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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2018 WAIRC 00163

CLEANERS AND CARETAKERS (GOVERNMENT) AWARD 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED VOICE WA

APPLICANT

-v-

THE HON MINISTER FOR EDUCATION AND TRAINING, COMMISSIONER MAIN ROADS
WESTERN AUSTRALIA, DIRECTOR GENERAL DEPARTMENT OF HOUSING (FORMERLY
DEPARTMENT OF HOUSING AND WORKS) & OTHERS

RESPONDENTS

CORAM CHIEF COMMISSIONER P E SCOTT
DATE TUESDAY, 6 MARCH 2018
FILE NO/S APPL 8 OF 2018
CITATION NO. 2018 WAIRC 00163

Result Award varied
Representation
Applicant Ms N Kefford of counsel
Respondents Mr C Bretnall as agent

Order

HAVING heard Ms N Kefford of counsel for United Voice WA and Mr C Bretnall as agent for the respondents, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Cleaners and Caretakers (Government) Award 1975* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 6 March 2018.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

SCHEDULE

1. **Clause 3. – Hours of Work: Delete subclause 3.2.3(a) and insert the following in lieu thereof:**
 - 3.2.3 (a) Any employee who, without being notified the previous day, is required to continue working for more than one hour after the usual ceasing time shall be provided with a meal by the employer or be paid \$13.15 in lieu of the meal.

2. Clause 5. – Allowances and Facilities:

A. Delete subclause 5.1 and insert the following in lieu thereof:

5.1. – SPECIAL RATES AND PROVISIONS

- 5.1.1 (a) All employees called upon to clean closets connected with septic tanks or sewerage shall receive an allowance of \$0.89 cents per closet per week.
- (b) For the purposes of 5.1 – Special Rates and Provisions, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.
- 5.1.2 Employees called upon outside the ordinary working hours to wash towels shall be paid \$5.50 per dozen for ordinary towels, and \$4.10 per dozen for dusters, hand towels and tea towels.
- 5.1.3 All materials and appliances required in connection with the performance of the employee's duties shall be supplied by the employer.
- 5.1.4 (a) An employee shall not be required to work from the top of a ladder more than 3.5 metres long which rests on the ground or floor level unless provided with an assistant.
- (b) (i) When window cleaning is done from a ladder and any portion of a window to be cleaned is more than seven metres from the nearest horizontal plane, the employee shall be paid an allowance of 15 cents per window.
- (ii) The allowance prescribed in 5.1.4(b)(i) shall not be paid where adequate safety equipment such as fall-arrest and restraint systems is supplied. Where such equipment is supplied, it must be used by the employee.
- 5.1.5 Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours, shall be paid an allowance of \$5.15 per day.
- 5.1.6 An employee who is required to open and close classrooms, halls and other school facilities for any activities authorised by the Principal, shall be paid an allowance according to the following scale:
- | | Per Day |
|---------------------------------|---------|
| | \$ |
| (a) Evenings – Monday to Friday | |
| Up to 40 rooms per week | \$8.75 |
| 41 rooms to 100 per week | \$13.25 |
| Over 100 rooms per week | \$17.35 |
| (b) Saturday and Sunday | \$16.65 |
- (c) An additional allowance of \$5.15 shall be paid to a caretaker on each occasion they are required to open or close a school facility after 11.00 pm, Monday to Friday, or for any opening or closing required on a Saturday or Sunday after the initial opening and closing. Provided that on a Saturday or Sunday the additional allowance shall not be paid if the duty is performed less than one hour after the initial or any subsequent opening or closing.
- 5.1.7 (a) Where practicable, suitable dressing accommodation shall be provided by the employer. Cleaning materials, tools and appliances shall not be kept in such rooms.
- (b) All employees shall be provided with the facilities for boiling water.
- (c) Employees shall be permitted to eat their meals in a convenient and clean place protected from the weather and employees shall remove all litter and foodstuffs after use.
- (d) In the event of a dispute concerning the provisions of 5.1, the matter shall be resolved in accordance with the dispute resolution procedure of this award.
- 5.1.8 (a) Any wood chopping duties carried out by the employee shall be by agreement between the employer and the employee.
- (b) Any employee performing wood chopping duties shall be paid an allowance of \$19.65 per tonne to a maximum of:
- (i) 100% of the weight of bushwood supplied or 50% of the weight of mill-ends supplied for enclosed fireplaces such as Wonderheats.
- (ii) 50% of the weight of bushwood supplied or 20% of the weight of mill-ends supplied for open fireplaces.
- 5.1.9 (a) An estate attendant (Homeswest) who, in their privately owned vehicle, commutes from estate to estate and is required to carry sundry cleaning and/or gardening implements and/or supplies shall be paid \$9.90 per week for all purposes of this award.
- (b) The amount and type of equipment to be carried as prescribed in 5.1.9(a) will be agreed between the union and employer.
- 5.1.10 The rates expressed in 5.1 shall be adjusted by a percentage derived from the ASNA amount divided by the key minimum classification rate of a cleaner – level 1, year 1.

B. Delete subclause 5.4 and insert the following in lieu thereof:5.4. - FIRST AID

- 5.4.1 The employer shall provide at each worksite, an adequate first aid kit for the use of the employees in case of accident, and this first aid kit shall be kept renewed and in proper condition.
- 5.4.2 (a) The employer shall, wherever practicable, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all sites or depots where employees are employed. Such employees shall, in addition to first aid duties, be responsible, under the general supervision of the foreperson, for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.
- (b) Employees so appointed shall be paid the following rates in addition to their prescribed wage:
- | | |
|----------------------|---------------------------|
| 10 employees or less | In excess of 10 employees |
| \$1.85 per day | \$3.00 per day |
- (c) The rates expressed in 5.4.2(b) shall be adjusted by a percentage derived from the ASNA amount divided by the key minimum classification rate of a cleaner – level 1, year 1.

2018 WAIRC 00164

CULTURAL CENTRE AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED VOICE WA

APPLICANT

-v-

THE LIBRARY BOARD OF WESTERN AUSTRALIA, THE TRUSTEES OF THE WESTERN AUSTRALIAN MUSEUM, THE BOARD OF THE ART GALLERY AND OTHERS

RESPONDENTS

CORAM CHIEF COMMISSIONER P E SCOTT
DATE TUESDAY, 6 MARCH 2018
FILE NO/S APPL 9 OF 2018
CITATION NO. 2018 WAIRC 00164

Result Award varied
Representation
Applicant Ms N Kefford of counsel
Respondents Mr C Bretnall as agent

Order

HAVING heard Ms N Kefford of counsel for United Voice WA and Mr C Bretnall as agent for the respondents, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Cultural Centre Award 1987* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 6 March 2018.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.SCHEDULE**1. Clause 8. – Overtime: Delete subclause (9)(a) of this clause and insert the following in lieu thereof:**

- (9) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid \$13.15 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each meal by the employer or be paid \$7.70 for each meal so required.

2. Clause 15. – Special Rates and Provisions: Delete this clause and insert the following in lieu thereof:15. - SPECIAL RATES AND PROVISIONS

- (1) The employer shall, where practicable, make suitable provisions for employees to change their clothing on the employer's premises.

- (2) Uniforms and/or clean overalls shall be supplied by the employer free of charge, where the employer requires such to be worn. Such items shall always remain the property of the employer.
- (3) (a) All employees called upon to clean closets connected to septic tanks or sewers shall be paid an allowance of 87 cents per closet per week.
- (b) For the purpose of this subclause one metre of urinal or three urinal stalls shall count as one closet.
- (4) An employee shall not be required to work from the top of a ladder more than 3.5 metres long which rests on the ground or floor level, unless he/she has an assistant.
- (5) An allowance of \$3.20 per day or part thereof shall be paid to an employee required to use an airlift in the course of their duties.
- (6) An allowance of \$12.35 per day shall be paid in addition to the ordinary rate to an attendant required to operate audio visual equipment.
- (7) (a) Except as provided for in paragraph (b) of this subclause an allowance of \$6.75 per day shall be paid to an employee required to carry keys and be responsible for securing the premises at the close of business.
- (b) Where it is agreed between the employer and the Union in writing then an alternative arrangement may exist in respect of this subclause.
- (8) (a) An employee who is required to work away from his/her usual place of work shall be paid for any fares in excess of those normally incurred in travelling from his/her home to his/her usual place of work and return, except where an allowance is paid in accordance with Clause 17. – Fares and Travelling Allowances of the Miscellaneous Government Conditions and Allowances Award No. A4 of 1992.
- (b) Travelling time in excess of that normally incurred in travelling from his/her home to his/her usual place of work and return shall be paid at the rate of ordinary time.
- (c) An employee who commences or completes a shift at or between the hours of 11.00 pm and 5.00 am, shall in addition to the ordinary rate of pay for that shift be paid an allowance of \$15.25 per shift.

3. Clause 16. – Wages: Delete subclause (2) of this clause and insert the following in lieu thereof:

- (2) Leading Hands: In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid:
- | | |
|---|---------|
| (a) if placed in charge of not less than one and more than five other employees | \$30.20 |
| (b) if placed in charge of more than six and not more than ten other employees | \$46.30 |
| (c) if placed in charge of more than 11 other employees | \$59.40 |

2018 WAIRC 00165

GARDENERS (GOVERNMENT) 1986 AWARD NO. 16 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED VOICE WA

APPLICANT

-v-

THE HON MINISTER FOR EDUCATION, THE HON. PREMIER OF WESTERN AUSTRALIA ,
THE HON. MINISTER FOR AGRICULTURE AND OTHERS

RESPONDENTS

CORAM CHIEF COMMISSIONER P E SCOTT
DATE TUESDAY, 6 MARCH 2018
FILE NO/S APPL 10 OF 2018
CITATION NO. 2018 WAIRC 00165

Result Award Varied
Representation
Applicant Ms N Kefford of counsel
Respondents Mr C Bretnall as agent

Order

HAVING heard Ms N Kefford of counsel for United Voice WA and Mr C Bretnall as agent for the respondents, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Gardeners (Government) 1986 Award No. 16 of 1983* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 6 March 2018.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

SCHEDULE

1. **Clause 12. – Overtime: Delete subclause (2) of this clause and insert the following in lieu thereof:**
- (2) When an employee without being notified on the previous day or earlier is required to continue working after his usual knock off time for more than two hours, the employee shall be provided with a meal or be paid \$13.15 in lieu thereof.
2. **Clause 16. – First Aid - Kits and Attendants: Delete subclause (2) of this clause and insert the following in lieu thereof:**
- (2) The employer shall, wherever practicable and where there are two or more employees, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the supervisor or foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.
- Employees so appointed shall be paid the following rates in addition to their prescribed rate per day:
- | Qualified Attendant | \$ Per Day |
|---------------------------|------------|
| 10 employees or less | 1.85 |
| In excess of 10 employees | 2.85 |
3. **Clause 25. – Wages:**
- A. Delete subclause (3) of this clause and insert the following in lieu thereof:**
- (3) A Senior Gardener/Ground Attendant who is required to maintain turf wickets, bowling greens or tennis courts shall be paid in addition to the rates prescribed an amount of \$8.20 per week. Occasional off-season attention shall not qualify an employee for payment under this subclause.
- B. Delete subclause (5) of this clause and insert the following in lieu thereof:**
- (5) Leading Hands
- Leading Hands and Senior Gardener/Ground Attendants if placed in charge of:
- (a) five and not more than ten other employees shall be paid \$29.10 per week extra;
- (b) more than ten but not more than 20 other employees shall be paid \$42.60 per week extra;
- (c) more than 20 other employees shall be paid \$56.50 per week extra.
- C. Delete subclause (10) of this clause and insert the following in lieu thereof:**
- (10) Toilet Cleaning Allowance (Zoological Gardens)
- (a) Employees of the Zoological Gardens Board covered by this award who are required to clean public toilets shall be paid 90 cents per closet, per week.
- (b) For the purposes of this subclause one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.
- (c) All such employees shall be supplied with rubber gloves on request.

2018 WAIRC 00166

PARLIAMENTARY EMPLOYEES AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED VOICE WA

APPLICANT**-v-**

THE SPEAKER OF THE LEGISLATIVE ASSEMBLY, THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, THE GOVERNOR OF WESTERN AUSTRALIA IN COUNCIL AND OTHERS

RESPONDENTS**CORAM**

CHIEF COMMISSIONER P E SCOTT

DATE

TUESDAY, 6 MARCH 2018

FILE NO/S

APPL 12 OF 2018

CITATION NO.

2018 WAIRC 00166

Result

Award varied

Representation

Applicant Ms N Kefford of counsel
Respondents Mr C Bretnall as agent

Order

HAVING heard Ms N Kefford of counsel for United Voice WA and Mr C Bretnall as agent for the respondents, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Parliamentary Employees Award 1989* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 6 March 2018.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

SCHEDULE

1. Clause 16. – Parliamentary Support Services Employee Wages: Delete subclauses (3) and (4) and insert the following in lieu thereof:

(3) The following allowances shall be paid to PSSEs indexed according to State Wage decisions and shall be:-

- | | |
|---------------------------------------|------------------------|
| (a) Chef | |
| 1st year | \$151.10 per fortnight |
| 2nd year | \$302.00 per fortnight |
| (b) Tradesperson Cook (Sous Chef) | |
| 1st year | \$98.10 per fortnight |
| 2nd year | \$151.10 per fortnight |
| (c) Stewards to Speaker and President | \$75.50 per fortnight |

(4) An allowance of \$43.70 per fortnight shall be paid to all PSSEs employed in the kitchen, dining room and bar areas.

2. Clause 19. – Meal Allowance: Delete subclause (1) and insert the following in lieu thereof:

(1) An employee who is required to work overtime under Clause 10. – Overtime, and where such overtime extends beyond 5.00 p.m., a meal allowance shall be paid in accordance with the provisions of Clause 22. - Overtime of the Public Service Award 1992 as amended. Provided that where such overtime extends beyond 6.00 a.m. the following day, an allowance of \$16.40 or the amount charged by the House, whichever is the higher, for such a three course meal shall be paid.

3. Clause 23. – Uniforms and Clothing: Delete subclause (2) and insert the following in lieu thereof:

(2) Such uniforms supplied shall be laundered and/or dry cleaned by the employer and remain the property of the employer, provided that in lieu of the employer laundering and/or dry cleaning same, an employee shall be paid \$9.30 per week for such laundering and/or dry cleaning, excepting any person employed as a Cook who shall be paid \$14.30 per week for laundering and/or dry cleaning.

