Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 4 THURSDAY 26 APRIL, 2018 Vol. 98—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

98 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2018 WAIRC 00184

APPEAL AGAINST A DECISION OF THE PUBLIC SERVICE ARBITRATOR IN MATTER NO. PSACR 25 OF 2015 GIVEN ON 2 OCTOBER 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2018 WAIRC 00184
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS
HEARD	:	THURSDAY, 8 FEBRUARY 2018
DELIVERED	:	THURSDAY, 15 MARCH 2018
FILE NO.	:	FBA 14 OF 2017
BETWEEN	:	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED Appellant AND DIRECTOR GENERAL, HOUSING AUTHORITY Respondent

ON APPEAL FROM:		
Jurisdiction	:	**Public Service Arbitrator**
Coram	:	**Commissioner T Emmanuel**
Citation	:	**[2017] WAIRC 00851; (2017) 97 WAIG 1655**
File No	:	**PSACR 25 of 2015**

CatchWords	:	Industrial Law (WA) - Appeal against decision of Public Service Arbitrator - Matter referred for hearing and determination pursuant to s 44 - Machinery of Government changes - Change in employing authority - Beyond power of the Arbitrator to review a decision made by the Public Sector Commissioner to make a notice pursuant to s 22B of the *Public Sector Management Act 1994* - Until the s 22B notice is set aside by a court of competent jurisdiction the notice is to be presumed as valid
Legislation	:	*Industrial Relations Act 1979* (WA) s 7, s 27(1)(a), s 27(1)(a)(ii), s 44, s 49(2a) *Public Sector Management Act 1994* (WA) s 3, s 5(1)(c)(iii), s 22B, s 34, s 35, s 35(1), s 35(1)(b), s 36, s 64(1), s 64(1)(b), s 65, s 66 *Alteration of Statutory Designations Act 1974* (WA) s 3 *Housing Act 1980* (WA) s 6, s 7, s 7(3), s 8, s 9, s 17, s 18A, s 18A(1) *Constitution Act 1889* (WA) s 74
Result	:	Leave to appeal refused - Appeal dismissed

Representation:

Appellant	:	Mr B Cusack and with him Mr H McGregor
Respondent	:	Mr R Andretich (of counsel) and with him Ms A Woods
Solicitors:		
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

Director General Department of Justice v Civil Service Association of Western Australia Inc [2005] WASCA 244; (2005) 86 WAIG 231

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

The Honourable Minister of Police v Western Australian Police Union of Workers (2000) 81 WAIG 356

Western Australian Police Union of Workers v The Civil Service Association of Western Australia Incorporated [2011] WAIRC 00786; (2011) 91 WAIG 1851

Reasons for Decision

SMITH AP:

Background

1 The Civil Service Association of Western Australia Incorporated (union) appeals from a decision of the Commission, in PSACR 25 of 2015, made on 2 October 2017, dismissing part of the matters referred for hearing and determination and refraining from hearing the remainder.

2 On 23 October 2015, the union filed an application for a conference under s 44 of the *Industrial Relations Act 1979* (WA) (IR Act) relating to a dispute about the Housing Authority's practice of employing public service officers on fixed term contracts.

3 The matter was referred for hearing and determination on 21 June 2016.

4 The union's claim was set out in an amended schedule attached to a memorandum of matters referred for hearing and determination dated 14 July 2016 (memorandum) as follows:

