for non-compliance.

Arguable case

- 10 As was also considered in *Nicholas*, at par 28:
 28. For the purposes of considering an extension of time to appeal, any assessment of the merits of the proceedings is to be made on a broad brush basis. As was said by Brennan CJ and McHugh J in *Jackamara v Krakour* (1998) 195 CLR 516 at par 9:

“Unless motions to extend time for appeals are to turn into full rehearsals for those appeals, appellate courts can only assess ‘the merits’ in a fairly rough and ready way”.
- 11 Having heard the submissions of the appellant on this issue, and the respondent’s counsel accepting that there may be matters the Appeal Board could relevantly inquire into, we were satisfied that the appeal grounds raised issues that could be the subject of inquiry and determination by the Appeal Board.
- 12 However, a matter of significance relates to the relief sought by the appellant. As noted above, in the notice of appeal and during the hearing, the appellant made it clear that she was looking for relief by way of some form of “payout”, whether it be for redundancy or some other form of compensatory payment. This is not a remedy open to the Appeal Board. The primary remedy available in matters such as this, is to adjust the decision to dismiss by reversing it; that is an order that a successful appellant be reinstated or re-employed: *State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169. Orders for compensation, of whatever kind, independent of an adjustment of the decision to dismiss, are not within the Appeal Board’s jurisdiction.
- 13 It was only belatedly, during the hearing, when the Appeal Board informed the appellant that the remedy that she sought was not one that she could obtain, that she informed the Appeal Board that she would then have to seek reinstatement. However, it was quite apparent to us, given the tenor of the submissions made by the appellant, and the distinct impression we formed, that the appellant did not in reality seek to be returned to her former employment. A payout of some kind was the appellant’s desire. The appellant also said that if successful, she would seek a “transfer to another area”. We also note, that unlike many in proceedings before the Appeal Board, challenging the termination of their employment, the appellant remains employed in alternative employment and will do so until March 2018, at least. In that sense, the appellant is better off than many others in similar circumstances. This is also a relevant consideration in our assessment of the remedy that the appellant really seeks in this appeal.
- 14 Given our reluctance in accepting the appellant’s submissions that she genuinely seeks reinstatement, and the circumstances of the delay and the reasons for it, the Appeal Board declined to exercise its discretion to extend the time for filing the appeal in the circumstances of the present case.
- 15 As a result, the appeal was dismissed.

2017 WAIRC 00930

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 6 JULY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JUDY SETHI

APPELLANT**-v-**

DEPARTMENT OF FINANCE, BUILDING MANAGEMENT & WORKS

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MR SUTHERLAND - BOARD MEMBER
MS S KANNIS - BOARD MEMBER**DATE**

THURSDAY, 9 NOVEMBER 2017

FILE NO

PSAB 19 OF 2017

CITATION NO.

2017 WAIRC 00930

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Mr R Andretich of counsel and with him Ms D Krestelica

Order

HAVING heard the appellant on her own behalf and Mr R Andretich of counsel on behalf of the respondent the Appeal Board, 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.]

(Sgd.) S J KENNER,
Senior Commissioner,
On behalf of the Public Service Appeal Board.

2017 WAIRC 00852

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 27 JULY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESTHE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED ON
BEHALF OF MR MARK MCCORMACK**APPELLANT****-v-**

DIRECTOR GENERAL DEPARTMENT OF TRANSPORT

RESPONDENT**CORAM**

SENIOR COMMISSIONER S J KENNER

DATE

WEDNESDAY, 4 OCTOBER 2017

FILE NO.

PSAB 14 OF 2017

CITATION NO.