2018 WAIRC 00167

RANGERS (NATIONAL PARKS) CONSOLIDATED AWARD 2000
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

THE CHIEF EXECUTIVE OFFICER (EXECUTIVE DIRECTOR) OF THE DEPARTMENT OF
BIODIVERSITY, CONSERVATION AND ATTRACTIONS (FORMERLY DEPARTMENT OF
CONSERVATION AND LAND MANAGEMENT) AND OTHERS

RESPONDENTS

CORAM CHIEF COMMISSIONER P E SCOTT

DATE TUESDAY, 6 MARCH 2018

FILE NO/S APPL 13 OF 2018

CITATION NO. 2018 WAIRC 00167

Result Award varied

Representation

Applicant Ms N Kefford of counsel

Respondents Mr C Bretnall as agent

Order

HAVING heard Ms N Kefford of counsel for United Voice WA and Mr C Bretnall as agent for the respondents, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Rangers (National Parks) Consolidated Award 2000* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 6 March 2018.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

SCHEDULE**1. Clause 9. – Overtime: Delete subclause (7) and insert the following in lieu thereof:**

- (7) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid \$13.15 for a meal, and if owing to the amount of overtime worked, a second or subsequent meal is required he/she shall be supplied with each such meal by the employer or be paid \$7.70 each meal so required.
- (b) The provisions of paragraph (a) of this subclause do not apply-
- (i) in respect of any period of overtime for which the employee has been notified on the previous day or earlier that he/she will be required; or
- (ii) to any employee who lives in the locality in which the place of work is situated who can reasonably return home for meals; or
- (iii) where the overtime worked is outside the customary meal time.
- (c) If an employee provides him/herself with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, the employee shall be paid for each meal provided and not required, the appropriate amount prescribed in paragraph (a) of this subclause.
- (d) An employee required to work continuously from midnight to 6.30am and ordered back to work at 8.00am the same day shall be paid \$6.75 breakfast.
- (e) The provisions of this subclause do not operate so as to require payment of more than double time rates, or double time and one half on a holiday prescribed under this Award for any work.

2. Clause 14. – Conditions and Allowances: Delete this clause and insert the following in lieu thereof:14. - CONDITIONS AND ALLOWANCES

- (1) The provisions of the *Miscellaneous Government Conditions and Allowances Award No. A 4 of 1992* shall apply mutatis mutandis to all employees covered by this Award.
- (2) Subject to the provisions of this Award, the provisions of the Public Service Award 1992 PSA NO. 4 of 1989 at:
- (a) Clause 30. - Camping Allowance and Schedule C - Camping Allowance; and
- (b) Clause 33. - Diving Allowance, Clause 34. - Flying Allowance and Schedule K - Diving, Flying and Seagoing Allowance.
- as amended from time to time, shall apply mutatis mutandis to employees covered by this Award.
- (3) Mobile Rangers shall, in addition to their normal rate of pay, be paid an allowance of \$135.10 per week to offset the costs associated with living in and maintaining a caravan.
- This allowance is to be moved year to year to reflect the change in CPI for Perth.
- (4) The following conditions shall apply to Rangers Assistants on vermin, plant or noxious weed control who are required to use a toxic substance.
- (a) The employee shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.
- (b) The employee using such materials shall be provided with, and shall use, all safeguards as are required by the appropriate government authority or, in the absence of such requirement, such safeguards as are defined by a competent authority or person chosen by the union and the employer.
- (c) The employee using toxic substances or materials of a like nature shall be paid 68 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 60 cents per hour extra.
- (d) For the purposes of this subclause toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.
- (5) (a) An employer who requires a Rangers Assistant to use a pesticide shall:
- (i) Inform the employee of any known health hazards involved; and
- (ii) Ascertain from the Department of Health and Medical Services whether and, if so, what protective clothing or equipment should be worn during its use.

- (b) Pending advice from that department the employer may require the pesticide to be used if the employer informs the employee of any safety precautions specified by the manufacturer of the pesticide and instructs the employee to follow those precautions.
 - (c) The employer shall supply the employee with any protective clothing or equipment required pursuant to paragraphs (a) and (b) of this subclause and, where necessary, instruct the employee in its use.
 - (d) An employee required to wear protective clothing or equipment for the purpose of this subclause shall be paid 76 cents per hour or part thereof while doing so unless the Union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while wearing it or, in the event of disagreement, the Western Australian Industrial Relations Commission so determines.
 - (e) An allowance is not payable under this clause if the Department of Health and Medical Services advises the employer in writing that protective clothing or equipment is not necessary.
- (6) Where agreement is reached between the employer and the employee, payment of wages may be made in cash and a signature of the employee shall be obtained for such cash payment.

AGREEMENTS—Industrial—Retirement from—

2018 WAIRC 00180

NOTICE

AG 13 OF 2011

BOCS TICKETING AND MARKETING SERVICES - DEPARTMENT OF CULTURE AND THE ARTS - AGREEMENT 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 15 of 2018

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations as agent for the Department of Local Government, Sports and Cultural Industries (formerly the Department of Culture and the Arts), will cease to be a party to the *BOCS Ticketing and Marketing Services - Department of Culture and the Arts -Agreement 2011*, on and from the 23rd day of March 2018.

DATED at Perth this 28th day of February 2018.

(Sgd.) S BASTIAN,

Registrar.

[L.S.]

2018 WAIRC 00181

NOTICE

PSAAG 47 OF 2002

CLERKS (PUBLIC AUTHORITIES) GENERAL AGREEMENT 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 16 of 2018

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations as agent for the Lotteries Commission (Lottery West), will cease to be a party to the *Clerks (Public Authorities) General Agreement 2002*, on and from the 23rd day of March 2018.

DATED at Perth this 28th day of February 2018.

(Sgd.) S BASTIAN,

Registrar.

[L.S.]

2018 WAIRC 00182

NOTICE**THE CONGREGATION OF THE PRESENTATION SISTERS (WA) INC TEACHERS ENTERPRISE BARGAINING AGREEMENT 2015.****NO. AG 25 OF 2016**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 17 of 2018

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Congregation of the Presentation Sisters (WA) Inc will cease to be a party to the *The Congregation of the Presentation Sisters (WA) Inc Teachers Enterprise Bargaining Agreement 2015, No AG 25 of 2016*, on and from the 26th day of March 2018.

DATED at Perth this 9th day of March 2018.

(Sgd.) S BASTIAN,

Registrar.

[L.S.]

2018 WAIRC 00183

NOTICE**THE CONGREGATION OF THE PRESENTATION SISTERS (WA) NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT (WA) INC, 2014. NO. AG 11 OF 2016**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 18 of 2018

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Congregation of the Presentation Sisters (WA) Inc will cease to be a party to the *Congregation of The Presentation Sisters (WA) Non-Teaching Staff Enterprise Bargaining Agreement (WA) Inc, 2014, No AG 11 of 2016*, on and from the 26th day of March 2018.

DATED at Perth this 9th day of March 2018.

(Sgd.) S BASTIAN,

Registrar.

[L.S.]

NOTICES—Application for General Order—

2018 WAIRC 00179

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

111 St Georges Terrace, Perth

Submissions for the 2018**WA Minimum Wage**

The Western Australian Industrial Relations Commission is required to set the minimum wage to apply to employers and employees covered by the WA industrial relations system. It must do this before 1 July each year. The current minimum wage for an adult employee of \$708.90 per week was set in June 2017 to apply from 1 July 2017.

The Commission invites interested persons and organisations to make a submission to the Commission on what minimum wage should be set in 2018. The Commission will hear oral submissions on Wednesday, 23 May 2018. The proceedings are open to the public and will be webcast. Any person who wishes to make an oral submission at that time should notify the Registrar of the Commission stating the basis of their interest. This must be done by Tuesday, 15 May 2018.

Written submissions are also welcome. Any person or organisation who wishes to make a written submission should do so by Tuesday, 15 May 2018. Please note that copies of written submissions may be made available to other persons appearing and may be displayed on the Commission's website. Anonymous submissions will not be considered.

In making its decision, the Commission is required to consider the need to —

- ensure that Western Australians have a system of fair wages and conditions of employment; and
- meet the needs of the low paid; and
- provide fair wage standards in the context of living standards generally prevailing in the community; and
- contribute to improved living standards for employees; and
- protect employees who may be unable to reach an industrial agreement; and
- encourage ongoing skills development; and
- provide equal remuneration for men and women for work of equal or comparable value.

It is also required to consider:

- the state of the economy of Western Australia and the likely effect of its decision on that economy and, in particular, on the level of employment, inflation and productivity in Western Australia; and
- to the extent that it is relevant, the state of the national economy; and
- to the extent that it is relevant, the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances and other remuneration; and
- the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment; and
- relevant decisions of other industrial courts and tribunals; and
- any other relevant matters.

People interested in making a submission are invited to address those issues.

Further particulars may be obtained from the Registry of the Commission and from the Commission's website at www.wairc.wa.gov.au.

All correspondence should be addressed to the Registrar at the above address or by email to registry@wairc.wa.gov.au quoting matter number APPL 1 of 2018.

DATED at Perth, Tuesday, 13 March 2018.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2018 WAIRC 00142

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2018 WAIRC 00142
CORAM : INDUSTRIAL MAGISTRATE FLYNN
HEARD : WEDNESDAY, 25 OCTOBER 2017
DELIVERED : THURSDAY, 22 FEBRUARY 2018
FILE NO. : M 166 OF 2014
BETWEEN : BRETT COCKMAN

CLAIMANT

AND
 GUARDIAN AIR PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – Claim for redundancy entitlement allegedly owed — Whether employer a ‘small business employer’ – Calculation of annual leave entitlement – ‘Cashing out accrued annual leave’ – Payment in lieu of notice – Accrued jurisdiction to determine common law claim

Legislation : *Fair Work Act 2009* (Cth)
Industrial Relations Act 1979 (WA)
Workplace Relations Act 1996 (Cth)
Family Law Act 1975 (Cth)
Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)
Fair Work Regulations 2009 (Cth)

Case(s) referred to in reasons	:	<i>McShane v Image Bollards Pty Ltd</i> [2011] FMCA 215 <i>Avel Proprietary Limited v Multicoin Amusements Proprietary Limited</i> [1990] HCA 58 <i>Coopes v Daishsat Pty Ltd & Anor (No.2)</i> [2017] FCCA 2210 <i>Fair Work Ombudsman v Grouped Property Services Pty Ltd</i> [2016] FCA 1034 <i>Beck v Spalla</i> [2005] FCAFC 82 <i>Miller v Sunland Park Pty Ltd</i> [2014] FCCA 89 <i>Rana v Google Inc</i> [2017] FCAFC 156 <i>Manotis and Manotis</i> [2016] FCWA 10 <i>Puddy and Grossvard and Anor</i> [2010] FamCAFC 54 <i>Rizeq v Western Australia</i> [2017] HCA 23 <i>Ruane & Bachmann-Ruane and Ors (Accrued jurisdiction)</i> [2012] FamCA 369 <i>Wright v Norris Real Estate Pty Ltd</i> [2016] FCCA 707 <i>Rogan-Gardiner v Woolworths Ltd</i> [2012] WASCA 31
Result	:	Judgment for the claimant
Representation:		
Claimant	:	Mr Jones (agent)
Respondent	:	Mr Gerrans (authorised by the respondent)

REASONS FOR DECISION

- On 12 December 2011, Mr Brett Cockman commenced employment as the ‘chief operations manager’ with the respondent (the Company). The agreed annual salary was \$125,000. On 18 November 2013, the Company wrote to Mr Cockman, stating that ‘the position of chief operations manager had been made redundant as of 17 November 2013’. Mr Cockman immediately ceased working for the Company.
- A dispute has arisen as to Mr Cockman’s entitlements arising from the termination of his employment. First, the Company claims (and Mr Cockman disputes) that it is a ‘small business employer’ as defined in the *Fair Work Act 2009* (Cth) (FW Act). A small business employer is not required make a redundancy payment to an employee: s 121(1)(b) FW Act. This issue is considered below under the heading, ‘Redundancy’.
- Secondly, there is a dispute about the calculation of Mr Cockman’s accrued annual leave entitlement at the end of his employment, including about whether he had ‘cashed out’ his unpaid annual leave in December 2012. This issue is considered below under the heading, ‘Annual leave’.
- Thirdly, there is a dispute about the calculation of the payment in lieu of notice to which Mr Cockman is entitled. The Company calculates an entitlement of ‘two weeks’ based upon s 117 of the FW Act. Mr Cockman calculates an entitlement of between three and eight months based upon the obligation of an employer, imposed by common law, to give an employee ‘reasonable notice’ of the termination of employment. Mr Cockman contends that his common law right is enforceable as part of the accrued jurisdiction of the *Industrial Magistrates Court* when determining a claim under the FW Act. This issue is considered below under the heading, ‘payment in lieu of notice’.
- The FW Act provides for an entitlement, in specified circumstances, to redundancy payments (s 119), annual leave (s 87) and payments in lieu of notice (s 117). These entitlements are ‘National Employment Standards’ and are enforceable as a result of each also being defined as a ‘civil remedy provision’ of the Act: FW Act, s 44, 539. Mr Cockman, being an employee of the Company, and the Company, being a ‘corporation to which paragraph 51(XX) of the Constitution applies’, are respectively a ‘national system employee’ and a ‘national systems employer’: FW Act, s 13, s 14.
- The Industrial Magistrates Court of Western Australia (the IM Court) is an ‘eligible state or territory court’ for the purposes of the FW Act: see s 12. If the IM Court is satisfied that there has been a contravention of a civil remedy provision, the IM Court may make orders for the Company to pay to Mr Cockman an amount that the Company was required to pay under the FW Act: s 545(3)(a). The IM Court is not bound by any rules of evidence or procedure and may inform itself on any matter and in any manner as it thinks fit: *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA), reg 35(4). Although the IM Court is not bound by rules of evidence, it remains necessary for Mr Cockman to prove his claim on the balance of probabilities and the IM Court will only act on evidence having rational probative force: *McShane v Image Bollards Pty Ltd* [2011] FMCA 215 [7].