> The applicant is in dispute with the respondent over the respondent's practices in its employment of officers under fixed term contracts. It says those practices are arbitrary and unfair. It says that:
>
> 1. (i) the respondent employs public service officers (the officers) on fixed term contracts for reasons not contemplated by clause 8(5) *Public Service Award 1992* (Award) and clause 15 *Public Service and Government Officers General Agreement 2014* (Agreement); and
>
> (ii) in its application of cl 7.1 of the Commissioner's Instruction No. 2 Filling a Public Sector Vacancy (CI2), the respondent has created a mischief which denies the officers the opportunity to seek permanent appointment.
>
> **Particulars**
>
> 2. The practices, amongst other things, result in the officers being engaged on rolling contracts of a short duration, which accumulate to exceed the 12 month threshold in CI2, cl 7.1(c), yet the officers are denied the opportunity of having their request for consideration to a permanent appointment assessed.
>
> 3. The practices include but are not limited to:
>
> (a) Not referring to the possibility of permanency in either an Expression of Interest or an external advertisement, yet continuing to award contracts to the same officer for extended periods which can result in the contractor exceeding the two year threshold in CI2, cl. 7.1(c);
>
> (b) Employing the officers beyond the two year threshold at CI2;
>
> (c) Not conducting a competitive merit selection process for the initial appointment;
>
> (d) Not engaging in a performance management process with the officers;
>
> (e) Not undertaking an individual assessment of merit;
>
> (f) Not filling a vacancy with a permanent appointment of an incumbent officer or another suitable officer when the substantive occupant has permanently vacated the position and funding remains in place for the appointment, but rather making an appointment by offering a further fixed term contract.
>
> **Contentions**
>
> 4. The respondent's practices have denied the applicant's members a workplace right.
>
> 5. The respondent justified the practices on the basis that:
>
> (a) It was undergoing a review. This was not a valid justification given the 'review' was ill defined and did not have any end date. Also, many of the officers have been employed for years at a time well beyond any short or medium term of a 'review'. The respondent subsequently resiled from this explanation.

(b) The Government of Western Australia's recruitment freeze until 30 June 2016, which prohibited any appointment to a permanent position in the public sector. This justification is not valid because the respondent is not bound by the recruitment freeze, but has chosen to voluntarily abide by the policy. The recruitment freeze is immaterial to the relief it seeks in the application.

6. The applicant seeks orders to create a new workplace right for officers employed pursuant to cl 8(5) of the Award and cl 15 of the Agreement and CI2, cl 7.1 that:

(a) the officers listed below be deemed to have satisfied the relevant considerations in cl 7.1; and

(b) if a vacancy or similar vacancy is identified in the respondent, the respondent may exercise the CEO's discretion and will, if it decides a permanent position is required, assess the employees described at 6(c) when contemplating making a permanent appointment; and

(c) those officers are:

Ms Emily Dickinson

Ms Pau Lin Liew

Ms Natasha Buck

Mr Cliff Goncalves

Mr Michael Rye

Mr William Peng

Mr Christopher Lees

Ms Dianne McCambridge

Ms Andra Biondi

Ms Julie Rodriguez (Tremain).

7. That for all future fixed term contracts, the respondent comply with the following:

(a) For any fixed term contract

(i) under six months' duration must include a statement in the original advertisement for the contract, as to whether or not there is the prospect of appointment to a permanent position;

(ii) which has the possibility of appointment to a permanent position must be advertised in accordance with s 64(4) of the *Public Sector Management Act 1994* (WA) (the PSM Act);

(iii) must include a competitive merit selection process.

(b) Any notice of appointment to a fixed term contract must include in the terms and conditions of the contract a statement as to whether or not there is the possibility of appointment to a permanent position.

(c) For any fixed term contract, in the event that an appointment to a permanent position does not occur within two years of the date of the original advertisement and the position is still required, the position must be re-advertised in compliance with s 64(4) of the *Public Sector Management Act 1994* (WA) at the cessation of the current contract.

(d) Any officer on a fixed term contract, whether there is the possibility of appointment to a permanent position and the contract has or contracts have exceeded 12 months in aggregate, must be subject to a performance management process before the cessation of the current contract or before two years from the date of the original advertisement, whichever is the sooner.

(e) The respondent must conduct an individual assessment of merit of a [sic] the officer prior to a permanent appointment being made; and

(f) Such other orders as the Public Service Arbitrator thinks fit.

5 In effect the memorandum raised two matters. The first is a claim that particular public service officers were (at the time of the referral) employed on rolling fixed term contracts and being denied permanent appointments. The second is a claim in para 7 of the memorandum that the Housing Authority comply with a range of requirements for all future fixed term contracts, including advertising, the selection process, performance management and merit assessment.

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

7 At the commencement of the substantive hearing on 15 August 2017, the Housing Authority raised a new objection to the matter being heard. In essence, the matters raised by the Housing Authority were:

(a) As a result of recent Machinery of Government changes, the Housing Authority was no longer the employing authority of the employees in question.

(b) There was no evidence that the new employing authority, the Department of Communities, had engaged in the alleged employment practices, the subject of the union's application.