2017 WAIRC 00852

Result	Direction issued
Representation	
Applicant	Ms J Moore of counsel
Respondent	Mr S Barrett

Direction

HAVING heard Ms J Moore of counsel on behalf of the appellant and Mr S Barrett on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the issue of whether the respondent's policies are inconsistent with s 143A of the *Road Traffic (Administration) Act 2008* and whether s 143A afforded a complete defence to the appellant be heard and determined as a preliminary issue on the papers.
- (2) THAT the parties file an agreed statement of facts by no later than 18 October 2017.
- (3) THAT the parties file and serve written submissions by no later than 25 October 2017.
- (4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2017 WAIRC 00986

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 27 JULY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00986
CORAM : PUBLIC SERVICE APPEAL BOARD
 SENIOR COMMISSIONER S J KENNER- CHAIRMAN
 MR G SUTHERLAND - BOARD MEMBER
 MS C THEOBALD- BOARD MEMBER
HEARD : WEDNESDAY, 4 OCTOBER 2017;
 WRITTEN SUBMISSIONS 26 OCTOBER 2017
DELIVERED : WEDNESDAY, 6 DECEMBER 2017
FILE NO. : PSAB 14 OF 2017
BETWEEN : THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA
 INCORPORATED ON BEHALF OF MR MARK MCCORMACK
 Appellant
 AND
 DIRECTOR GENERAL DEPARTMENT OF TRANSPORT
 Respondent

Catchwords : *Industrial Law (WA) - Preliminary issue - Whether s 143A of the Road Traffic (Administration) Act 2008 provides a complete statutory defence to disciplinary action in employment - Principles applied - Defence to disciplinary matters not afforded*

Legislation : *Industrial Relations Act 1979 (WA)*
Public Sector Management Act 1994 (WA)
Road Traffic (Administration) Act 2008 (WA)
Road Traffic (Authorisation to Drive) Act 2008 (WA)

Result : Preliminary application dismissed

Representation:
 Counsel:
 Appellant : Ms J Moore of counsel
 Respondent : Mr S Barrett

Case(s) referred to in reasons:

Commissioner of Taxation v Day (2008) 236 CLR 163

R v White; Ex parte Byrnes (1963) 109 CLR 665

Case(s) also cited:

Steve Burke Transporting Pty Ltd v Toll Transport Pty Ltd trading as Toll IPEC (2016) WAIRC 00718

The Public Transport Authority of Western Australia v Junghee Yoon (2015) 95 WAIG 1620

Reasons for Decision

- 1 The substantive matter in this appeal is a claim by the appellant that its member Mr McCormack have a reprimand and improvement action, which were imposed on him by disciplinary action, quashed. The disciplinary action and penalties imposed, arose out of conduct by Mr McCormack in relation to the use of the respondent's TRELIS motor vehicle and driver information database. The allegations related to his alleged personal use of the database and his use of it for a colleague and his daughter, in a manner that contravened the respondent's policies and procedures governing access to and use of this information.
- 2 A preliminary issue has arisen between the parties. That issue relates to the effect of s 143A of the *Road Traffic (Administration) Act 2008* (WA). The appellant maintained during the disciplinary investigation and maintains on this appeal, that s 143A of the RTA Act provided a statutory defence to the actions of Mr McCormack as he accessed the TRELIS database either for a road traffic purpose as prescribed, or with the consent of the individuals concerned. Accordingly, the appellant says the appeal should be allowed on this basis and the disciplinary action quashed. By agreement between the parties, the Appeal Board has been asked to determine this issue as a preliminary matter, based upon the written submissions of the parties.