Redundancy

- The FW Act provides that an employee is entitled to redundancy pay when employment is terminated at the employer’s initiative and the employer no longer requires the job done by the employee to be done by anyone: s 119 of the FW Act. The Company relies upon the ‘small business employer’ exception found in s 121(1)(b) of the FW Act. A ‘small business employer’ is defined as an employer who employs less than 15 employees: s 23(1) of the FW Act. The Company argues that at the relevant date it had one employee only, namely, Mr Cockman.
- Mr Cockman’s response is to note that the employees of the ‘associated entities’ of the Company are to be included when in the count of employees: s 23(3) of the FW Act. He contends that the entity that operates the business known as ‘WA Direct Plasterboard Sales’ (WADPS) is an associated entity of the Company and that the combined number of employees of the

Company and WADPS is at least fifteen. Two issues arise for my determination. First, whether the entity that operates WADPS was an 'associated entity' of the Company at the relevant date. Secondly, (if so) did the employees of the Company and WADPS number at least fifteen?

Associate Entity?

- 9 The first issue for me to determine is whether the entity operating a business known as 'WA Direct Plasterboard Sales' was an 'associated entity' of the Company at the relevant date.
- 10 The FW Act provides (in s 119) for an employee entitlement to paid redundancy, subject (in s 121(1)) to the non-application of the entitlement if the employer is a small business employer. The significance of this statutory framework and the language of sections 119 and 121 is that the onus is on the employer to prove, on the balance of probabilities, the non-application of the entitlement by reason of the employer being a 'small business employer': *Avel Proprietary Limited v Multicoin Amusements Proprietary Limited* [1990] HCA 58; (1990) 171 CLR 88 at 119 (McHugh J).
- 11 Section 23 of FW Act provides that a small business employer is an employer with fewer than 15 employees and that, for the purpose of calculating the number of employees employed by the employer, associated entities is to taken to be one entity. Section 12 of the FW Act provides that an associated entity has the meaning given by s 50AAA of the *Corporations Act 2001* (Cth) (the CA). Section 50AAA of the CA provides:

50AAA Associated entities

- (1) *One entity (the **associate**) is an associated entity of another entity (the **principal**) if subsection (2), (3), (4), (5), (6) or (7) is satisfied.*
- (2) *This subsection is satisfied if the associate and the principal are related bodies corporate.*
- (3) *This subsection is satisfied if the principal controls the associate.*
- (4) *This subsection is satisfied if:*
 - (a) *the associate controls the principal; and*
 - (b) *the operations, resources or affairs of the principal are material to the associate.*
- (5) *This subsection is satisfied if:*
 - (a) *the associate has a qualifying investment (see subsection (8)) in the principal; and*
 - (b) *the associate has significant influence over the principal; and*
 - (c) *the interest is material to the associate.*
- (6) *This subsection is satisfied if:*
 - (a) *the principal has a qualifying investment (see subsection (8)) in the associate; and*
 - (b) *the principal has significant influence over the associate; and*
 - (c) *the interest is material to the principal.*
- (7) *This subsection is satisfied if:*
 - (a) *an entity (the **third entity**) controls both the principal and the associate; and*
 - (b) *the operations, resources or affairs of the principal and the associate are both material to the third entity.*
- (8) *For the purposes of this section, one entity (the **first entity**) has a **qualifying investment** in another entity (the **second entity**) if the first entity:*
 - (a) *has an asset that is an investment in the second entity; or*
 - (b) *has an asset that is the beneficial interest in an investment in the second entity and has control over that asset.*

- 12 The effect of s 50AAA(1) of the CA is that one entity is associated with another entity (the principal) if the criteria in any one of the subsections (2), (3), (4), (5), (6) or (7) is satisfied.
- 13 For the purpose of applying the criteria found in each of s 50AAA(2) - (7) of the CA, it is necessary to identify the entity that operated WADPS as at the relevant date. The relevant date for assessing the existence of any 'associated entity' of the Company is 17 November 2013, being the earlier of the time of termination of Mr Cockman (by telephone conversation with Mr Gerrans) and the notice of termination of 18 November 2013: s 121(1) of the FW Act.
- 14 I am satisfied that Roselander Pty Ltd was the entity that operated WADPS as at 17 November 2013. The evidence in support of this finding is twofold. First, for the purpose of proving that at the time of Mr Cockman's redundancy there were not more than 12 employees of WADPS, Mr Gerrans produced a document entitled, 'Employee Period Pay Report' (the Roselander Employee List Document) (exhibit C). The 'footer' of the document contained a reference to 'ROSELANDER PTY LTD'. Secondly, Mr Gerrans explained the significance of the reference in his evidence transcribed at page 72 of the trial transcript: 'Roselander Proprietary Limited as trustee for the Roselander Trust owned the trading name and trading entity WA Direct Plasterboard Sales up until June 2015.' In context, I infer that Roselander Pty Ltd was the entity that operated WADPS as at 17 November 2013.
- 15 Roselander Pty Ltd is associated with the Company if the criteria in any one of the CA subsections 50AAA (2), (3), (4), (5), (6) or (7) is satisfied. Those criteria require an assessment of the evidence on whether the association between Roselander Pty Ltd

(or a third entity) and the Company is one of: being 'related' (as defined), 'control' (as defined); and having a 'qualifying investment' (as defined). In some cases, an assessment of evidence on the 'operations, resources and affairs' of Roselander Pty Ltd, the Company and a third entity will be required. It is convenient to make the following observations about the evidence relevant to findings (made below) on the concepts identified in the two preceding sentences i.e. 'related', 'control', 'qualifying investment' etc.:

- (a) Australian Securities and Investments Commission (ASIC) records adduced in evidence by Mr Cockman concerning the Company, Roselander Pty Ltd and certain other entities (World Environmental Technologies Pty Ltd, Biothys Australia Pty Ltd and R. Watson Nominees Pty Ltd) are summarised in a table set out in an endnote to these reasons. Those ASIC records reveal that, as at 17 November 2013:
 - i. The Company had issued two classes of share: one (1) governing share, held by Tracey Chester and 800 ordinary shares held by nine different entities, including 256 shares (32%) held by R. Watson Nominees Pty Ltd. The sole director of the Company was Tracey Chester.
 - ii. R. Watson Nominees Pty Ltd had issued two ordinary shares to Robert Clarence Watson. The two directors were Robert Clarence Watson and Gloria Watson.
 - iii. Roselander Pty Ltd had issued two ordinary shares to Robert Clarence Watson. The two directors were Robert Clarence Watson and Gloria Watson.
- (b) Neither Mr Cockman or the Company adduced the Constitution of the Company as evidence on the rights or restrictions that attach to the one governing share held by Tracey Chester in the Company compared to the rights or restrictions that attach to the 800 ordinary shares. I am unable to make findings on the existence of any rights or restrictions. However, in circumstances where the onus is upon the Company to prove that it is not a small business employer, it is appropriate to draw an inference that the absent evidence would not help the case of the Company. The result is that, on matters requiring a poll of members of the Company such as the election of directors and voting at a general meeting of the Company, it is appropriate to infer that those matters will be resolved by either Tracey Chester alone as the holder of the one issued governing share or the nine entities holding ordinary shares (in proportion to their share holding) or by some combination of Tracey Chester and the nine entities holding ordinary shares in the manner provided for by the Constitution of the Company.
- (c) It is not in dispute that, in addition to being the sole director of the Company, Tracey Chester was the chief executive officer (CEO) of the Company. The Roselander Employee List Document also identifies Tracey Chester as an employee of Roselander Pty Ltd. Mr Gerrans gave evidence that her role in Roselander Pty Ltd was limited, describing her as an employee in the accounts division. A chart, apparently prepared by Mr Cockman for the trial of this case, and a print out of a 'Linked In' web page (adduced by Mr Cockman) of uncertain date, describe Tracey Chester as the 'CEO' of WADPS. Little weight should be given to those documents. In any event, in cross-examination, Mr Cockman conceded that he had no personal knowledge of the role performed by Tracy Chester in Roselander Pty Ltd. Tracey Chester was not called by the Company to give evidence. Again, in circumstances where the onus is upon the Company to prove that it is not a small business employer it is appropriate to draw an inference that the absent evidence on the role of Tracey Chester would not help the case of the Company. In circumstances where Tracey Chester was an employee of Roselander Pty Ltd (irrespective of her role) and where the directors of her employer, Roselander Pty Ltd, were also the directors of a company, R. Watson Nominees Pty Ltd, holding 256 of 800 ordinary shares in the Company, it is open to infer that Tracy Chester, as an employee, was subject to the direction of those directors of Roselander Pty Ltd when exercising rights associated with being the holder of the one issued governing share in the Company.
- (d) Mr Cockman adduced a document in the form of a chart on an A4 sheet headed, 'Watson Family Group' identifying a large number of entities including 'Roselander Pty Ltd', 'R. Watson Nominees Pty Ltd' and 'World Environmental Technologies' and including what could be interpreted as the percentage of an entity 'owned' by another identified entity. The provenance, purpose, author and date of the document is unknown and, for that reason, my view is that: limited weight can be placed on the document; and where inconsistent with ASIC records, no weight can be placed on the document.
- (e) Mr Cockman adduced two documents concerning a business trading as 'World Environmental Technologies' (WET) (a letter from WET business dated 12 October 2012 and a 'capability statement' of WET business). Extracts are set out in an endnote to these reasons. The documents were transparently created for marketing purposes and must be assessed accordingly. Of present significance is a claim in the capability statement that 'administrative functions (of the WET business) are performed and delivered by staff co-located within the Watson Group'. I infer that, in this context, the 'Watson Group' may be taken to include Roselander Pty Ltd, a company in which Robert Clarence Watson and Gloria Watson were sole directors and shareholders.
- (f) Mr Gerrans gave evidence of regular meetings attended by (unidentified) shareholders of the Company in which the ongoing operations of the Company were the subject of discussion. Mr Gerrans stated that Robert Clarence Watson did not participate in those meetings. I infer that those shareholders included some or all of the members identified in ASIC records.

Were Roselander Pty Ltd and the Company 'related bodies corporate': s 50AAA(2) of the CA?

16 The effect of the definition of 'related bodies corporate' in s 50 of the CA is that I must consider whether the Company is a 'subsidiary' of Roselander Pty Ltd. The effect of the definition of 'subsidiary' in s 46 of the CA is that the Company is a subsidiary of Roselander Pty Ltd 'if, and only if' (relevantly) Roselander Pty Ltd:

- (i) controls the composition of the Company board; or

- (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the Company.

17 It is apparent from my findings above at paragraph 17 that, as a result of Tracey Chester being the holder of the one issued governing share in the Company and being an employee of Roselander Pty Ltd, it is open to me to infer that she was subject to the direction of Roselander Pty Ltd whenever there was a poll affecting the composition of the Company board, or a poll of votes at a general meeting of the Company. It follows that Roselander Pty Ltd and the Company were associated by reason of being 'related bodies corporate'. For completeness, I make the following additional findings on s 50AAA of the CA.

Did the Company 'control' Roselander Pty Ltd: s 50AAA(3) of the CA?

18 The effect of the definition of 'control' in section s 50AA of the CA is that the Company controls Roselander Pty Ltd if the Company has the capacity to determine the outcome of decisions about the financial and operating policies of Roselander Pty Ltd. It is apparent from my findings in paragraph 15 that, save for a claim made for marketing purposes about the possibility of sharing administrative functions, there is no evidence of the Company having any influence on the business of Roselander Pty Ltd. The Company did *not* 'control' Roselander Pty Ltd.

Did Roselander Pty Ltd 'control' the Company and were the operations, resources or affairs of the Company material to Roselander Pty Ltd: s 50AAA(4)?

19 Assuming (for the same reasons identified in paragraph 17 as to Tracey Chester's role as an employee of Roselander Pty and a director of the Company) that Roselander Pty Ltd had the capacity to determine the outcome of decisions about the financial and operating policies of Company, there is no evidence that the operations, resources or affairs of the Company were material to Roselander Pty Ltd.

Does Roselander Pty Ltd have a 'qualifying investment' in the Company etc.: s 50AAA(5)?

20 The effect of the definition of qualifying investment in s 50AAA(8) of the CA is that it is necessary to ascertain whether Roselander Pty Ltd:

- (a) has an asset that is an investment in the Company; or
- (b) has an asset that is the beneficial interest in an investment in the Company and has control over that asset?

21 There is no evidence that the assets of Roselander Pty Ltd, legal or beneficial, include investments in the Company. Submissions made on behalf of Mr Cockman wrongly assume that the common directors and shareholders of Roselander Pty Ltd and R. Watson Nominees Pty Ltd result in the former holding the 'same' investments as the latter.

Does the Company have a 'qualifying investment' in Roselander Pty Ltd etc.: s 50 AAA(6)?

22 It is necessary to ascertain whether the Company:

- (a) has an asset that is an investment in the Roselander Pty Ltd; or
- (b) has an asset that is the beneficial interest in an investment in Roselander Pty Ltd and has control over that asset?

23 There is no evidence that the assets of the Company, legal or beneficial, include investments in Roselander Pty Ltd. The only evidence of the assets of the Company, apparent from my findings in paragraph 15, is of assets relevant to the conduct of the WET business and, from 30 April 2014, of the sole issued share in World Environmental Technologies Pty Ltd. There is no apparent connection with an investment in Roselander Pty Ltd.

Does a third entity control both the Company and Roselander Pty Ltd and are the operations, resources or affairs of the Company and Roselander Pty Ltd both material to the third entity: s 50AAA(7)?

24 The only 'third entity' with the capacity to determine the outcome of decisions about the financial and operating policies of the Company and Roselander Pty Ltd are Robert Clarence Watson and Gloria Watson. As directors of Roselander Pty Ltd they have the capacity to determine the financial and operating policies of Roselander Pty Ltd. They also have the capacity to direct their employee, Tracy Chester, in the manner that she discharges her role as the sole director, CEO and holder of the sole governing share of the Company. Accordingly, Robert Clarence Watson and Gloria Watson have the *capacity* to also determine the outcome of decisions about the financial and operating policies of the Company.

25 There is no evidence that the operations, resources or affairs of the Company and Roselander Pty Ltd are *both* material to Robert Clarence Watson and Gloria Watson. The uncontradicted evidence of Mr Gerrans is that the operations of the Company were the subject of monthly 'investor' meetings and that Robert Clarence Watson did not participate. There is some evidence of Robert Clarence Watson having a role in meeting a potential client of the Company. However, there is insufficient evidence to make a finding of 'materiality' to Robert Clarence Watson.

At Least 15 Employees?

26 As a result of my finding that Roselander Pty Ltd is, for the purposes of the FW Act, an 'associated entity' of the Company, the next issue for me to determine is whether the number of employees of the Company *and* Roselander Pty Ltd numbered at least fifteen on 17 November 2013.