8 In these circumstances, the Housing Authority sought an order under s 27(1)(a)(ii) of the IR Act that further hearing of the matters referred in the memorandum be discontinued in the public interest.

9 As a result of the objection being raised by the Housing Authority, the hearing was adjourned and the parties filed written submissions as to whether further proceedings were not necessary or desirable in the public interest or whether for any other reason the matter should be dismissed or discontinued.

10 The Arbitrator, after considering the parties' written submissions, ordered:

1. THAT the part of this matter referred as it relates to the orders sought at [7] of the Memorandum of Referral in relation to all future fixed term contracts be, and by this order is, dismissed.

2. THAT the Public Service Arbitrator will refrain from further hearing or determining the matter.

2017 Machinery of Government changes - effect from 1 July 2017

11 Pursuant to s 34 of the *Public Sector Management Act 1994* (WA) (PSM Act), the public service is constituted by, among others, departments and persons employed under pt 3 of div 1, whether in departments or in the Senior Executive Service in SES organisations. An SES organisation is defined in s 3 of the PSM Act to include an entity which consists of a body, whether corporate or unincorporate, established or continued for a public purpose under a written law and specified in column 2 of sch 2 of the PSM Act. The Housing Authority is so specified in column 2 of sch 2 as an SES organisation.

12 Pursuant to s 35(1)(b) of the PSM Act, the Governor may, on the recommendation of the Public Sector Commissioner, amalgamate or divide existing departments and designate the resulting department or departments.

13 The Public Sector Commissioner may also make arrangements in respect of the disposition of employees and officers pursuant to s 22B of the PSM Act. Section 22B provides:

> When departments or organisations are established in place of existing departments or organisations or by the amalgamation or division of existing departments or organisations, the Commissioner may effect the disposition of offices, posts and positions and employees and such other consequential changes as appear necessary to give effect to the change in departments or organisations.

14 In a notice published in the Government Gazette on 28 June 2017 (3503), notice was given that the Governor had, under s 35(1)(b) of the PSM Act:

(a) amalgamated departments designated the Department of Housing, the Disability Services Commission, the Department of Local Government and Communities, and the Department for Child Protection and Family Support; and

(b) designated the resulting department as the Department of Communities with effect on and from 1 July 2017.

15 On the same day, the Alteration of Statutory Designations Order 2017 (2017 Order) made by the Governor by Order in Council was published in the Government Gazette (3497 - 3502). The Order was made pursuant to s 3 of the *Alteration of Statutory Designations Act 1974* (WA). The provisions of the Order that are material to this appeal are:

(a) Clause 5(1) which provides:

> A reference to the Department of Local Government and Communities contained in any law, or in any instrument, contract, or legal proceedings made or commenced before 1 July 2017, is to be read and construed as a reference to the relevant successor.

(b) Clause 8(1) which provides:

> A reference contained in any law, or in any instrument, contract, or legal proceedings made or commenced before 1 July 2017, to a department of the Public Service with a designation set out in the 2nd column of an item in the Table is to be read and construed as a reference to the department of the Public Service with the designation set out in the 3rd column of that item.

16 Item 4 of the third column of the table specifies the Department of Communities. However, there is no mention of the Housing Authority in the references set out in the second column of item 4.

17 On 30 June 2017, the Public Sector Commissioner gave notice under s 22B of the PSM Act that offices and employees (except the chief executive officer) of the Housing Authority were disposed to the department designated as the Department of Communities on and from 1 July 2017 (s 22B Disposition Notice) as follows:

> On the establishment of the Department of Communities as Gazetted 28 June 2017 (Special Edition No. 129), the following is made to give effect to the disposition of offices and employees and shall have effect on and from 1 July 2017:
>
> 1. All offices (other than that of chief executive officer) in existence as at midnight on 30 June 2017 within the Housing Authority, shall be taken to continue in the department designated the Department of Communities.
>
> 2. All existing employees (other than that of chief executive officer) within the Housing Authority, whose employment or appointments have not otherwise expired or terminated as at midnight on 30 June 2017, shall be taken:
>
> a. as retained in their current offices with their current substantive classifications and terms and conditions of employment; and
>
> b. to be performing their current functions within the department designated the Department of Communities.

3. In relation to the above, all references to the Housing Authority as the employing authority, in instruments, notices and notifications in operation as at midnight on 30 June 2017, shall be read and construed as references to the employing authority of the department designated the Department of Communities.