Agreed facts

- 3 In relation to the preliminary issue, the parties have filed a statement of agreed facts. It is in the following terms:
 1. The Appellant is Mr Mark McCormack.
 2. The Respondent is the Director General, Department of Transport.
 3. The Appellant is represented by the Civil Service Association of Western Australia Incorporated (CSA) pursuant to section 80J (b) of the *Industrial Relations Act 1979*.
 4. The Appellant is a Public Service Officer appointed under part 3 of the *Public Sector Management Act 1994*. The Appellant is a Regional Officer based at South Hedland.
 5. The Appellant's primary duty is to undertake Practical Driver Assessments (PDAs). The Assessments are pre-booked by the Karratha Office, South Hedland Post Office, via 131156 or online.
 6. The Appellant undertakes PDAs from a facility shared with Main Roads Western Australia in South Hedland.
 7. The Respondent's South Hedland facility does not provide a Customer Service function except for undertaking pre-booked PDAs. A customer in South Hedland would normally undertake any non-PDA enquiries or transactions at the South Hedland Post Office.
 8. The South Hedland Post Office is approximately 400 metres from the Appellant's workplace.
 9. The Respondent manages the Transport Executive Licensing System (TRELIS) which holds the names, addresses, dates of birth, driver's licence numbers, photo IDs and credit card numbers for members of the public that hold licences.
 10. The Respondent has the following policies and procedures in place to ensure employees are aware of their obligations and responsibilities in respect to this information, including:
 - The Code of Conduct
 - The DVS System Access Policy
 - Administration Instruction 61/2015 - TRELIS Secure Access and Usage
 - Licensing Information 26/2007 - Accessing and Using Licensing Information
 11. The Respondent has a Licensing Information 26/2007 - Accessing and Using Licensing Information which requires that employees only access information regarding family members by written request of the family member, with the direction of an immediate supervisor and with an appropriate comment made in the record contact history.
 12. A review of the Appellant's TRELIS log for 2 November 2016 indicated that he may have accessed a family member's TRELIS record.
 13. The A/Regional Director Northern Regions undertook a review of the Appellant's TRELIS access for the period 9 November 2015 to 9 November 2016. This review indicated that the Appellant may have:
 - Accessed his own TRELIS record on multiple occasions;
 - Accessed his work colleague's TRELIS record;
 - Accessed a family member's TRELIS record; and
 - Failed to add contact history notes for these system accesses.
 14. The Appellant's TRELIS use appeared to the Respondent to be in breach (sic) Respondent's policy and procedures.
 15. On 8 December 2016, the Respondent advised the Appellant a Suspected Breach of Discipline Process would commence in accordance with section 81(1)(a) of the *Public Sector Management Act 1994*.
 16. On 22 February 2017, the Civil Service Association responded to the allegations on the Appellant's behalf. This response claimed that Mr McCormack:
 - Accessed his own record for training purposes;
 - Accessed records of his daughter and his colleague with their consent;

- Had not left contact history because he was not confident in how to enter the contact history information in TRELIS; and
 - The Appellant was permitted to access those records under the provisions of section 143A of the *Road Traffic (Administration) Act 2008* (RTA Act 2008) and that the Respondent's policy or confidentiality undertaking were incompetent to change the requirements of that section of the RTA Act 2008.
17. The Respondent did not find this response satisfactory and caused an independent investigation to be held to establish the full facts of the matter, including any mitigating factors.
 18. On 10 March 2017, the Respondent appointed Mr Simon Smith of Brennan and Associates as an independent investigator to investigate the facts of the matter.
 19. Mr Smith provided his report on 6 June 2017.
 20. The investigator found, that on the balance of probability, the Appellant:
 - Accessed his TRELIS records for self-training in a manner that was not authorised by the Department of Transport;
 - Accessed his colleague's TRELIS record with his permission to check his license number but did not leave a contact history to justify the access and this access was not authorised by the Department of Transport; and
 - Accessed the TRELIS record of his daughter with her permission and did not leave a contact history to justify this access and this access was not authorised by the Department of Transport.
 21. The Appellant has stated that he was not confident in how to enter the contact history information in TRELIS on 2 November 2016 when he accessed his daughters TRELIS record and was not trained in leaving contact history until December 2016.
 22. The investigation established that between 2 February 2016 and 19 October 2016 the Appellant made one (1) Contact History entry on 13 April 2016.
 23. The investigation established that between 19 October 2016 and 25 October 2016 the Appellant made twenty-seven (27) Contact History entries.
 24. On 21 June 2017, the Respondent advised the Appellant of the findings of the investigation and proposed to formally reprimand him and impose the following improvement actions:
 - That he retake the Accountable and Ethical Decision Making online training course and provide a certificate of completion;
 - That he familiarise himself with the DVS System Access Policy and Procedure;
 - That he undertake TRELIS training as directed by local management and provide evidence of completion.
 25. On 29 June 2017, the CSA responded on the Appellant's behalf and again reiterated the view that the Appellant was permitted to access those records under the provisions of the RTA Act 2008 as he had consent to do so. This continued position was of particular concern to the Respondent and an additional improvement action was proposed:
 - That he write to the Director Northern Regions, advising him that he will comply with all Departmental policies and procedures as well as any direction provided by management.
 26. On 21 July 2017, the CSA responded on the Appellant's behalf and again reiterated the statutory defence.
 27. On 27 July 2017, the Respondent imposed a formal Reprimand and Improvement action on the Appellant which included a strict completion date of 31 August 2017. A statement was included that failure to complete these improvement actions, in particular providing reassurance that he would comply with departmental policies and procedures may make his ongoing employment untenable.
 28. The CSA on behalf of the Appellant raised the interaction between the Department of Transport Policy and section 143A *Road Traffic (Administration) Act 2008*, this is a matter the investigator was not qualified to comment on.
 29. The CSA considers this is the crux of this matter and the parties have agreed to resolve this issue prior to the substantive appeal being heard.