27 The Company case is that, *including* employees of Roselander Pty Ltd, the Company was nevertheless an employer who employed less than 15 employees, namely 13 employees. Those employees comprise Mr Cockman, as the sole employee of the Company, and 12 of the 13 persons who are listed on the Roseland Employee List Document. Mr Cockman's case is that, in addition to the 13 'conceded' employees there should be *added*: two identified employees of the Company (Mr Leigh Wolinski and Mr Sean Lewer); and four identified employees of Roselander Pty Ltd (Mr Geoffrey Jones, Ms Katherine White, Mr David King, Mr Brian Goodwin). Mr Cockman also relied upon a statement in marketing material of WADPS referring to employing 'over 40 staff'. I do not regard the marketing material as a reliable basis for determining the number of employees of Roseland Pty Ltd. I prefer to place weight on the Roseland Employee List Document and other evidence described below.

Mr Geoffrey Jones is an employee

- 28 The evidence of Mr Gerrans on Mr Jones is not contradicted; I am satisfied as to its reliability. While an employee of Roselander Pty Ltd, Mr Jones was injured at work and was unable to work. As a result, he became entitled to 'workers compensation payments' under a workers compensation insurance policy maintained by Roselander Pty Ltd. The effect of the policy was that regular payments were remitted from the insurer to Roselander Pty Ltd for payment to Mr Jones. Mr Jones' name appeared in the Roselander Employee List Document for the purpose of enabling the processing of those payments from the insurer to Mr Jones. Mr Gerrans emphasised that Mr Jones was not engaged in work for the Company. My conclusion is that, as at 17 November 2013, Mr Jones remained an employee of the Company. His contract of employment was not terminated, as a matter of law, by his injury or by him being unable to work as a consequence of his injury or by his receipt of workers compensation payments. There is no evidence of Roselander Pty Ltd or Mr Jones expressly initiating the termination of the employment contract. Nor is the termination of his employment contract to be implied from the fact of Mr Jones being unable to work while in receipt of workers compensation payments. It follows that, as at 17 November 2013, his contract of employment remained on foot and he remained an 'employee'.
- 29 The Company contends that any work done by the other persons identified by Mr Cockman as 'employees' was done as independent contractors. It is convenient to adopt the statement of relevant principles from two cases, amended as relevant to this case, omitting citations, and reproduce those statements in an endnote to these reasons: *Coopes v Daishsat Pty Ltd & Anor (No.2)* [2017] FCCA 2210; *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034 (Katzmann J). In summary, the principles that guide me in an assessment of the evidence in this case are as follows:
- (a) The question of whether someone is an employee or an independent contractor is a question of law and is not to be determined by what they may be called or, indeed, what they may call themselves. A label, consensual or otherwise, cannot affect 'the inherent character' of the relationship.
 - (b) A contract of employment is based on personal service. The difference between an employee and an independent contractor is the difference between a person who serves the employer in the employer's business, and a person who carries on his or her own trade or business.
 - (c) Control and the right to control is one relevant factor (albeit an important one). The totality of the relationship must be considered. The modern approach to determining whether someone is an employee is 'multi-factorial'. The object of the exercise is to paint a picture from the accumulation of detail. Not all details are of equal weight or importance in any given situation.
 - (d) Factors that are relevant to determining whether a person (the Worker) is an employee or an independent contractor include:
 - What are the payment arrangements? Regular payments to the Worker (i.e. payment of a 'wage') suggests the recipient is an employee. Payments initiated by delivery of an invoice from the Worker suggest a payment to an independent contractor. Payments to a Worker that were not initiated by the Worker suggests an employer/employee relationship. Taxation and superannuation arrangements may suggest the nature of the relationship e.g. 'PAYG' taxation arrangements suggests an employer/employee relationship.
 - What are the workplace arrangements? A Worker who is permitted to sub-contract tasks is less likely to be an employee. A Worker who has an entitlement to holidays is more likely to be an employee. A Worker who uses his or her own tools is more likely to be an independent contractor.
 - For the benefit of whom does the goodwill inure? A Worker who is held out as 'representing' a principal is more likely to be an employee (e.g. wearing uniforms in the name of the principal or communicating with third parties in the name of the principal).

Mr Leigh Wolinski is an employee

- 30 The Company case is that Mr Wolinski was engaged as a subcontractor to perform certain tasks which, if not performed correctly, were required to be corrected 'without charge' to the Company. His 'main' source of income as a real estate agent was not related to his work for the Company. He was paid on invoices with the Company accounting for GST. The case was supported by the oral evidence of Mr Gerrans and Ms White and, absent contradictory evidence, may be accepted as accurate. Mr Cockman's evidence is that he worked alongside Mr Lewers and Mr Wolinski in premises at Burswood; each worked full time ('[in] the office every day, same time, every week'); the Capability Statement accurately stated the role of Mr Wolinski as 'senior projects manager' who reported to Tracey Chester as CEO; Mr Wolinski was 'held out' as an employee of the Company.
- 31 Mr Cockman's evidence is not necessarily inconsistent with the case of the Company and may also be accepted as accurate. My conclusion is that, as at 17 November 2013, Mr Wolinski was an employee of the Company. The significance of the Company and Mr Wolinski adopting the 'contractor label' and arranging payment accordingly is less significant to me than Mr Cockman's evidence of regular hours and regular duties of Mr Wolinski and of the overall impression that Mr Wolinski's daily work was directed towards building the goodwill of the business of the Company rather than the goodwill of his own business. There is also evidence of him being subject to the control of the Company, including him accepting the instruction to deliver a letter of termination to Mr Cockman.

Mr Sean Lewer is not an employee

- 32 The Company case is that Mr Lewer was engaged as a subcontractor to perform certain tasks which, if not performed correctly, were required to be corrected 'without charge' to the Company; his activities, unrelated to his work for the Company included playing music in a band and operating his own window cleaning business. Like Mr Wolinski, he was paid on invoices with the Company accounting for GST. Mr Lewer also participated in regular 'investor meetings' on the direction of the Company. The

Company case was supported by the oral evidence of Mr Gerrans and Ms White and, absent contradictory evidence, may be accepted as accurate. Mr Cockman's evidence is that he worked alongside Mr Lewers as described above; the Capability Statement accurately stated the role of Mr Lewers as a 'business development manager' who was the founding shareholder of the business. Mr Lewers was 'held out' as an employee of the Company (e.g. by email address). Again, Mr Cockman's evidence is not inconsistent with the case of the Company and may also be accepted as accurate. My conclusion is that, as at 17 November 2013, Mr Lewers was *not* an employee of the Company. Although there are obviously similarities with the position of Mr Wolinski (payment arrangements, regular hours and regular duties; work directed towards building the goodwill of the Company), there is also evidence that Mr Lewers was not subject to the control of the Company. He participated in investor meetings. His dealings with Mr Cockman in the last days of his employment suggested that he was not subject to direction by Ms Tracey Chester.

Ms Katherine White is an employee

33 Ms White stated that she was engaged as an independent contractor by a variety of entities including the Company and Roselander Pty Ltd to perform administrative tasks including the preparation of payroll. She was engaged in that role by the Company and, at the request of Ms Tracey Chester, she made calculations of Mr Cockman's entitlements on the termination of his employment. She said that she performed a similar role for Roselander Pty Ltd (trading as WADPS) and for other entities. She stated that she did the payroll for 'about five different companies' (including the Company and WADPS).

34 I infer from her evidence that her *only* clients were those introduced by a person who had a connection (officeholder, shareholder, investor etc.) to an existing client. There is no evidence on the payment arrangements for Ms White or of the workplace arrangements e.g. whether she worked from her own premises or from the premises of her clients. I note that an email from Ms White on 1 July 2014 was from her email account 'kathy.white@guardianair.com.au' and was signed by her as 'accounts manager', 'Guardian Air.' I note that in her 'LinkedIn' web page, Ms White identifies herself as a 'personal assistant' at 'WA Direct Plasterboard', although I must be cautious that a 'LinkedIn' web page may be inaccurate insofar as Ms White may not have been afforded the opportunity to update the page with timely and accurate information. My conclusion is that, as at 17 November 2013, Ms White was a part-time employee of the Company and a part-time employee of Roselander Pty Ltd. The significance of Ms White adopting the 'contractor' label is less significant to me than: her evidence of regular tasks for the Company (payroll) and Roselander Pty Ltd (payroll) over a lengthy period; the evidence of Ms White being 'held out' in email communications as an employee of the Company and of her being subject to the direction of Ms Tracey Chester.

Mr Brian Goodwin and Mr David King are not employees

35 Mr Gerrans stated that Mr Goodwin was engaged in the Kalgoorlie operations of Roselander Pty Ltd and, perhaps, other entities. Mr Gerrans was unsure as to the precise remuneration arrangements of Mr Goodwin, except that, his name not appearing in the Roselander Employee List Document, Mr Goodwin was not employee of Roselander Pty Ltd. Mr Gerrans stated that Mr King was engaged 'through a labour hire company to perform various duties' for entities that included the Company and Roselander Pty Ltd. Ms White gave evidence to similar effect as Mr Gerrans. There is evidence of communications from Mr King using the email of WADPS ('david.king@directplasterboard.com.au') when communicating with Mr Cockman about the circumstances of the termination of his employment. My conclusion is that, as at 17 November 2013, Mr Goodwin and Mr King were not employees of the Company or of Roselander Pty Ltd. The (admittedly scant) evidence suggests payment arrangements and irregular 'task-based' work that are consistent with work of each as an independent contractor.

36 In the result, there are 16 relevant employees: Mr Cockman, Mr Wolinski, Ms White and the 13 persons named on Roselander Employee List Document. The Company was not a small business employer at the relevant date.

Conclusion on Redundancy Issue

37 The Company has failed to satisfy me that the 'small business employer' exception applies when assessing Mr Cockman's entitlement to a redundancy payment as provided in s 119 of the FW Act. The effect of s 119(2) of the FW Act is that Mr Cockman is entitled to redundancy pay calculated by reference to his 'period of continuous service with the employer on termination'. The relevant commencement date is 12 December 2011. If the relevant 'termination date' is the date of written notice of termination (18 November 2013), the period of continuous service is less than two years, giving rise to an entitlement to four weeks pay. The result is the same if the termination date is 'extended' for two weeks to 2 December 2013, being the period of notice required by s 117 of the FW Act (as calculated below) or 'extended' for 5.5 days to 24 November 2013, being the period of unpaid accrued annual leave at 18 November 2013, or 'extended' for two weeks plus 5.5 days to 8 December 2013, being *both* of those periods. The result is different if the termination date is extended by a period of 'reasonable notice' required, at common law, to terminate an employment contract. Mr Cockman argues in favour of a period of 3 – 8 months i.e. for a termination date of between 18 February 2014 – 18 July 2014. I consider a similar argument below at paragraph 45 for the purpose of determining the end date of Mr Cockman's employment for the purpose of calculating his annual leave. For the same reasons as articulated at paragraph 45, I do not consider that the text and structure of s 119 of the FW Act provide for resort to a termination date calculated by reference to an implied term of the contract of employment.

Annual Leave

38 The FW Act provides that Mr Cockman is entitled to four weeks (20 days) of paid annual leave, accruing progressively during the year and accumulating from year to year: s 87 of the FW Act. At the end of his employment, the Company was required to pay to Mr Cockman the amount that would have been payable had he then taken any untaken annual leave: s 90(2) of the FW Act.

39 The Company contends that, in December 2012 and in accordance with industry practice, Mr Cockman was paid the whole of his annual leave accrued over the preceding year i.e. he cashed out the whole balance of his accrued annual leave. The Company case is supported by the oral evidence of Mr Gerrans and Ms White as to the practice of a small business in the industry of the Company and of the Company in particular. The Company did not call a witness to give evidence of being present when Mr Cockman was handed a cheque or cash in December 2012 on account of unpaid annual leave.

- 40 Mr Cockman disputes receiving any such payment and denies the existence of an agreement between him and the Company to cash out accrued annual leave. Mr Cockman contends that his entitlements upon termination should reflect (on his calculation) the 12 days of untaken annual leave that had accrued at the end of 2012. Mr Cockman gave evidence denying any agreement to receive any payment in lieu of unpaid annual leave and denies having received, in December 2012, any payment on account of untaken accrued annual leave. He conceded that Tracey Chester may have made a cash payment to him of an unknown amount shortly before Christmas, 2012. Mr Cockman stated that any such payment was not tendered or received by him on account of annual leave obligations; he believed it to be a 'Christmas bonus'.
- 41 For the following reasons, Mr Cockman succeeds on this issue:
- Mr Cockman's credible and plausible evidence of not receiving a payment must be accepted given that the Company did not call direct evidence (a witness or a business record) of the payment being made.
 - The FW Act provides that an employer and an employee may, *subject to certain conditions*, agree to an employee cashing out accrued annual leave: s 94 of the FW Act. Two of those conditions were *not* satisfied by the Company in this case:
 - (i) each agreement to cash out an annual leave entitlement must be contained in a separate agreement in writing: s 94(3) FW Act. The Company did not adduce evidence of a written agreement to cash out leave in December 2012. The "industry practice" is not an answer to the statutory obligation of a written agreement.
 - (ii) cashing out accrued annual leave is prohibited unless, after cashing out, the employee's *remaining* accrued annual leave entitlement was at least four weeks: s 94(2) of the FW Act. If Mr Cockman cashed out 12 days leave in December 2012, he did not have any accrued annual leave entitlement.
 - The Company did not produce written records that confirmed the alleged agreement or the alleged payment in December 2012. The failure to produce those records is significant. The FW Act provides that an employer must make (and keep for seven years) certain proscribed records and if an employer fails to keep those records, the employer has the burden of disproving any relevant allegation: sections 535(1), 557C(1) of the FW Act. Regulation 3.36(2) of the *Fair Work Regulations 2009* (Cth) provides that the Company was required to make and keep the following records:
 - (2) *If an employer and employee agree to cash out an accrued amount of leave:*
 - (a) *a copy of the agreement is a kind of employee record that the employer must make and keep;*
and
 - (b) *a kind of employee record that the employer must make and keep is a record that sets out:*
 - (i) *the rate of payment for the amount of leave that was cashed out; and*
 - (ii) *when the payment was made*
- 42 Mr Cockman's entitlement to accrued annual leave on termination will reflect his employment commencing on 12 December 2011 and his evidence of having taken eight days leave in 2012 and 26 days leave in 2013 i.e. a total of 34 days. The relevant 'end date' of his employment is required to calculate Mr Cockman's accrued annual leave entitlement.
- 43 The Company contends that his accrued annual leave entitlement is to be calculated on the basis that his employment ended on the last day that he 'worked' (15 November 2013) or the date of on which he was given oral notice of termination of his employment (17 November 2013) or the date on which he was given written notice of termination of his employment (18 November 2013).
- 44 Mr Cockman contends that his accrued annual leave entitlement is to be calculated on the basis that his employment ended at the end of the expiration of the minimum period of notice of termination required by s 117 of the FW Act (two weeks i.e. 2 December 2013) or at the end of the expiration of the 'reasonable notice' period required, at common law, to terminate an employment contract (3 – 8 months i.e. between 18 February 2014 – 18 July 2014).
- 45 My view is that, for the purpose of calculating Mr Cockman's accrued annual leave entitlement, the relevant 'end date' of his employment is the date at the end of the minimum period of notice required by s 117 of the FW Act i.e. 2 December 2013. Section 90(2) of the FW Act creates an obligation to pay accrued annual leave entitlement, when 'employment of an employee ends'. In context, 'employment' ends for the purpose of s 90(2) of the FW Act when the legal relationship of employer/employee ends as provided by the FW Act. The Company arguments in favour of 15 – 18 November 2013 ignore the text and structure of s 117 of the FW Act providing for *either* (paid) work until the end of the notice period (s 117(1)) *or* for payment in lieu as if the employee worked until the end of the notice period (s 117(2)). Mr Cockman's argument in favour of 18 February 2014 – 18 July 2014 ignores the whole of s 117 of the FW Act and, indeed, the whole of the FW Act in favour of importing the common law on 'reasonable notice' for the purpose of calculating the end of employment for the purpose of s 90(2) FW Act. Put plainly, there is nothing in the text or structure of s 90, Division 6 of Part 2-2, Chapter 2 of the FW Act as a whole that would invite resort to a concept outside Part 2-2 of the FW Act on the National Employment Standards for the purpose of calculating the end of employment.