18 Leaving aside the central contention raised in this appeal by the appellant that the Housing Authority could not be the subject of a s 22B Disposition Notice, the effect of the s 22B Order was, by 'disposition', a transfer of all employees including the offices held by each of them (other than the chief executive officer) from the Housing Authority to the Department of Communities. Consequently, from 1 July 2017 the only employee of the Housing Authority would be the chief executive officer.

19 Pursuant to s 9 of the *Housing Act 1980* (WA), the Housing Authority is to be governed by its chief executive officer who, in its name, is to perform the functions of the Housing Authority under the *Housing Act*, or any other written law.

20 Whilst pursuant to s 17 of the *Housing Act* there is to be a chief executive officer and such other officers appointed under and subject to pt 3 of the PSM Act, as the Housing Authority considers necessary, to enable the Housing Authority to exercise and perform the powers, functions and duties conferred on it by or under the *Housing Act,* or any other Act, the Housing Authority is expressly empowered under s 18A of the *Housing Act* to make arrangements to use other staff and facilities.

21 Section 18A of the *Housing Act* provides:

(1) The Authority may by arrangement with the relevant employing authority make use, either full-time or part-time, of the services of any officer or employee —

(a) in the Public Service; or

(b) in a State agency or instrumentality; or

(c) otherwise in the service of the State.

(2) The Authority may by arrangement with —

(a) a department of the Public Service; or

(b) a State agency or instrumentality,

make use of any facilities of the department, agency or instrumentality.

(3) An arrangement under subsection (1) or (2) is to be made on such terms as are agreed to by the parties.

(4) In this section, ***employing authority***, ***Public Service*** and other expressions used in the *Public Sector Management Act 1994* have the same respective meanings as they have in that Act.

22 Pursuant to the power conferred by s 18A, arrangements were made from 3 July 2017 for the Housing Authority to make use of the services of any officer or employee of the Department of Communities.

23 Grahame John Searle is the appointed Director General of the Department of Communities. He is also the chief executive officer of the Housing Authority. On 3 July 2017, Mr Searle entered into an arrangement under s 18A of the *Housing Act*, as chief executive officer of both the Department of Communities and the Housing Authority. The s 18A arrangement was made in writing as follows:

I, Grahame John Searle, as both the:

- Director General of the Department of Communities, and employing authority for all officers and employees of the Department
- Chief Executive Officer of the Housing Authority

agree that:

1. The Housing Authority may under section 18A of the *Housing Act 1980* (WA) make use of the services of any officer or employee of the Department.

2. Appropriate transactions will be recorded in the financial accounts of the Department and the Authority to reflect the costs of services provided.

The Arbitrator's decision

24 The orders sought by the union in the memorandum sought to address what it says is longstanding 'misuse' by the Housing Authority of its power to employ employees for fixed terms under s 64(1)(b) of the PSM Act.

25 The Arbitrator observed that the union concedes the Housing Authority has not been amalgamated into the Department of Communities.

26 The Arbitrator accepted:

(a) The Housing Authority was the employing authority (and not the Director General) at the time the application was filed. She also found that this was an issue that could have been dealt with (presumably by amendment).

(b) The employees employed by the Housing Authority (other than the chief executive officer) are now employed by the chief executive officer of the Department of Communities (as the employing authority) and are made available to the Housing Authority under the s 18A arrangement (referred to by the Arbitrator as the MOU).

(c) The employment practices of the Housing Authority cannot be attributed to the Department of Communities.

(d) The Department of Communities cannot be held vicariously responsible for the Housing Authority's (past) employment decisions as the Department of Communities' employment practices only began on 1 July 2017.

(e) The union had not raised a case against the Department of Communities.

27 The Arbitrator found that in the circumstances where the Housing Authority no longer employs employees other than the chief executive officer, and will not employ any other employees in the foreseeable future, it would not be appropriate to order that the Housing Authority comply with the range of requirements sought by the union for all future employment of officers on fixed term contracts.

28 The Arbitrator was not persuaded that the ordinary meaning of 'instrument' in the 2017 Order extended to initiating processes in legal proceedings. Nor did she agree that the reference to the Director General of the Housing Authority as the employing authority in the proceedings before her could be considered a reference to a 'notice' - in cl 3 of the s 22B Disposition Notice and therefore be read as a reference to the employing authority of the department designated the Department of Communities.