Statutory provisions

- 4 It is convenient at this point to set out the relevant statutory provisions. The RTA Act by its long title provides that it is "an Act to provide for the administration and enforcement of the *Road Traffic Act 1974* the *Road Traffic (Authorisation to Drive) Act 2008* and the *Road Traffic (Vehicles) Act 2012* and for other matters relating to road traffic".
- 5 The key provision in issue in this matter is s 143A. It is in the following terms:

143A. Confidentiality of information

 - (1) A person who is or has been engaged in the performance of functions under a road law must not, directly or indirectly, record, disclose or make use of information obtained under a road law except —
 - (a) for a purpose related to the administration or enforcement of a road law; or
 - (b) as required or authorised under a road law or another written law; or

- (c) with the consent of the person to whom the information relates; or
- (d) in circumstances prescribed by the regulations.

Penalty: a fine of 100 PU or imprisonment for 12 months.

- (2) Subsection (1) does not prevent the disclosure of statistical or other information that could not reasonably be expected to lead to the identification of any person to whom it relates.
- (3) Subsection (2) does not apply to information relating to particular commercial operations, even if its disclosure could not reasonably be expected to lead to the identification of the commercial operation to which it relates.

6 For the purposes of s 143A a “road law” is defined in s 4 in the following terms:

road law means any of the following enactments —

- (a) this Act;
- (b) the *Road Traffic Act 1974*;
- (c) the *Road Traffic (Authorisation to Drive) Act 2008*;
- (d) the *Road Traffic (Vehicles) Act 2012*;

7 Relevant also and as referred to by the respondent, are provisions of the *Public Sector Management Act 1994* (WA). Section 9 deals with principles of conduct by public sector bodies and is as follows:

9. Principles of conduct by public sector bodies etc.

The principles of conduct that are to be observed by all public sector bodies and employees are that they —

- (a) are to comply with the provisions of —
 - (i) this Act and any other Act governing their conduct; and
 - (ii) the Commissioner’s instructions, public sector standards and codes of ethics; and
 - (iii) any code of conduct applicable to the public sector body or employee concerned;
 and
- (b) are to act with integrity in the performance of official duties and are to be scrupulous in the use of official information, equipment and facilities; and
- (c) are to exercise proper courtesy, consideration and sensitivity in their dealings with members of the public and employees.

8 Furthermore, by s 21 of the PSM Act, the Public Sector Commissioner may issue instructions in relation to public sector standards, establish codes of ethics and assist public sector bodies to develop codes of conduct concerning minimum standards of conduct and integrity to be complied with by themselves and their employees. It is also common ground that the respondent has policies and procedures requiring employees to be aware of and comply with their responsibilities and obligations in relation to the use of restricted information including that on the TRELIS database. Those policies and procedures, as annexed to the appellant’s written submissions, include the DVS System Access Policy; the DVS System Access Procedure; the Administration Instruction 61/2015; and the Licensing Information 26/2007.

9 Also relevant are the disciplinary matters provisions of the PSM Act in Division 3 of Part 5. Whilst I do not set them out for the purposes of these reasons, the establishment of and compliance with codes of practice, policies and procedures and the maintenance of integrity and high standards of conduct generally, are essential to the proper functioning of public sector bodies. The disciplinary provisions of the PSM Act are reflective of these important principles and the maintenance of public confidence: *Commissioner of Taxation v Day* (2008) 236 CLR 163.