Conclusion on Annual Leave issue

- 46 Mr Cockman's accrued annual leave entitlement is to be calculated on the basis of employment between 12 December 2011 and 2 December 2013. Employment for one year, 11 months, 21 days at four weeks per annum (per s 87(1) of the FW Act) equates to an entitlement to 39.5 days. Mr Cockman had taken 34 days leave. His accrued annual leave entitlement at the end of his employment was 5.5 days. This calculation is included in a reconciliation undertaken below in the conclusion of these reasons.

Payment In Lieu Of Notice

- 47 Section 117 of the FW Act provides for a 'minimum period of notice' of termination of employment calculated by reference to the length of the period of continuous service as at 'the end of the day the (written) notice (of termination) is given'. There is also provision for an increase of the notice period by one week if the employee is over 45 years old and has completed at least two years of continuous service with the employer at the end of the day the notice is given. It is not in dispute that written notice of termination was given by the Company to Mr Cockman on 18 November 2013 (after commencing on 12 December 2011) and that he was over 45 years old at that date.
- 48 The Company propose to make a payment to Mr Cockman in lieu of notice by reference to its obligations under s 117 of the FW Act. The Company calculated the relevant 'minimum period of notice' under s 117(3) as being 'two weeks' on the basis that Mr Cockman had not completed two years of employment as at 18 November 2013. The ordinary meaning of the text of s 117 FW Act supports the Company interpretation. Section 117(1) expressly refers to the employer giving written notice of the day of the termination. Section 117(3) expressly refers to a calculation of the relevant period of continuous service as 'at the end of the day the notice is given'. The relevant 'end date' for the purpose of s 117 is 18 November 2013.
- 49 Mr Cockman's response is that, in addition to an obligation imposed by s 117 of the FW Act, the Company has an obligation, imposed by common law, to give an employee 'reasonable notice' of the termination of employment (the Common Law Reasonable Notice Obligation). Mr Cockman contends that the Company has breached this obligation. He submits that a period of reasonable notice, given the circumstances of Mr Cockman's employment would have been a period of between three and eight months and he seeks damages for breach of the obligation.
- 50 A threshold question is whether the IM Court has jurisdiction to determine a claim based upon the Common Law Reasonable Notice Obligation. Two preliminary points can be made. First, the FW Act does not expressly confer jurisdiction upon the IM Court to determine a claim of in the nature of the Common Law Reasonable Notice Obligation. By s 539(2) of the FW Act, defined persons may apply in relation to a contravention a specified civil remedy provision of the Act to a specified court. Depending upon the particular civil remedy provision, the specified court is one or more of the Federal Court, the Federal Circuit Court, and 'an eligible State or Territory court'. The IM Court is an eligible state or territory court. The result is that the jurisdiction of the IM Court expressly conferred by the FW Act is identified by reference to the ambit of the civil remedy provision which is the subject of a claim. Secondly, the *Industrial Relations Act 1979* (WA) (IR Act) does not confer jurisdiction upon the IM Court to determine a claim in the nature of the Common Law Reasonable Notice Obligation. The IM Court is a 'court of record' created by s 81 of the IR Act. However, unlike the Magistrates Court of WA or the District Court of WA or the Supreme Court of WA, the IM Court does not have a general civil law jurisdiction. The jurisdiction of the IM Court is proscribed by sections 81A and 81AA of the IR Act. Nothing in those provisions would confer jurisdiction on the IM Court to determine a claim of the nature of the Common Law Employment Claim.
- 51 Mr Cockman submits that, in common with the Federal Court and the Federal Circuit Court, the IM Court has an 'accrued jurisdiction' which allows a court exercising Federal jurisdiction Court to determine an entire matter brought before them, including matters of non-federal jurisdiction of the nature of the Common Law Reasonable Notice Obligation. He draws attention to decisions of the Full Court of the Federal Court (*Beck v Spalla* [2005] FCAFC 82) and the Federal Circuit (*Miller v Sunland Park Pty Ltd* [2014] FCCA 89 affirming the existence the accrued jurisdiction of those Courts. Emphasis is placed upon *Miller v Sunland Park Pty Ltd* as an example of a case where the Federal Circuit Court determined a federal claim for a contravention of the *Workplace Relations Act 1996* (Cth) and, exercising accrued jurisdiction also determined a non-federal claim for damages in common law arising from a breach of an employment contract. The alleged breach of employment contract in that case, like the case of Mr Cockman, was a failure by an employer to give reasonable notice of the termination of employment.
- 52 The accrued jurisdiction of the Federal Court, Federal Circuit Court and the Family Court is undoubted: *Rana v Google Inc* [2017] FCAFC 156. It is convenient to quote (without citations) the relevant paragraph of *Halsbury's Laws of Australia* [125-115]:
- [Federal courts] have accrued jurisdiction which allow them to determine an entire matter brought before them, including matters of non-federal jurisdiction linked to the matter before the court. Whether a claim is sufficiently linked to a matter to be covered by the accrued jurisdiction of the court is a practical question based upon the facts and circumstances of the case. It will include circumstances where there is a common substratum of facts, both claims arise out of common transaction and facts or where the determination of one is essential to the determination of the other. It will not include matters that are separate or disparate.*
- 53 The accrued jurisdiction of federal courts follows from the conferral of federal jurisdiction upon those courts by a law of the Commonwealth Parliament as provided by s 77(i) of the Constitution. By s 77(iii), the Constitution also empowers the Commonwealth Parliament to invest any court of a state with federal jurisdiction with respect to any of the matters mentioned in sections 75 and 76 of the Constitution. Section 539(2) of the FW Act (noted above) is an example of Commonwealth law conferring federal jurisdiction upon a state court. Supporting Mr Cockman's contention, Professor Lane opines that 'a s 77(iii) State Court is as much favoured by the doctrine of accrued jurisdiction as is the High Court or another federal Court.' Further, there is at least one example of a Commonwealth law, namely sections 41(3) and 69H(2) of the *Family Law Act 1975* (Cth) conferring federal jurisdiction upon a state court, namely the Family Court of Western Australia, being held to result in the state court having accrued jurisdiction to determine non-federal claims: *Manotis and Manotis* [2016] FCWA 10 [151] per Crisford J citing *Puddy and Grossvard and Anor* [2010] FamCAFC 54 (Family Court of Western Australia has the same accrued jurisdiction as the Family Court of Australia).
- 54 Notwithstanding the opinion of Professor Lane and the result in *Manotis and Manotis*, there may be reason to question whether the result of the conferral of federal jurisdiction upon the IM Court by s 539(2) FW Act is an accrued jurisdiction to determine a claim of the nature of the Common Law Reasonable Notice Obligation. Of significance to the underlying rationale

- of accrued jurisdiction of federal courts *and* of the Family Court of Western Australia is the use of the word ‘matter’ to delineate the ambit of the jurisdiction being conferred by the relevant Commonwealth law: *Rizeq v Western Australia* [2017] HCA 23; 91 ALJR 707 at [55] per Bell, Gageler, Keane, Nettle and Gordon JJ; *Ruane & Bachmann-Ruane and Ors (Accrued jurisdiction)* [2012] FamCA 369 [36]ff (Murphy J). Section 566 of the FW Act confers jurisdiction upon the Federal Circuit Court in relation to any civil *matter* arising under the FW Act. The jurisdiction of the Federal Circuit Court to determine non-federal civil claims within the (subject) *matter* of the federal claim may be more readily inferred from the text of s 566 of the FW Act compared to the text of s 539(2) of the FW Act conferring the power on a person to apply to the IM Court in relation to the contravention of a civil remedy provision.
- 55 In the result, I have not found it necessary to resolve the question whether the IM Court has an accrued jurisdiction to determine claims arising under non-federal law. This is because, making an assumption, in favour of Mr Cockman, that the IM Court does have accrued jurisdiction to determine claims arising under non-federal law, my view is that the Common Law Reasonable Notice Obligation would *not* fall within the accrued jurisdiction of this court. In *Wright v Norris Real Estate Pty Ltd* [2016] FCCA 707, in the context of consideration of whether the Federal Circuit Court had accrued jurisdiction to determine a cross-claim by an employer alleging a breach of a common law duty of fidelity in answer to an employee’s claim made under the FW Act, Riethmuller J states (omitting quotation marks and citations):
7. ...[A]ssociated disputes must have one common substratum of individual facts and that the determination of one dispute is essential to the determination of the other. The central task is to identify the justiciable controversy. In civil proceedings, that will ordinarily require a close attention to the pleadings (if any) and to the factual basis of each claim.
 8. ...[I]t is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter. ... [T]he question is not at large. What is a single controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships. There is but a single matter if different claims arise out of common transactions and facts or a common substratum of facts, notwithstanding that the facts upon which the claims depend ‘do not wholly coincide’. So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other.... Conversely, claims which are completely disparate, completely separate and distinct or distinct and unrelated are not part of the same matter. Often, the conclusion that, if proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings will indicate that there is a single matter.
 10. In this case, there are no disputed questions of fact or law that are common to both the claim and the cross-claim. There is no dispute that the applicant was employed by the first respondent during the period covered by the cross-claim, nor any dispute as to the nature and terms of that employment that are relevant to the claim.
 11. To the extent that there is any dispute relating to the contract of employment, it is only as to the extent of the duties of fidelity or duties of care that the employee owed the employer which does not affect the applicant’s claim under the Fair Work Act.
 13. Whilst the relationship of the parties results from their contractual relationship as employer and employee, and that relationship is relevant in each proceeding (albeit as an undisputed relationship), the nature of the claims is otherwise disparate.
- 56 The civil remedy provisions of the FW Act relevant to Mr Cockman’s claim (and which are identified in s 539(2) of the FW Act are): s 119 on redundancy; sections 90 and 94 on annual leave entitlements; s 535 on record keeping; and s 117 on payment in lieu of notice. The substratum of transactions and facts involved in the application of those provisions is separate and distinct from the transactions and facts that would be involved in the determination of the claim based on the Common Law Reasonable Notice Obligation. The FW Act claim requires consideration of facts and transactions relevant to statutory concepts of ‘associated entity’, ‘cashed out annual leave’ and, for the purpose of s 117 of the FW Act, the length of Mr Cockman’s employment. Consideration of a claim based on the Common Law Reasonable Notice Obligation also involves consideration of the length of Mr Cockman’s employment. However, the start date (12 December 2011) and termination date (18 November 2013) of Mr Cockman’s employment are not in dispute. There is no possibility of conflicting findings in different courts on that issue. The facts and issues relevant to the common law claim may be gleaned from the summary of relevant law made by the Court of Appeal in Western Australia in *Rogan-Gardiner v Woolworths Ltd* [2012] WASCA 31 (Newnes JA with whom McLure P and Allanson J agreed):
- 46 ...[T]he reasonable time for the fulfilment of the [common] purpose [of the parties] is a matter to be determined as at the date of the notice. The common purpose is frequently derived from the desire that both parties may be expected to have to cushion themselves against sudden change, giving themselves time to make alternative arrangements of a sort similar to those which are being terminated.
 - 47 ...[T]he primary purpose of giving a period of notice was to enable the employee to obtain new employment of a similar nature.
 - 49 The length of the required notice in any case is a question of fact to be decided in the light of the objective circumstances as they exist at the time the notice is, or should have been, given: *Saad and Macauslane*.
 - 50 ...[C]onsiderations which may be relevant to the determination of the period of reasonable notice include the ‘high grade’ and importance of the position; the size of the salary; the nature of the employment; the employee’s length of service; the professional standing, age, qualifications, experience and job mobility of the employee; the expected period of time it would take the employee to find alternative employment; and the period that, apart from the dismissal, the employee would have continued in the employment. ... [T]he factors which are relevant in any particular case must, of course, depend upon the particular facts of the case.

57 Significantly, the above facts and issues simply do arise under the FW Act claims.

58 It follows that *if* the IM Court does have accrued jurisdiction to determine claims arising under non-federal law, my view is that the Common Law Reasonable Notice Obligation does not fall within the accrued jurisdiction of this Court.

Conclusion

59 At the end of his employment, being the end of day of 18 November 2013, Mr Cockman was entitled to:

- \$9,611.99, being four weeks (152 hours) redundancy pay as provided by s 119 of the FW Act, for the reasons set out in paragraph 37 above.
- \$2,643.30, being 5.5 days (41.8 hours) accrued unpaid annual leave as provided by s 87 of the FW Act, for the reasons set out in paragraph 46 above.
- \$4,805.99, being two weeks (76 hours) payment in lieu as provided by s 117 of the FW Act, for the reasons set out in paragraph 48 above.