29 Whilst the Arbitrator accepted that the Department of Communities could be joined as a party to the matter before her, she did not accept that that meant it should be joined as a party. In fact, she was not satisfied that the Department of Communities should be joined because there was no case raised against the Department of Communities and there was no evidence that the Department of Communities had engaged in the alleged 'mischief' that was the subject of the memorandum.

30 The Arbitrator rejected the submission made on behalf of the union that s 22B of the PSM Act does not apply to the Housing Authority because it is not a department established under s 35 of the PSM Act. Nor did she accept the submission that the Disposition Notice was invalid because it cannot override the explicit power of appointment of public service officers under s 17 of the *Housing Act*.

31 The Arbitrator accepted the Housing Authority's submission that the effect of s 18A(1) of the *Housing Act* is that the Housing Authority may use other agencies' employees by arrangement and that the arrangement which was made was such an arrangement.

32 The Arbitrator did not accept the contention put on behalf of the union that the public service officers of the Housing Authority could not have been transferred to the Department of Communities, on the grounds that a transfer of public service officers can only occur pursuant to the power conferred in s 65 of the PSM Act, or by secondment under s 66 of the PSM Act.

33 The Arbitrator also rejected an argument put on behalf of the union that a change in entity may not result in a change of employment. She found it was not the amalgamation that caused the change in employer, but the s 22B Disposition Notice caused the change in employer.

34 She also rejected an argument that the State is the employer of public service officers. She observed that applications brought under the IR Act are instituted not against the State, but against the employing authority. She noted that in the application before her, the union names the employing authority as the Housing Authority.

35 Having regard to the 2017 Machinery of Government changes, the Arbitrator held that the part of the matter referred in the memorandum that relates to all future fixed term contracts should be dismissed as further proceedings in respect of this issue are not necessary, or desirable, in the public interest. Consequently, she found that the matter referred should not proceed so far as it related to all future fixed term contracts, as set out in para 7 of the memorandum, because the orders sought by the union could not deal with the 'mischief' alleged by the union.

36 The Arbitrator then held that she should refrain from further hearing the remaining part of the matter referred, being the part of the matter that related to the orders sought in para 6 of the memorandum in relation to the listed employees. The Arbitrator found that it would not be appropriate or efficient to unravel the memorandum in order to hear that part of the matter that related to the listed employees. She found that refraining from further hearing this part of the matter, to the extent that it relates to the orders sought in para 7, would not finally determine anything against the union. In particular, she found it would not leave the union without a remedy to resolve that remaining part of the industrial matter.

37 It appears from the Arbitrator's reasons, that at the commencement of the proceedings before her on 15 August 2017, the orders sought in para 6 could only apply to one of the employees listed in the memorandum, namely Mr Rye. Whilst the circumstances of Mr Rye are not considered by the Arbitrator in her decision, a submission was made by Mr Shipman on behalf of the union that there was a technicality as to whether Mr Rye is eligible, or not eligible, for permanent appointment because he had moved from one job description number to another and he had not been 12 months in a particular job.

38 Consequently, it appears clear from the Arbitrator's reasons that it is open to the union in the future to file and pursue a fresh application insofar as the circumstances it relies upon relates to Mr Rye.

Grounds of appeal

39 There are five grounds of appeal. These are as follows:

1. The Arbitrator made an error of law in respect of the interpretation and operation of s. 22B Public Sector Management Act 1994 [PSM Act]:

   Particulars

   By finding (in paragraph 50) that:

   b. The employees employed by the Housing Authority (other than the CEO) are now employed by the CEO of the Department of Communities and are made available to the Housing Authority under the MOU;

   c. The employment practices of the Housing Authority cannot be attributed to the Department of Communities;

   d. In circumstances where the Housing Authority no longer employs employees other than the CEO, and will not employ any other employees for the foreseeable future, it would not be appropriate for the Arbitrator to order that the Housing Authority comply with a range of requirements for all future fixed term

contracts, including in relation to advertising, the selection process, performance management and merit assessment;

flew in the face of the express words of s. 22B PSM Act and the requirements of the *Housing Act 1980* (Housing Act) read in conjunction with PSM Act.