Contentions of the parties

10 The appellant filed detailed written submissions in support of its position on the preliminary issue. Without wishing to do any injustice to the submissions, in summary form, they were as follows.

11 The RTA Act was said to be introduced as part of a nationally consistent framework for and to improve compliance outcomes in relation to road safety, infrastructure and the environment. It was submitted that one purpose of the legislation was to provide a clear delineation between the administrative and enforcement aspects of road traffic law in Western Australia.

12 Specifically, in relation to s 143A, the appellant contended that the effect of this provision is to provide exceptions to the general prohibition on the use of confidential information obtained under a road law. The TRELIS database is an example of such information. Mr McCormack in this case, relied upon two exceptions, those specified in s 143A(a), concerning the administration or enforcement of a road law and secondly, in s 143A(c), which excludes liability in circumstances where consent of the person to whom information relates, applies.

13 In this case, the appellant contended that Mr McCormack is engaged in work involving the performance of practical driver licence tests to enable members of the public to obtain a drivers’ licence under the *Road Traffic (Authorisation to Drive) Act 2008* (WA). For this purpose, Mr McCormack is authorised to use the respondent’s TRELIS database. TRELIS contains information including names, addresses, dates of birth, drivers licence numbers, photo identification and credit card numbers for members of the public who are in possession of a drivers’ licence. In this case, there is no dispute that Mr McCormack did access TRELIS for three purposes.

- 14 The first was to access his own records which he maintained he did for self-training purposes. The second occasion involved accessing information in relation to his daughter, concerning demerit points. The appellant maintains Mr McCormack did so with her written consent. Finally, Mr McCormack accessed TRELIS on behalf of a colleague, to obtain his driver's licence number, with his written consent. It was said that this information was required to complete the respondent's "motor bike log sheet". It was contended that Mr McCormack was required to complete such log sheets at the end of each month.
- 15 Thus, the appellant contended that Mr McCormack accessed the TRELIS database either for a purpose related to the administration of a road law (i.e. for his further self-training) or alternatively, with the written consent of the person to whom the information related. In this respect, the appellant maintained that s 143A of the RTA Act afforded Mr McCormack a complete defence to the disciplinary allegations brought against him.
- 16 Submissions were also made by the appellant setting out the scope of the various policies referred to above. It was contended by the appellant that to the extent that the various policies and procedures of the respondent are inconsistent with the terms of s 143A of the RTA Act, then they impose an impermissible restriction and should be read down accordingly. In short, the appellant contended that Mr McCormack should not be found to be in breach of any of the respondent's policies and procedures in relation to the use of confidential information, including in TRELIS, in circumstances where there is compliance with s 143A.
- 17 On the other hand, the respondent contended that the terms of s 143A of the RTA Act prescribe a statutory offence and specify exceptions to criminal liability. It was submitted that there is nothing in s 143A which means that employees of the respondent are not required to comply with the respondent's policies and procedures, made in accordance with codes of conduct established under the PSM Act.
- 18 The broad submission made by the respondent was that the terms of s 143A do not fetter or otherwise restrict the respondent's ability to make and enforce policies concerning employee access to and use of information held by the respondent. The question of criminal responsibility as set out in s 143A, is a different question to a disciplinary proceeding brought against an employee for contravening a policy or code of conduct of the respondent. In that sense, the respondent submitted that s 143A of the RTA Act does not afford Mr McCormack a complete defence and the disciplinary action should not be quashed on this basis.