60 The result is an entitlement, at the end of 18 November 2013, to \$17,061.28 (269.8 hours at the relevant rate of \$63.2368 per hour). Mr Cockman had been paid in advance for 19 and 20 November 2013 this must also be brought to account. After taking account of the payment in advance (by a reduction of \$961.19 being 15.2 hours), the Company was required, under the FW Act, to pay Mr Cockman the sum of \$16,100.

61 Section 547(1)(2) of the FW Act provides, in effect, that when making an order that an employer pay an amount to an employee the court 'must, on application, include an amount of interest on the sum ordered unless good cause is shown to the contrary'.

62 I will hear from the parties on the precise orders to be made.

M. FLYNN

INDUSTRIAL MAGISTRATE

i FW Act

119 Redundancy pay

Entitlement to redundancy pay

- (1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
- (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
 - (b) because of the insolvency or bankruptcy of the employer.

Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.

Amount of redundancy pay

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

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

ii FW Act

121 Exclusions from obligation to pay redundancy pay

- (1) Section 119 does not apply to the termination of an employee's employment if, immediately before the time of the

termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):

- (a) the employee's period of continuous service with the employer is less than 12 months; or
 - (b) the employer is a small business employer.
- (2) A modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee's employment.
- (3) If a modern award that is in operation includes such a term (the *award term*), an enterprise agreement may:
- (a) incorporate the award term by reference (and as in force from time to time) into the enterprise agreement; and
 - (b) provide that the incorporated term covers some or all of the employees who are also covered by the award term.

iii FW Act

23 Meaning of *small business employer*

- (1) A national system employer is a *small business employer* at a particular time if the employer employs fewer than 15 employees at that time.
- (2) For the purpose of calculating the number of employees employed by the employer at a particular time:
- (a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and
 - (b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.
- (3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.
- (4) To avoid doubt, in determining whether a national system employer is a *small business employer* at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to paragraph (2)(b)):
- (a) the employee who is being dismissed or whose employment is being terminated; and
 - (b) any other employee of the employer who is also being dismissed or whose employment is also being terminated.

iv ASIC records as at 17 November 2013:

Name	Directors	Shareholders	Holds Shares in
Guardian Air Pty Ltd	TC (1 Ord) Note: (a)	TC (1 Gov; 80 Ord) R. Watson Nominees Pty Ltd (256 Ord) Watcor Pty Ltd (80 Ord) S & C J Pty Ltd (80 Ord) Peter Treen Electrical Discounter Pty Ltd (80 Ord) AC (56 Ord) Illawong Investments Pty Ltd (24 Ord) NM (40 Ord) Westsky Investments Pty Ltd (13 Ord) BC (27 Ord) Roggerrs Pty Ltd (24 Ord) SSDGPR Pty Ltd (40 Ord) Note: (b)	(From 30/4/14:) World Environmental Technologies Pty Ltd
World Environmental Technologies Pty Ltd	DG TC Note: (b)	DG (Until 30/4/14) Note: (c)	
Biothys Australia Pty Ltd	TC	R. Watson Nominees Pty Ltd	
R. Watson Nominees Pty Ltd	RCW GJW	RCW (1 ord) GJW (1 ord)	Biothys Australia Pty Ltd (1 ord) Guardian Air Pty Ltd (256 ord)
Roselander Pty Ltd	RCW GJW	RCW (2 ord)	

TC: Tracey Chester

DG: David Gerrans
 RCW: Robert Clarence Watson
 GJW: Gloria Watson
 MT: Miles Trusty
 AC: Adrian Cocks
 NM: Noel McEvoy
 BC: Brent Morfesse

- (a) Previous Directors were: SL (5/6/08 – 22/11/10); RCW (Ceased 22/11/10); MT (5/6/08 – 8/1/10);
- (b) Previous Shareholders included: R. Watson Nominees Pty Ltd who transferred its one 'Gov' to TC on 9/10/12.
- (c) Previous shareholder was DG who transferred his share to the Company on 30 April 2014.

v *Jones v Dunkel* (1959) 101 CLR 298 at 320-1

vi **Extracts from Letter of 10 October 2012**

I'd like to advise you that Biothys / Guardian Air will now fall under one umbrella World Environmental Technologies (WET).

The company is now broken up into two divisions, Petroleum and Environmental.

Petroleum:

The Petroleum Division specialises in maintenance and servicing for the fuel industry, and the selling of diesel conditioners for the commercial and industrial sectors.

Environmental:

The environmental division specialises in air quality, odour control, brand fragrance and water treatments.

New appointment:
 We have newly appointed Brett Cockman as Chief Operations Manager for the company. Brett brings a wealth of knowledge to the company with having senior roles in State Government and CSIRO.

Sean Lewer will remain your main point of contact and service provider for site with David King (Burswood / Crown inducted) as your second contact when Sean is unavailable.

Changes:

Please update internal records to reflect the trading name of World Environmental Technologies Pty Ltd and remove any reference to Biothys / Guardian Air.

Extracts from Capability Statement

The Business Model

World Environmental Technologies ('WET') is Perth-based and privately owned. WET was incorporated in 2012 as the parent company of four subsidiary companies including Guardian Air which was established in 2008. WET has deliberately focussed on two key technology segments (environmental and petroleum) developing its competencies in odour control, air and water treatment, pest management and fuel quality enhancement.

...

The Management Team

Ms Tracey Chester (CEO) has qualifications in journalism and marketing and brings in excess of 20 years experience in company management including company secretarial, executive and non-executive roles within the Watson Group and Chester family companies.

Mr Brett Cockman (Chief Operations Manager) ...

Mr Sean Lewer (Business Development Manager) is a founding shareholder of the business and his significant business development and technical skills provides a valuable platform to support the ongoing growth of WET. Having established several businesses servicing a range of industries including waste management, animal production and hospitality with high performance misting technologies and air quality enhancement his experience and networks are invaluable.

Mr Leigh Wolinski (Senior Projects Manager) brings significant marketing and sales closing capability to WET. He is supported by extensive technical / mechanical knowledge critical to the development and implementation of air treatment devices. Having managed teams of salespersons in the real estate industry and carrying out marketing roles within the hospitality sector he provides valuable support and integrity to WET's market presence.

Products, Services, and Delivery

WET is a brick and mortar company serving the Australian domestic market. The company has ambitions to partner with other successful technology businesses. WET has spent considerable efforts and resources to establish relationships with the local hospitality, commercial building and mining sectors and more recently fuel distribution businesses within Western Australia. Amongst other growth initiatives, WET is currently establishing its wholesale operations to offer a premium range of fuel and oil additives with wide application. The company's administrative functions are performed and delivered by staff co-located within the Watson Group operations.

vii Exhibit 8. The relevant text reads, 'WA Direct Plasterboard is a family owned and operated business specialising in the provision of plasterboard and building materials throughout Western Australia. Established in 1950, we are proud to have grown to become one of WAIS most trusted suppliers of plasterboard, building systems and wall and ceiling materials - as well as quality tools and accessories, Today, we employ over 40 staff, with branches located in Welshpool and Kalgoorlie. Our dedicated team ensures that every customer receives the very best service and advice. And with a fleet of 15 trucks at our disposal, we are also able to deliver goods anywhere, anytime.'

viii *Coopes v Daishsat Pty Ltd & Anor (No.2)* [2017] FCCA 2210:

[17] The determination of [the issue of whether the Respondent employs fewer than 15 employees] requires consideration of the question of whether particular individuals are or are not employees, 'employee' being separately defined in the first Division of each Part (with one exception) of the FW Act in which the term appears: FW Act, s 12 (definition of 'employee'). For the purposes of the general protections provisions of the FW Act the meaning of 'employee' is set out in s 335 of the FW Act, and provides that 'employee and employer have their ordinary meanings'. Essentially, the issue to then be determined by the court would appear to be whether or not [certain ... persons] ... are employees of the Respondent. ...

...

[19] Whether a person is an employee or not is a question of law and there are many factors which may point to a contract being a contract of employment, with their relative importance varying with the circumstances. Control of the employee exercisable by the employer is a prominent factor, but not the sole criterion, and is one of a number of possible indicia of employment, including but not limited to 'the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and the provision of holidays, the deduction of income tax and the delegation of work by the putative employee'. Payment of wages by a third party is not fatal to the existence of a contract of employment between an employee and an employer and employees may have so-called 'host' employers. The rendering of invoices is usually 'quite foreign to an ordinary employment relationship'. Of course, the rendering of invoices and the labelling of an employment relationship in a particular way has never been determinative of a person not being an employee if the invoices and labelling are part of a sham arrangement designed to avoid the persons being designated as employees. In a now oft quoted passage the Federal Court in *Re Porter; Re Transport Workers' Union of Australia* [1989] FCA 226; (1989) 34 IR 179; (1989) 31 AILR 382; IR at 184 per Gray J ('Porter') it was said 'the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck.'

Fair Work Ombudsman v Grouped Property Services Pty Ltd [2016] FCA 1034 (Katzmann J)

[39] The question of whether someone is an employee or an independent contractor is not to be determined by what they may be called or, indeed, what they may call themselves. A label, consensual or otherwise, cannot affect 'the inherent character' of the relationship. Further, the relationship between the parties is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed ... go to establishing 'the totality of the relationship' between the parties; it is this which is to be considered.

[41] A contract of employment is based on personal service. Shortly put, the difference between an employee and an independent contractor is 'rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own'. Control (and later the right to control) the manner in which the work is done was once determinative. For some time now, however, it is regarded as only one relevant factor (albeit an important one); the totality of the relationship must be considered. Other indicia of an employment relationship include 'whether tax is deducted; whether sub-contracting is permitted; ... whether uniforms are worn; whether tools are supplied; whether holidays are permitted; ... whether wages are paid ...; what is disclosed in the tax returns; whether one party 'represents' the other; for the benefit of whom does the goodwill in the business inure; how 'business-like' is the alleged business of the putative employee - are there systems, manuals and invoices; and so on ...'.

[42] The modern approach to determining whether someone is an employee is 'multi-factorial'. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.

ix The following are quotes from the transcript of the evidence of Mr Gerrans:

[B]ecause of the nature of the small business, that this - and the industry that it's in, that they quite often pay out annual leave on an agreed basis annually at Christmas

... It - quite often in this - in the building industry and these things, because a lot of businesses can't carry annual leave on the books, they give the opportunity to staff to be paid out in lieu of... not taking it during the year.

I think in reality, because of the nature of the small business, that this - and the industry that it's in, that they quite often pay out annual leave on an agreed basis annually at Christmas and I think he - there was a payment in December 2012 ... and then he - so he's been paid those holiday pays and then he's taken holidays in June [2013]

x The following quotes are from the transcript of the evidence of Ms White:

[D]ue to the fact that it's a small company, we can't afford to carry over holidays so we make it an agreement when the employee starts that it's a forced rule that holidays are paid out over the Christmas period, ah, usually because we, um, close the company for two weeks over the period. So therefore whatever's owed at that time is paid out in full.

... Tracey asked me to pay Brett, um, a period of four weeks, um, for the month of June [2013] as he was going away. Um, I alerted her to the fact that he had only accrued two weeks holiday pay. Um, she said in good faith could we please pay the four weeks, um, as he was going to be away that long and didn't want him to be financially out of pocket.

xi The following are quotes from the transcript of the evidence of Mr Cockman:

I did not owe time back to the company. There was carry forward of leave from 2012, which then allowed my fiancée and I to take holidays in June [2013], which was approved by Tracey Chester. And, ah, the lead up to 2012, I requested six days' leave over that, um, period of time, the Christmas close down period. And there's documentation to support that. The fact that the company may have applied a policy of paying out was certainly never - never explained to me and was certainly never agreed. So on that basis, I was always - in my mind, always had sufficient leave to, ah, service any leave that I did take.

....

...If there was additional cash paid, I can only presume that was a bonus. The Watson family were extremely generous towards me, ah, particularly when I travelled, so I didn't question it and, um, I - I don't question it now. But I know there is a, ah - there is, ah, certainly evidence that I can provide to show there was email traffic to confirm what I was, um, asked to rely on, in terms of, ah, leave entitlements.

xii I note that the Company calculations assume Mr Cockman took 20 days leave in 2013. Absent Company records, I prefer to rely upon the evidence of Mr Cockman.

xiii **FW Act**

117 Requirement for notice of termination or payment in lieu

Notice specifying day of termination

- (1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:

- (a) delivering it personally; or
- (b) leaving it at the employee's last known address; or
- (c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

- (2) The employer must not terminate the employee's employment unless:
- (a) the time between giving the notice and the day of the termination is at least the period (the **minimum period of notice**) worked out under subsection (3); or
 - (b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.
- (3) Work out the minimum period of notice as follows:
- (a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

- (b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

xiv For example, the *Magistrates Court (Civil Proceedings) Act 2004* (WA) provides:

6. General civil jurisdiction

(1) *The Court has jurisdiction to deal with —*

(a) *a claim for an amount of money that is —*

(i) *a debt or damages, whether liquidated or unliquidated;*

...

where the amount claimed, even if it is a balance after allowing for a payment on account or for any admitted set-off or for any other amount, is not more than the jurisdictional limit...

xv E.g. *Stack v Coast Securities (No 9) Pty Ltd* [1983] HCA 36; (1983) 154 CLR 261 at 292 per Mason, Brennan and Deane JJ: '[A] Commonwealth law conferring jurisdiction on a federal court under s 77(i) of the Constitution with respect to proceedings under a federal statute ... carries with it authority to determine non-federal aspects of the controversy between the parties'.

xvi P H Lane, *Commentary on the Australian Constitution* (2nd edition at page 623) as cited by Thackray J in *Valley and Valley* [2005] FCWA 98 [45].

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2018 WAIRC 00143

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TOMMASO CARZANIGA **APPLICANT**

-v-

THE TRUSTEE FOR CHEF OF THE DAY ABN:56538152558 **RESPONDENT**

CORAM CHIEF COMMISSIONER P E SCOTT

DATE FRIDAY, 23 FEBRUARY 2018

FILE NO/S B 161 OF 2017

CITATION NO. 2018 WAIRC 00143

Result Application dismissed

Order

1. The applicant claims that he has been denied benefits arising under his contract of employment.
 2. The applicant wrote to the Commission on 13 February 2018 advising that he wished to discontinue his application.
- 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 00175

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TERRENCE BRIAN FITZGERALD **APPLICANT**

-v-

COMMERCIAL TYRE SERVICE **RESPONDENT**

CORAM COMMISSIONER T EMMANUEL

DATE WEDNESDAY, 14 MARCH 2018

FILE NO/S U 137 OF 2017

CITATION NO. 2018 WAIRC 00175

Result Application dismissed

Representation (by telephone)

Applicant In person

Respondent N/A

Order

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

AND WHEREAS this application was listed for a show cause hearing on 26 March 2018;

AND WHEREAS on 2 March 2018 the applicant informed the Commission by telephone that he would like to discontinue the matter because it has settled;

AND WHEREAS during this same telephone conversation the applicant informed the Commission that because of his personal circumstances he is unable to file a *Form 14 – Notice of withdrawal or discontinuance* in the Registry or online;

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.]