2. The Arbitrator made an error of law in respect of the interpretation and operation of s. 22B PSM Act.

Particulars

By finding (in paragraph 61) that employees of the Housing Authority can be affected by a disposition order under s. 22B PSM Act when s. 22B could not be applied to the Housing Authority since it remained in existence in its own right; it was not amalgamated with other entities to form the Department of Communities. There was a misconstruction of the PSM Act.

3. The Arbitrator made an error of law by ignoring the following facts:

Particulars

(a) The witness evidence before the Commission demonstrated the mischiefs for giving relief both to specified employees, and for future fixed term contracts. That evidence consisted of a demonstration of individual circumstances, documentation showing a systemic problem of staff being unable to qualify for conversion to permanency, spreadsheets concerning staff affected and correspondence on the issues of the case.

(b) As the Housing Authority had not been amalgamated with the Department of Communities, its staff could not be the subject of a s. 22B disposition order under the PSM Act.

4. The Arbitrator made an error of law in refusing the [sic] amend, or correct any defect under s. 27(1)(l) and (m) Industrial Relations Act [IR Act]:

Particulars

If the Housing Authority continued to exist in its own right, and continued to employ staff, then the proceedings could continue. But if the Department of Communities employed the former staff of the Housing Authority, then that Department could be joined because the employment practices and mischiefs continued under the new entity. The error of law was to treat the employment circumstances as if the corporate veil applied to public sector employment limiting the responsibility of the new entity for the manifest mischiefs; when s 64 PSM Act treated employing authorities as agents of the State of Western Australia.

5. The Arbitrator made an error of law dismissing the application under s. 27(1)(a) IR Act:

Particulars

The error consisted of a miscarriage of the discretion invested under s. 27(1)(a) IR Act in holding:

a. the dispute concerns alleged 'mischief' in the employment practices on the part of a party that no longer employs the employees listed in the Memorandum of Referral, or any employees other than the CEO;

b. the CSA seeks orders in relation to all future fixed term contracts;

c. no case has been raised against the Department of Communities; and

d. taking into account my obligation to act accordingly to equity, good conscience and the substantial merits of the case;

The Arbitrator made an order to dismiss part of the matter that relates to all future fixed term contracts [paragraph 74].

The Arbitrator also made an order refraining from further hearing of the matter, to the extent that it relates to orders sought a [sic] [6] of the Memorandum of Referral in relation to the listed employees [paragraph 80].

The Respondent failed to discharge the heavy onus based on the evidence before the Commission set out in ground 3.

The miscarriage involved a misapplication of the facts and the law, which included the fact that the Director General of the Department of Communities was the CEO of the Housing Authority, the mischiefs complained had not ceased, the decision makers for the Housing Authority had responsible positions in the new Department, and a controversy over the operation of ss. 22B and 64 PSM Act. The Applicant's case outweighed the Respondent's arguments on public interest because the mischiefs had not ceased.

40 In the notice of appeal, the union also seeks leave to appeal pursuant to s 49(2a) of the IR Act. However, leave is not necessary insofar as the appeal seeks to challenge order 1 of the decision as the union has an appeal as of right against a decision of the Commission that is not a finding. The meaning of finding in s 49(2a) is defined in s 7 of the IR Act to mean a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate. It is clear from the order made by the Arbitrator on 2 October 2017 that order 1 disposed of part of the matter in PSACR 25 of 2015.

Is error established?

41 The central issue raised by the union in this appeal is the proper construction of s 22B of the PSM Act, the s 22B Disposition Notice made by the Public Sector Commissioner, the s 18A *Housing Act* arrangement and the 2017 Order.

42 The union argues that the Alteration of Statutory Designations Order did not apply to the Housing Authority because a name change would have required an amendment to the *Housing Act*. With respect, this point is misconceived. The *Alteration of Statutory Designations Act* does not apply to statutory authorities. It applies only to the alteration of style and title of Ministers of the Crown, departments and offices in departments.

43 Pursuant to s 3 of the *Alteration of Statutory Designations Act*, whenever the Governor establishes, amalgamates, divides, or abolishes a department or alters the designation of any department, the Governor may, by Order in Council, direct that a reference to a Minister, office or department, in any law, or any instrument, contract, or legal proceeding made or commenced before the coming into operation of the Order, shall be read and construed as a reference to a Minister, office or department, by the reference specified in that Order, and effect shall be given to any such direction. Consequently, the Alteration of Statutory Designations Order does not apply to the Housing Authority.