Consideration

- 19 Section 143A of the RTA Act is a penal provision. It provides that the use, recording or disclosure of confidential information which has been obtained under road legislation (such as licencing information etc) is an offence, attracting a substantial fine or imprisonment. The section reflects the importance attached by Parliament to the protection of confidential information supplied by members of the public and others, regarding road transport activities. The exceptions to criminal responsibility are set out in pars (a) to (c). The only matter prescribed by regulations for the purposes of par (d), is not relevant to the circumstances of this case.
- 20 The respondent has various policies and procedures, setting out in some detail, access to and the use of confidential information by employees. Licensing Information 26/2007, deals with employees accessing TRELIS on behalf of family members and friends. This provides that such access may only be on the written request of the person concerned. Furthermore, such requests should be referred to a manager or supervisor to be carried out preferably by another staff member. These steps are obviously designed to avoid any suggestion of a conflict of interest between the employee's duties and responsibilities and their relationship with family members or friends. If this is not possible, then the employee must leave a record of the access to TRELIS in the "contact history". The same approach applies in the case of an employee accessing their own records on TRELIS. These requirements are reflected in a "Confidentiality Undertaking" to be signed by an employee. It seems that Mr McCormack signed such an undertaking on 3 November 2015. These policies and the undertaking, are part of the respondent's policies and procedures, compliance with which is required under the respondent's code of conduct, made in accordance with s 9 of the PSM Act, set out above.
- 21 As far as the Appeal Board is aware, Mr McCormack has not been charged with a criminal offence under s 143A of the RTA Act. Had he been, no doubt, one or more of the statutory defences to criminal liability under pars (a) and (c) would be raised. This however, is a different issue to an alleged breach of discipline as an employee, arising from the policies and codes of conduct made by an employer under the PSM Act. Nothing in s 143A of the RTA Act, dealing with criminal culpability, precludes a public sector employer from imposing limits on and procedures for access to its information systems, in relation to its employees, which might then become the subject of disciplinary action. The subject matter is quite different, is directed towards very different purposes and involves no issue of criminal conduct: *R v White; Ex parte Byrnes* (1963) 109 CLR 665. Nor in my view, can it be concluded that the terms of s 143A of the RTA Act are necessarily limited to employees engaged in the public service or public sector. Its terms are broader in scope. The obligations imposed extend to all "persons" who are "engaged" to perform functions under a road law as defined. This is not necessarily, from its plain language, limited to employees, including of the respondent.
- 22 The processes and policies of the respondent referred to above, may on one view, impose a layer of compliance on an employee over and above what s 143A may prescribe as a defence to criminal conduct, in relation to access to a record with the consent of the relevant person. However, nothing prevents an employer, especially in the public sector, as the owner or custodian of the relevant information, from prescribing prudent procedures for accessing information to avoid an obvious possibility of a conflict of interest. Such policies could well be viewed as directed to the avoidance of possible disciplinary action, by ensuring access by employees to very confidential information on behalf of family members and friends, is strictly controlled and is at "arm's length" as far as is possible. In the context of employment in the public service and the broader public sector, this is entirely consistent with the principles referred to above: *Day*. It also goes to the protection of the reputation of the public service and public sector generally, as reflected in the public sector principles in Part 2 of the PSM Act as a whole.

- 23 Given the nature of the information contained in the respondent's databases, and the obligations of employers and employees to one another, including under the common law contract of employment, it would be surprising if there were not such restrictions in place.
- 24 When viewed in this way, the respondent's policies and procedures do not derogate from the criminal consequences of misconduct under s 143A of the RTA Act and nor could they. To the extent that any policies of the respondent may refer to possible criminal conduct, this can only be a form of fair warning to staff members. It will always be a matter of whether relevant conduct, based on admissible evidence, establishes the elements of any offence concerned, having regard to the statutory defences set out in s 143A.
- 25 We do not therefore see, despite the attempts of the appellant to persuade the Appeal Board to the contrary, how any defence to criminal responsibility under s 143A, derogates from or invalidates the respondent's policies, which have been made for proper purposes under s 9 of the PSM Act. These policies have been made to govern the performance by employees of the respondent, of the duties and responsibilities of their positions. In these circumstances, the terms of s 143A dealing with criminal culpability, do not afford Mr McCormack, as an employee of the respondent and subject to the lawful and reasonable directions of his employer, a complete defence to the disciplinary matters brought against him, arising out of his employment. They may well provide him with a complete defence against allegations of criminal conduct, but that is a different matter.
- 26 Accordingly, the appeal will be listed for hearing on the merits in due course. We request the parties confer on preparation for the future conduct of the appeal. If no agreement can be reached, the Appeal Board will re-list the matter for the making of formal directions.