2018 WAIRC 00085

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2018 WAIRC 00085
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : TUESDAY, 28 NOVEMBER 2017, WEDNESDAY, 29 NOVEMBER 2017
DELIVERED : WEDNESDAY, 7 FEBRUARY 2018
FILE NO. : B 70 OF 2017
BETWEEN : QUOC MINH TRAN
 Applicant
 AND
 HOANG TRANG FAMILY TRUST AND PHI AND MAI FAMILY TRUST TRADING
 AS LIDO RESTAURANT
 Respondent

Catchwords : *Industrial Law (WA) - Contractual benefits claim - Claim for overtime and annual leave - Principles applied - Application upheld in part - Order issued*

Legislation : *Industrial Relations Act 1979 (WA)*
Industrial Relations Commission Regulations 2005 (WA)
Migration Act 1958 (Cth)
Migration Regulations 1994 (Cth)

Result : Application upheld in part

Representation:

Counsel:

Applicant : In person

Respondent : Mr H Nguyen

Case(s) referred to in reasons:

Anne Patricia Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc) (1999) 79 WAIG 1867.

Australian Meat Holdings Pty Ltd v Kazi [2004] QCA 147

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

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

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266

Byrne & Frew v Australian Airlines Limited (1995) 185 CLR 410

Hillas and Co Ltd v Arcos Ltd [1932] All ER 494

Hotcopper Australia Ltd v David Saab (2001) 81 WAIG 2704

Hussein v Secretary of the Department of Immigration and Multicultural Affairs (No. 2) [2006] FCA 1263

May and Butcher Ltd v R [1934] 2 KB 17

Reasons for Decision

- 1 The applicant came to Australia from Vietnam to study. He did so in accordance with a Higher Education Sector visa (subclass 573) in accordance with the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) and the conditions made under the Regulations.
- 2 On 10 March 2016, the applicant commenced work for the respondent as a cook. The respondent operates three Vietnamese restaurants in Perth called the "Lido" Restaurant. One is in Northbridge and the others are in Osborne Park and Peppermint Grove. The applicant contended that he was employed on a full-time basis, working 50 to 60 hours per week for a salary of \$54,000 gross per annum. The applicant said his employment came to an end on 20 March 2017. The applicant claimed that he was denied contractual benefits by the respondent arising from his employment. The first claim is one for overtime payments in the sum of \$11,960, said to be based on 520 hours of overtime at \$23 nett per hour. The second claim is for \$3,680, being 160 hours of annual leave the applicant maintained that he had accrued but not taken whilst employed by the respondent. There was a third claim for superannuation which the applicant abandoned as being beyond the Commission's jurisdiction.
- 3 It was common ground that the applicant and the respondent entered into a written contract of employment dated 1 March 2016, a copy of which was exhibit A1. Relevantly, it provided as follows:

Hoang Trang Family Trust and Phi and Mai Family Trust
Trading as
Lido Restaurant
ABN: 51815459373
416 William Street
Perth
Western Australia 6000
TL: 92275445

March 1, 2016

Mr Johnny Tran Quoc Minh

[Present]

BY HAND

Dear Mr Tran

Re: Offer of full time employment under the SC457 Visa program as a Cook

I am pleased to confirm our offer to you of a full time position with this business, as a Cook. Your role and responsibilities in the business are detailed in the attached job description. It is expected you will be based in our restaurant in Northbridge, WA. This is of course subject to you obtaining all relevant authority from the Immigration Department for your temporary residence visa.

As you are aware your conditions of employment are subject to normal Australian Fair Work Australia conditions and your commencing base salary will be AUD54,000.00. This will gross AUD59,130.00 per annum, including normal 9.5% superannuation entitlements. This is for a 38-hour week. Overtime will be available and will be paid at agreed rates.

This is a full time position for up to four years as prescribed under the SC 457 provisions. You are entitled to four weeks annual leave and 10 days sick leave a year with a doctor's certificate per Fair Work Australia entitlements.

To confirm your acceptance of this offer, please countersign where indicated under and return to me as soon as possible.

Yours sincerely

{signed}

Mr Phil Nguyen

General Manager

Northbridge, WA

I hereby agree with the terms and conditions of my employment as a cook with Lido Restaurant in Northbridge WA

Mr Tran Quoc Minh

Northbridge, WA

- 4 The applicant contended that the respondent agreed to sponsor him in order that he obtain a Temporary Work (Skilled) visa (subclass 457). After several refusals of the sponsorship requests by the then Department of Immigration and Border Protection, the applicant's application for a subclass 457 visa was finally refused on 6 February 2017. This meant the applicant had 28 days to leave Australia from that date.
- 5 As part of the subclass 457 visa application process, the applicant sought and obtained a Bridging Visa A (subclass 010) on 10 March 2016. The effect of this visa was to enable the applicant to stay in Australia while his subclass 457 visa application was being determined. The applicant's student (subclass 573) visa expired on 15 March 2016. From this time, given that the applicant was no longer studying and accordingly his course was no longer "in session", the applicant had an unrestricted right to work in Australia under his Bridging Visa, until his subclass 457 visa application was ultimately refused.
- 6 The respondent, whilst it did not file an answer to the applicant's claim, contrary to reg 61(5) of the *Industrial Relations*

Commission Regulations 2005 (WA), denied the applicant's claim. The respondent maintained that it did not owe any monies to the applicant. The respondent said it felt aggrieved by the applicant's claim as it contended that the applicant was employed on his request, even though he did not have the relevant experience to cook in the restaurant and had to be trained. The applicant took some time to learn the required cooking in the restaurant. Despite this, the respondent agreed to pay the higher salary to the applicant from his commencement, as if he had already obtained a subclass 457 visa, which he did not have during his employment.

7 It is necessary for the applicant to establish on balance that he had a contractual entitlement to the benefits claimed and that they have been denied by the respondent: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704; *Anne Patricia Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867.

Overtime claim

8 In respect of this claim the applicant contended that he was denied the payment of "overtime" at the rate of \$23 per hour for 520 hours. The terms of the applicant's contract of employment are set out above. The onus is on the applicant to establish that it was a term of his contract of employment with the respondent that he be paid overtime and if so, to establish further that he worked overtime in accordance with the hours set out in his claim. Of course, to the extent that any award may have applied to the applicant's employment, such as the *Restaurant, Tearoom and Catering Workers Award* for example, recovery of entitlements under its terms is not a matter within the Commission's jurisdiction. Matters of bare enforcement of awards must go before the Industrial Magistrates Court.

9 The relevant part of the contract for present purposes provided that "overtime will be available and will be paid at agreed rates". In his testimony, the applicant said that in relation to overtime, he and Mr Nguyen, on behalf of the respondent, did not discuss or agree on rates for overtime (ts 8 and 13). This seemed to be confirmed in the evidence on behalf of the respondent from Mr Nguyen. Mr Nguyen testified however, that there was some arrangement to provide staff meals instead. Mr Nguyen seemed to suggest that the applicant agreed to be "paid" for such additional time by the provision of meals in the restaurant. This seemed to be the practice adopted by the respondent in relation to its staff (ts 58-59). The applicant said he did not agree to such an arrangement. I find that there was no such agreement.

10 The applicant said that the restaurant was open for business each day except Tuesday afternoon. On days that the restaurant was open the applicant would generally work from 10am to 3pm and then from 5pm until about 10 or 11pm at night. He may have some days off in accordance with a roster prepared by the respondent.

11 The applicant testified that he kept a record of his hours of work on an application installed on his mobile phone called "My Hours". This application recorded the date, month and year in addition to the daily work hours Monday to Sunday, of each week. A copy of these records, for the period 27 June 2016 to 6 March 2017, were exhibit A2. For each week at the top of the page of exhibit A2, on the right-hand side, containing the applicant's work hours, are total number of hours worked as maintained by the applicant each week. On the left-hand side of each page are "screenshots" of messages the applicant says he sent to Mr Nguyen, attaching a copy of his work hours for each week. The applicant maintained that Mr Nguyen requested that he send him his working hours for each week. Additionally, on the left-hand side of the page in exhibit A2, are messages passing between Mr Nguyen and the applicant, which the applicant said confirmed that Mr Nguyen did receive the information as to his working hours each week as he requested. The applicant testified that he worked in accordance with a roster prepared by Mr Nguyen. The applicant did not keep records for the period prior to 27 June 2016.

12 The applicant testified that there were some days or mornings that he was not rostered to work. Whilst it was clear from exhibit A2, if I am to accept the applicant's testimony, that he worked considerably more than 38 hours per week, the applicant testified that he did not claim overtime from the respondent because he was worried about the effect this would have on the respondent's sponsorship for his subclass 457 visa. I pause to note at this point that despite this assertion, the respondent made four attempts to become the applicant's sponsor and lodged an appeal against the final refusal of the applicant's 457 visa application on the applicant's behalf. This does not on its face, suggest any lack motivation by the respondent to assist the applicant in obtaining a visa so he could remain in Australia and work. Whilst the applicant's claim in this respect was for "overtime", it was clear from exhibit A2, that the actual amount claimed was based on the applicant's nett wage of \$847 per week, divided by 38 hours.

13 As to the system of recording his hours on his mobile phone and sending it to Mr Nguyen, Mr Nguyen testified that he told the applicant not to do this. Mr Nguyen did not consider this was the correct way for the applicant to proceed. Mr Nguyen's evidence was that other staff would work in accordance with a roster and a signed time card, examples of which were exhibits R2 and R3. None of these documents referred to the applicant because Mr Nguyen said that the applicant did not follow his request in this respect. Mr Nguyen said that he asked the applicant not to record his hours in this way, because they could not be verified and were not accurate. As an example, Mr Nguyen noted that the applicant said he worked at lunchtime on Tuesday, 3 May 2016, a time when the restaurant was closed.

14 In this case it is common ground that despite the terms of the contract, the parties did not agree on the rates applicable to overtime. Whilst the parties turned their minds to the possibility of overtime being worked, as is plain from the terms of the written contract, the term of the contract in relation to the agreed rate of pay for such overtime remained unsatisfied. How is this issue to be resolved?

15 It is well settled that courts and tribunals will endeavour to uphold the terms of a bargain struck between parties: *Hillas and Co Ltd v Arcos Ltd* [1932] All ER 494. As was said by Keane CJ in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 274 ALR 731 at para 121-123:

[121] A consideration of these arguments must begin with the proposition that a mere agreement to agree is not legally enforceable: *Thorby v Goldberg* (1964) 112 CLR 597 *Booker Industries Pty Ltd v Wilson Parking (Queensland) Pty Ltd*

(1982) 149 CLR 600 ; 43 ALR 68 . An agreement to negotiate, unless clearly and unequivocally expressed, is rarely viewed differently: see *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 .

[122] It is well-established that the courts strive to uphold bargains: *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494 . To that end, the courts will construe the terms of an agreement with an inclination to give effect to the intention of the parties, even if that intention has been obscurely expressed: *Australian Goldfields NL (in liq) v North Australian Diamonds NL* (2009) 72 ACSR 132 ; [2009] WASCA 98 , especially at [6]–[8] . Further, the courts may, where circumstances permit, apply objective standards of reasonableness to prevent the intention of the parties being defeated. And where the want of an express provision in an agreement can be supplied by implying a term in order to give efficacy to the bargain, the courts will make the necessary implication: *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2002] 2 NZLR 433 at [64]–[67] ; *Moffat Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2009] QCA 60 .

[123] But where the parties have not agreed upon the content of essential terms and have not agreed upon the application of an objective standard to measure their obligations or to provide a mechanism to fix the content of essential terms (as by third party determination), it is no business of the courts to foist upon the parties a bargain which they have not made. The trial judge referred to the decision of the Court of Appeal in England in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd’s Rep 601 (*Pagnan*) as supporting the proposition that a legally enforceable agreement may be made even where issues as to price and quantity of subject matter had not been agreed: at [294]. In this regard, his Honour erred. In *Pagnan*, price and subject matter had been agreed.

- 16 In this case, despite making provision for it in the contract, as to overtime, the parties have failed to agree on an appropriate rate to apply. The clause in the contract in this respect constitutes an agreement to agree. It did not provide any objective standard or mechanism by which such a rate could be determined, as was the case in, for example, *Booker Industries Pty Ltd v Wilson Parking (Queensland) Pty Ltd* (1982) 149 CLR 600. This part of the contract was a bare agreement to agree and no such agreement was reached. The term is not enforceable on that basis alone. It may be said that such a term may be given meaning by the implication of a further term as to a rate of pay for overtime. However, to imply such a term as an “agreed rate” would be at odds with the express terms of the contract that required the parties to agree when they did not: *May and Butcher Ltd v R* [1934] 2 KB 17.
- 17 There is a further and more fundamental problem in implying a term into the contract to provide overtime rates, in this case. The relevant general principles in relation to implication of terms are set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 282 – 283. One of them is that for a term to be implied it must be necessary for the effective operation of the contract.
- 18 If, for example, the terms of the *Restaurant, Tearoom and Catering Workers Award* had applied to the applicant’s employment, then the terms of the award in relation to additional rates for ordinary hours and overtime will have applied. This is a different question however, to what the contract provides and its operation, which is the focus of inquiry in this case. I should also observe however, that the rate of wage for a Cook (Tradesperson) Grade 3 “commi chef” as at July 2016, under the award, was a fortnightly rate of \$1583.90 or \$41,181.40 on an annual basis. This is a substantially lower rate of pay than that agreed to between the parties in this case. It is of note also, that as at the time of the applicant’s employment by the respondent, he had no entitlement to the rate of salary then applicable for an employee engaged under a subclass 457 visa. This is because at the time, and indeed for the duration of the applicant’s employment by the respondent, he never held such a visa. The only entitlement of the applicant at that time, in terms of rates of pay and conditions of employment, were those applicable under the relevant award. The applicant did not dispute that he required a period of training at the restaurant. The extent of it however was disputed. I note also that the applicant himself described his position on his curriculum vitae as “Assistant Chef”.
- 19 Similar considerations apply under the relevant federal award, the *Hospitality Industry (General) Award 2010*.
- 20 I have no doubt that one or other of these awards would have covered the applicant’s employment during the relevant period, depending on the respondent’s business structure. That being so, the relevant provisions of the awards dealing with additional rates for work in ordinary hours and for overtime would have applied. The contract of employment would need to be read along with the relevant award obligations. In these circumstances, a term will not be implied into a contract dealing with an obligation that is imposed under an award, as it would not be necessary for the effective operation of the contract to do so: *Byrne & Frew v Australian Airlines Limited* (1995) 185 CLR 410 at 423.
- 21 Therefore, despite the clear dispute between the parties in this case, in relation to the actual working hours said to have been worked by the applicant, the relevant clause in the contract being unenforceable, the applicant’s claim in this respect must be refused. Having said this however, I note that although Mr Nguyen, while he maintained that he told the applicant not to record his hours of work as he did, never replied to any of the applicant’s many messages enclosing his weekly working hours, telling him not to use this method of recording his hours of work. It would have been a simple matter for Mr Nguyen to have confirmed his instructions in writing in response. Furthermore, even on the evidence of Mr Nguyen, who said that the applicant usually worked from 11.00am to 3.00pm and then from 5.00pm to 10.00pm over five or five and a half days per week, this would mean the applicant was working in excess of 38 hours per week. If so, it is highly likely that the terms of the relevant awards in relation to additional rates for ordinary hours and overtime would have application. However, as I have already said, any enforcement of the relevant award in relation to additional rates or for overtime, must be brought in the Industrial Magistrates Court or other eligible court.