44 In any event, it is accepted by the union that the Housing Authority was not amalgamated by the Machinery of Government changes. Nor was its designation changed.

45 The Housing Authority is a body corporate with perpetual succession and a common seal and is capable in law in its corporate name of suing and being sued: s 6 and s 7 of the *Housing Act.* Pursuant to s 7(3) of the *Housing Act*, the Housing Authority is an agent of the Crown in right of the State. As provided for in s 8 of the *Housing Act*, it is an SES organisation for the purposes of the PSM Act.

46 Whilst the Housing Authority is an agent of the Crown in right of the State, it does not follow that its chief executive officer or any of its officers or wages staff that it may employ pursuant to s 17 of the *Housing Act* are employees of the Crown in right of the State of Western Australia. Pursuant to s 17, the chief executive officer and officers of the Housing Authority are required to be appointed under and subject to pt 3 of the PSM Act.

47 In support of this argument, the union relies upon observations made in ***Western Australian Police Union of Workers v The Civil Service Association of Western Australia Incorporated*** [2011] WAIRC 00786; (2011) 91 WAIG 1851 [228] - [229] in which it was observed that Sharkey P had put to rest the question whether police officers in Western Australia are employees in ***The Honourable Minister of Police v Western Australian Police Union of Workers*** (2000) 81 WAIG 356 [79] - [90]:

(a) At common law, a constable or police officer was regarded as the holder of a public office and was regarded as exercising an original and not delegated authority.

(b) Police are servants of no one but the law itself.

(c) Police officers appointed under the *Police Act 1892* (WA) are not employees.

48 In ***Western Australian Police Union of Workers v The Civil Service Association of Western Australia Incorporated*** it was also observed [233] - [235]:

> As police auxiliary officers:
>
> (a) do not take an oath of office;
>
> (b) are not conferred with any powers or duties at common law;
>
> (c) can have their authority to carry out the statutory powers, duties and obligations of a sworn police officer limited at the discretion of the Commissioner of Police; and
>
> (d) their terms and conditions of service are (subject to the prescribed minimum safety net in s 38G(2)(b) of the Police Act), to be determined by the Commissioner of Police;
>
> the nature of the office of police auxiliary officer can be said to arise by way of a contract of service, as these incidents of service, in particular the statutory right to restrict statutory powers, duties and obligations of a police officer that are carried out by a police auxiliary officer raise a clear inference that the Commissioner of Police is the employer of a police auxiliary officer. This is because the Commissioner of Police is expressly empowered to determine each and every power and function of each police auxiliary officer appointed under the Police Act in much the same way as any other employer can determine the duties and functions to be carried out by an employee.
>
> It is also notable that the power conferred on the Commissioner of Police to appoint a police auxiliary officer by s 38G of the Police Act is similar to the power conferred on the Commissioner of Police as an employing authority to appoint public service officers (other than executive officers). Pursuant to s 4(3) and s 64(1) of the PSM Act. Section 64(1) of the PSM Act relevantly provides:
>
> > Subject to this section and to any binding award, order or industrial agreement under the *Industrial Relations Act 1979* or employer-employee agreement under Part VID of the *Industrial Relations Act 1979*, the employing authority of a department or organisation may in accordance with the Commissioner's instructions appoint for and on behalf of the State a person as a public service officer (otherwise than as an executive officer) on a full-time or part-time basis –
> >
> > (a) for an indefinite period as a permanent officer, or
> >
> > (b) for such term not exceeding 5 years as is specified in the instrument of his or her appointment.
>
> It is well established that public service officers appointed under s 64(1) of the PSM Act are employees. Both police auxiliary officers appointed under the Police Act and public service officers appointed under the provisions of the PSM Act are appointed as statutory officers and most are at the lower levels of those who can be said to be servants of the Crown, but in neither case can they be said to be the holders of an independent office of the Crown.

49 Whilst an observation was made in that matter that public service officers at the lower level of the public service can be said to be servants of the Crown, that does not mean they are employed by the Crown. When regard is had to the power to appoint officers in s 64(1) of the PSM Act (when read with s 74 of the *Constitution Act 1889* (WA)), it is clear that the employer of a public service officer who is appointed for and on behalf of the State, is the employing authority of a department or organisation.