2017 WAIRC 00987

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 27 JULY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED ON
BEHALF OF MR MARK MCCORMACK

APPELLANT

-v-

DIRECTOR GENERAL DEPARTMENT OF TRANSPORT

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MS C THEOBALD - BOARD MEMBER
MR G SUTHERLAND - BOARD MEMBER

DATE

WEDNESDAY, 6 DECEMBER 2017

FILE NO

PSAB 14 OF 2017

CITATION NO.

2017 WAIRC 00987

Result	Order issued
Representation	
Appellant	Ms J Moore of counsel
Respondent	Mr S Barrett

Order

HAVING heard Ms J Moore of counsel on behalf of the appellant and Mr S Barrett on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the appellant's preliminary application to quash the disciplinary action imposed on the appellant by the respondent be and is hereby dismissed.

(Sgd.) S J KENNER,
Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2018 WAIRC 00058

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 27 JULY 2017

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED ON BEHALF OF MR MARK MCCORMACK	APPELLANT
	-v- DIRECTOR GENERAL DEPARTMENT OF TRANSPORT	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN MR G SUTHERLAND - BOARD MEMBER MS C THEOBALD - BOARD MEMBER	
DATE	TUESDAY, 30 JANUARY 2018	
FILE NO	PSAB 14 OF 2017	
CITATION NO.	2018 WAIRC 00058	

Result	Discontinued by leave
Representation	
Appellant	Ms J Moore of counsel
Respondent	Mr S Barrett

Order

HAVING heard Ms J Moore of counsel on behalf of the appellant and Mr S Barrett on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

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 9/2016	Mr Laurance Webb North Metropolitan Health Service established as a health service provider pursuant to section 32 of the Health Services Act 2016	Emmanuel C	Appeal against the decision to terminate employment on 14 July 2016	04/10/2016	Discontinued

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 2/2017	N/A	N/A	Emmanuel C	Request for mediation	N/A	Concluded
APPL 7/2018	N/A	N/A	Emmanuel C	Request for mediation	N/A	Discontinued

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 3/2015	Floyd Jansen	Department of Corrective Services of W.A.	Emmanuel C	Discontinued	18/01/2017
PSA 4/2015	Nathan Craig Smith	Department of Corrective Services of W.A.	Emmanuel C	Discontinued	18/01/2017
PSA 5/2015	Terence Keith Leighton	Department of Corrective Services of W.A.	Emmanuel C	Discontinued	18/01/2017
PSA 7/2015	Justin Anthony Smith	Department of Corrective Services of W.A.	Emmanuel C	Discontinued	18/01/2017

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 6/2016	Sasha Maistry, L&D Business Partner, Downer	Philip Wyles, Department of Training and Workforce Development	Emmanuel C	Appeal against the refusal to register a training contract	04/10/2016	Discontinued
APA 7/2016	Sasha Maistry, L&D Business Partner, Downer	Philip Wyles, Department of Training and Workforce Development	Emmanuel C	Appeal against the refusal to register a training contract	04/10/2016	Discontinued

NOTICES—Appointments—


2018 WAIRC 00141

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner DJ Matthews to be an additional Public Service Arbitrator for a period of one year from the 21st day of March, 2018.

Dated the 20th day of February, 2018.

 (Sgd.) P.E. SCOTT

CHIEF COMMISSIONER P.E. SCOTT


2018 WAIRC 00140

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner T Emmanuel to be an additional Public Service Arbitrator for a period of one year from the 8th day of March, 2018.

Dated the 20th day of February, 2018.

 (Sgd.) P.E. SCOTT

CHIEF COMMISSIONER P.E. SCOTT

NOTICES—Union Matters—

2018 WAIRC 00144

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 the Title, Rule 1 – Name and Rule 30 – Ballots, sub rules (4)(c) (1) and (2), of its registered rules.

The proposed alterations are detailed below. Proposed alterations are shown as ~~strike through~~ for deletions and underlining for additions.