Annual leave claim

- 22 I turn now to consider the applicant’s annual leave claim. The applicant maintained that he took no annual leave whilst he was working for the respondent. Nor did he receive any payment for accrued annual leave when the employment ended. This was denied by the respondent. Mr Nguyen said that the applicant had two periods of annual leave for one week each. The first was from 20 June 2016 to 27 June 2016. The second was said to have been taken from 8 January 2017 to 15 January 2017. The

respondent contended that the applicant was paid for these weeks and nothing further is owed to the applicant. I pause to observe at this point, that that proposition cannot be correct. This is because the applicant was employed for a full year and would, in accordance with the contract and generally accepted minimum conditions, be entitled to four weeks' annual leave over such a period.

- 23 The applicant's evidence in relation to this matter was contained in exhibit A3, which he said showed for the week commencing 20 June 2016, he worked at the restaurant all week. The applicant maintained that he did not have any time away from the restaurant to take annual leave as contended by the respondent. Furthermore, in relation to the period 8 January 2017 to 15 January 2017, as set out in exhibit A3, the applicant enclosed further screenshots of his hours of work for that week. In addition, there are photos of lists of ingredients for recipes for Vietnamese dishes. Included with these photos, are text messages in Vietnamese between the applicant and Mr Nguyen.
- 24 When those messages were translated during the proceedings, these exchanges reflected a conversation between the applicant and Mr Nguyen about various dishes to be cooked in the restaurant. There is also attached a photo of a mobile phone with the date 16 January 2017. The applicant testified that he took Mr Nguyen's mobile phone to be repaired and the message from him to Mr Nguyen was "ready for you" to let Mr Nguyen know that the repair had been completed. Mr Nguyen replied in the same message "Thank" (sic) shortly after. Another witness called on behalf of the applicant, Ms Che, who worked as a part-time waitress for the respondent, confirmed that she was working in June 2016 and January 2017. As far as she was aware, the applicant was not absent on annual leave at any time in those months.
- 25 Having regard to exhibit A3 and the applicant's evidence on this issue, where the evidence conflicted on this point, I prefer the applicant's evidence. The text message exchanges between the applicant and Mr Nguyen on 12, 14 and 15 January 2017, are inconsistent with the respondent's contention that the applicant was on annual leave during this week. Whilst Mr Nguyen also maintained that the respondent paid \$400 in cash to the applicant via his cousin, it was not clear to me the basis for this payment on the evidence. I note also, that it cannot have been in respect of a week of annual leave, as the applicant was paid at the weekly rate of \$847.50 per week nett. However, the applicant cannot have worked until 30 March 2017 as he claimed in his application. This is because his subclass 457 visa was refused on 6 February 2017 which meant that he had to leave Australia by 6 March 2017. From the respondent's pay records, I am satisfied that the applicant worked until 19 February 2017. In any event, work performed by the applicant beyond this date was unlawful, as being contrary to the *Migration Act 1958* and the *Migration Regulations 1994* and unenforceable to that extent: *Australian Meat Holdings Pty Ltd v Kazi* [2004] QCA 147; *Hussein v Secretary of the Department of Immigration and Multicultural Affairs (No. 2)* [2006] FCA 1263.
- 26 I am satisfied therefore that the applicant had an entitlement to annual leave as a contractual benefit in respect of his period of employment and that it has not been provided to him. I consider that the applicant was entitled to, in round terms, 11 months of his four-week entitlement of annual leave based on a 38-hour week at the rate of \$23 per hour nett, which totals \$3,204 nett. The Commission will order accordingly.

2018 WAIRC 00125

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2018 WAIRC 00125
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : TUESDAY, 28 NOVEMBER 2017, WEDNESDAY, 29 NOVEMBER 2017
DELIVERED : MONDAY, 19 FEBRUARY 2018
FILE NO. : B 70 OF 2017
BETWEEN : QUOC MINH TRAN
 Applicant
 AND
 HOANG TRANG FAMILY TRUST AND PHI AND MAI FAMILY TRUST TRADING
 AS LIDO RESTAURANT
 Respondent

Catchwords : *Industrial Law (WA) - Contractual benefits claim - Request to vary minute of proposed order to enable respondent to make payments by instalments - Request opposed by applicant - Principles applied - To further delay payment would be inequitable and unfair - Order issued*

Legislation : *Industrial Relations Act 1979 (WA)*

Result : Order issued

Representation:

Counsel:

Applicant : In person

Respondent : Mr H Nguyen

Further Reasons for Decision

- 1 On 7 February 2018 the Commission published its reasons for decision and minute of proposed order in respect of the above matter. The minute of proposed order required the respondent to pay to the applicant the sum of \$3,204 nett as a denied contractual benefit within 14 days.
- 2 On 9 February 2018 the respondent wrote to my Associate requesting a variation to the minute of proposed order, to the effect that the respondent be given time to pay the sum set out in the order by way of instalments of \$534 per month over six months. The respondent requested payment by instalments, because of other debts owed by the business to the Australian Taxation Office and in respect of other employee entitlements. The applicant opposed the request by the respondent. The applicant maintained the annual leave owed to him should be paid in accordance with the minute of proposed order and that the sum involved is not large.
- 3 I have considered the respondent's request and the applicant's response. I am not persuaded to vary the minute of proposed order to enable the respondent to make payments by instalments. The amount found by the Commission to be owing to the applicant, has now been outstanding for over one year and in my view, to further delay the payment of this relatively small sum, would be inequitable and unfair. Accordingly, the order now issues, requiring payment of the sum of \$3,204 nett within 14 days.

2018 WAIRC 00126

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

QUOC MINH TRAN

APPLICANT

-v-

HOANG TRANG FAMILY TRUST AND PHI AND MAI FAMILY TRUST TRADING AS LIDO RESTAURANT

RESPONDENT**CORAM** SENIOR COMMISSIONER S J KENNER**DATE** MONDAY, 19 FEBRUARY 2018**FILE NO/S** B 70 OF 2017**CITATION NO.** 2018 WAIRC 00126**Result** Application upheld in part**Representation****Applicant** In person**Respondent** Mr H Nguyen*Order*

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

- (1) THAT the respondent pay to the applicant the sum of \$3,204 nett as a denied contractual benefit within 14 days.
- (2) THAT otherwise the application be and is hereby dismissed.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Jessica Lucarella	Kadra Elmi T/as Salin Hair & Beauty	B 21/2017	Commissioner D J Matthews	Discontinued
Jessica Lucarella	Kadra Elmi T/as Salin Hair & Beauty	U 21/2017	Commissioner D J Matthews	Discontinued
Jody Lee Latham	Centacare Kimberley Association Inc	U 140/2017	Commissioner D J Matthews	Discontinued
Renica (Rena) Nyasvimbo	Centacare Employment and Training	U 141/2017	Commissioner D J Matthews	Discontinued
Xiaoman (Chloe) Peng	Iain Campbell Chief Executive Officer Community Living Association Inc.	U 129/2017	Commissioner D J Matthews	Discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Australian Nursing Federation, Industrial Union of Workers Perth	East Metropolitan Health Service	Emmanuel C	C 14/2017	08/03/2017 21/11/2017	Dispute re changes of Theatre roster	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00145

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 8 NOVEMBER 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MR MILAN SOACTAR

APPELLANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR G LEE - BOARD MEMBER
MR P BYRNE - BOARD MEMBER

DATE

MONDAY, 26 FEBRUARY 2018

FILE NO

PSAB 24 OF 2017

CITATION NO.

2018 WAIRC 00145

Result Order issued

Representation

Appellant Mr N Parkinson (of counsel)

Respondent Ms A Gillespie

Order

HAVING heard from Mr N Parkinson (of counsel) on behalf of the applicant and from Ms A Gillespie on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), orders –

THAT application PSAB 24 of 2017 be adjourned until 13 April 2018.

(Sgd.) T EMMANUEL,
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 27/2017	Shankar Mhaske	Ravi Kahagalla HR Manager WACHS Goldfields	Emmanuel C	Appeal against a decision given on 15 September 2017 in an internal reclassification process	N/A	Discontinued

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2018 WAIRC 00049

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KAREN ELIZABETH MINOGUE

APPLICANT

-v-

MS PAULINE BAGDONAVICIUS

RESPONDENT**CORAM** SENIOR COMMISSIONER S J KENNER**DATE** MONDAY, 22 JANUARY 2018**FILE NO.** APPL 83 OF 2017**CITATION NO.** 2018 WAIRC 00049

Result	Direction issued
Representation	
Applicant	In person
Respondent	Mr J Carroll of counsel

Direction

HAVING heard the applicant on her own behalf and Mr J Carroll of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the Commission's jurisdiction to hear and determine the herein application be heard as a preliminary issue.
- (2) THAT the respondent file and serve any affidavits, an outline of submissions and any list of authorities upon which it intends to rely by no later than 2 February 2018.
- (3) THAT the applicant file and serve any affidavits, an outline of submissions and any list of authorities upon which she intends to rely by no later than 14 February 2018.
- (4) THAT the matter be listed for hearing for one day on a date to be fixed.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00128

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2018 WAIRC 00128
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	TUESDAY, 20 FEBRUARY 2018
DELIVERED	:	WEDNESDAY, 21 FEBRUARY 2018
FILE NO.	:	APPL 83 OF 2017
BETWEEN	:	KAREN ELIZABETH MINOGUE Applicant AND MS PAULINE BAGDONAVICIUS Respondent

Catchwords	:	<i>Industrial Law (WA) - Whether the Commission has jurisdiction - Whether applicant is a 'government officer' - Principles applied - Application dismissed</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA) Public Sector Management Act 1994 (WA)</i>
Result	:	Dismissed for want of jurisdiction
Representation:		
Counsel:		
Applicant	:	In person
Respondent	:	Mr J Carroll of counsel

Solicitors:

Respondent : State Solicitor's Office

Reasons for Decision

- 1 By this application the applicant purports to refer under s 78(2) of the *Public Sector Management Act 1994* (WA) a dispute in relation to disciplinary action said to have been commenced by the respondent in April 2015. Many grievances are set out by the applicant in her claim, which have a lengthy history. The parties have filed submissions and affidavits in support of their contentions. From the submissions and affidavit evidence before the Commission, it is now common ground that the applicant was employed as a public service officer in June 2009, in the position of a Family Violence Case Worker. It is also apparent from the affidavit evidence filed, that despite the events complained of occurring in April 2015, the applicant remains an employee of the respondent.
- 2 The respondent has raised as a preliminary issue, the jurisdiction of the Commission to deal with this claim. It is contended that as the applicant was and remains employed as a public service officer under s 64(1)(a) of the PSM Act, the applicant is therefore a "government officer" for the purposes of s 80C of the Industrial Relations Act 1979 (WA). Thus, the respondent submitted that as a government officer, the only avenue to challenge the respondent's decision to take disciplinary action, if such a decision was in fact taken, is to commence an appeal to the Public Service Appeal Board under s 78(1) of the PSM Act and s 80I(1)(b) of the IR Act. As the applicant has commenced her claim under s 78(2) of the PSM Act, which only enables an "employee", other than a government officer, to commence such proceedings, the submission was made that this claim is beyond the jurisdiction of the Commission and it must be dismissed.
- 3 As noted, the respondent's submissions were supported by affidavit evidence. Mr Spivey, the respondent's Workplace Services Coordinator said that he obtained the applicant's personnel file from departmental records. It shows that by letter of 18 June 2009, the applicant was employed by the then Department of the Attorney-General as a permanent public service officer under s 64(1)(a) of the PSM Act. Based on Mr Spivey's search of the records, he also confirmed that the applicant remains employed by the respondent.
- 4 On these facts as they are before the Commission, which as I have said, are not controversial, there can be no doubt that the applicant was employed by the respondent as a public service officer and therefore is a "government officer" for the purposes of s 78(1) of the PSM Act. Whilst the applicant has many grievances against the respondent which she considers have not been resolved, proceedings by a government officer may not be brought before the Commission under s 78(2). Accordingly, this application is not competent and it must be dismissed for want of jurisdiction. If any further proceedings are to be taken by the applicant then they must be by way of an appeal to the Public Service Appeal Board under s 78(1) of the PSM Act. I make no comment on that issue other than to observe that this course may not be without difficulties, given the facts before the Commission in these proceedings.
- 5 Finally, the name of the respondent needs to be amended to reflect the proper identity of the employer, that being the Director General, Department of Justice.
- 6 The Commission now orders accordingly.

2018 WAIRC 00129

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KAREN ELIZABETH MINOGUE

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT**CORAM** SENIOR COMMISSIONER S J KENNER**DATE** WEDNESDAY, 21 FEBRUARY 2018**FILE NO/S** APPL 83 OF 2017**CITATION NO.** 2018 WAIRC 00129**Result** Dismissed for want of jurisdiction**Representation****Applicant** In person**Respondent** Mr J Carroll of counsel*Order*

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

- (1) THAT the name of the respondent be amended by deleting the name "Ms Pauline Bagdonavicius" and inserting in lieu thereof the name "Director General, Department of Justice".
- (2) THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]