Existing Title

Rules of United Firefighters Union of Australia West Australian Branch

Proposed Title

Rules of The United Professional Firefighters Union of Western Australia ~~West Australian Branch~~

Existing Rule 1

1 – NAME

The name of the Union shall be the “United Firefighters Union of Australia West Australian Branch”.

Proposed Rule 1

1 – NAME

The name of the Union shall be the “The United Professional Firefighters Union of Western Australia ~~West Australian Branch~~”.

Existing Rule 30 (4) (c) (1) and (2)

30 - BALLOTS

(4) The Returning Officer shall on or before the date fixed by the posting of ballot papers by ordinary post to each Member of the Union entitled to vote in the ballot a sealed envelope containing:

(c) (1) In an election the Returning Officer shall issue instructions to the following effect:

Enclosed is a ballot paper for an election in the United Firefighters Union of Australia West Australian Branch.

To vote for a candidate for an office you should place the figure 1 opposite the name of the candidate for whom you vote as your first preference and give preference votes for all the remaining candidates by placing figures 2, 3, 4 (and so on as the case requires) opposite their names so as to indicate the order of your preference for them.

Failure to so indicate the order of your preference will not render invalid your vote for that candidate for whom you do vote. However if the candidate or those candidates who you do vote for are eliminated at an early stage of the count your vote will not have the same force and effect as a voter who has expressed the order of his preference for all candidates. After voting you should place the ballot paper in the declaration envelope and insert the declaration envelope in the addressed envelope which is enclosed and post it so that it will reach the private box to which it is addressed by (set out the time and date on which the ballot closes).

(2) In a plebiscite, instructions to the following effect.

Enclosed is a ballot paper for a plebiscite in the United Firefighters Union of Australia West Australian Branch.

To vote in favour of a proposal or decision you should place the figure 1 opposite the word "Yes". To vote against a proposal or decision you should place the figure 1 opposite the word "No". Where the Rules require an expression of preference you should place a figure in the box opposite the proposals commencing with the figure 1 for your first preference. You should ensure that all boxes are appropriately numbered. After voting you should place the ballot paper in the addressed envelope which is enclosed and post it so that it will reach the private box to which it is addressed by (set out the time and date on which the ballot closes).

Proposed Rule 30 (4) (c) (1) and (2)

30 - BALLOTS

(4) The Returning Officer shall on or before the date fixed by the posting of ballot papers by ordinary post to each Member of the Union entitled to vote in the ballot a sealed envelope containing:

(c) (1) In an election the Returning Officer shall issue instructions to the following effect:

Enclosed is a ballot paper for an election in the The United Professional Firefighters Union of Western Australia ~~West Australian Branch~~.

To vote for a candidate for an office you should place the figure 1 opposite the name of the candidate for whom you vote as your first preference and give preference votes for all the remaining candidates by placing figures 2, 3, 4 (and so on as the case requires) opposite their names so as to indicate the order of your preference for them.

Failure to so indicate the order of your preference will not render invalid your vote for that candidate for whom you do vote. However if the candidate or those candidates who you do vote for are eliminated at an early stage of the count your vote will not have the same force and effect as a voter who has expressed the order of his preference for all candidates. After voting you should place the ballot paper in the declaration envelope and insert the declaration envelope in the addressed envelope which is enclosed and post it so that it will reach the private box to which it is addressed by (set out the time and date on which the ballot closes).

- (2) In a plebiscite, instructions to the following effect.

Enclosed is a ballot paper for a plebiscite in the The United Professional Firefighters Union of Western Australia ~~West Australian Branch~~.

To vote in favour of a proposal or decision you should place the figure 1 opposite the word "Yes". To vote against a proposal or decision you should place the figure 1 opposite the word "No". Where the Rules require an expression of preference you should place a figure in the box opposite the proposals commencing with the figure 1 for your first preference. You should ensure that all boxes are appropriately numbered. After voting you should place the ballot paper in the addressed envelope which is enclosed and post it so that it will reach the private box to which it is addressed by (set out the time and date on which the ballot closes).

The matter is listed for hearing before the Full Bench at 10am on Tuesday 3 April 2018 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* (WA), 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 under Applications & Forms.

S. KEMP

DEPUTY REGISTRAR

23 February 2018