50 When regard is had to the nature of the offices held by the public service officers on whose behalf the union seeks to litigate issues, it is clear that these officers would be regarded as 'minor appointments' within the meaning of s 74 of the *Constitution Act*. Section 74 of the *Constitution Act* is to the effect that the appointment to all public offices of the Crown in right of the State of Western Australia is vested in the Governor in Council (with the exception of appointment of officers liable to retire from office on political grounds) which appointments should be vested in the Governor alone, provided always, that this (power to appoint) shall not extend to minor appointments which by an Act of the Legislature or by order of the Governor in Council may be vested in heads of departments or other officers or persons.

51 Prior to the 2017 Disposition Notice coming into force, the Housing Authority, not the State, was the employing authority of its officers pursuant to s 8 of the *Housing Act* and s 5(1)(c)(iii) of the PSM Act.

52 The question the union poses is whether in the circumstances of the 2017 Machinery of Government changes, s 22B authorised the making of the Disposition Notice to dispose of all employees and the offices (except the chief executive officer) of the Housing Authority to the Department of Communities with effect from 1 July 2017.

53 The union concedes its case rises or falls on the question of whether the 2017 Disposition Notice was a valid exercise of power pursuant to the power conferred on the Public Sector Commissioner under s 22B of the PSM Act. It contends the 2017 Disposition Notice was invalid on grounds that s 22B only confers power to affect a disposition in relation to the offices and employees of existing departments or organisations that are amalgamated or divided. As the Housing Authority itself was not amalgamated or divided with any department or organisation, the s 22B Disposition Notice is ineffective.

54 The difficulty with this submission is that no determination could be made in the proceedings at first instance, or on appeal, that the 2017 Disposition Notice was invalid and ineffective. To do so would result in the making of a 'bare' declaration in circumstances where there is no power to do so. The Arbitrator has no power to engage in any inquiry in the nature of judicial review of the power of the Public Sector Commissioner to make the 2017 Disposition Notice.

55 The Arbitrator's powers are solely conferred by statute. In circumstances where the Public Sector Commissioner was not a party to the proceedings and the nature of the dispute is such that he was not capable of being joined as a party to the industrial matter before the Arbitrator, the Arbitrator had no power to review the acts of the Public Sector Commissioner to make the 2017 Disposition Notice.

56 This point was made clear by Wheeler J in ***Director General Department of Justice v Civil Service Association of Western Australia Inc*** [2005] WASCA 244; (2005) 86 WAIG 231. In her Honour's reasons for decision, she made the following observations about the jurisdiction of the Arbitrator:

> 21 The jurisdiction of the Arbitrator, by contrast, is the jurisdiction conferred by s 80E of the Act. Not surprisingly, one does not find in that section the words 'judicial review' or any words indicative of the power of the Arbitrator to grant prerogative relief, or to make declarations. The question which then requires consideration is what it is that s 80E permits.
>
> 22 Aside from making the obvious point as to the absence from s 80E of any words of the kind to which we have referred, the appellant made two other submissions. The first was that the *Balog* principle meant that, particularly where the finding might concern the lawfulness or unlawfulness of the actions of a particular individual, the Arbitrator was unable to make a finding that there had been unlawfulness or contravention of particular provisions of the PSM Act. The second was that s 80E must necessarily be read as excluding the power of the Arbitrator to engage in what was called 'judicial review', because by s 80E(1) the jurisdiction of the Arbitrator was exclusive, and to read the section otherwise would be to exclude the jurisdiction of this Court, a result which Parliament was not likely to have intended.
>
> …
>
> 28 Turning, then, to the question of the proper construction of s 80E(5), read with s 80E(1), in our view the controversy which has arisen relates to a false issue. As we have noted, there is no power conferred by the Act upon the Arbitrator to engage in anything in the nature of 'judicial review', or to make a bare declaration. That is jurisdiction of a kind quite different from the merits-based inquiry contemplated by s 80E. To the extent that the reasons of the Full Bench might be read as suggesting that there is such power, they are in error.
>
> 29 However, the powers of the Arbitrator are very wide. They are to inquire into and deal with any industrial matter. To the extent necessary, the exercise by an employer in relation to a government officer of a power relating to that industrial matter may be reviewed, nullified, modified, or varied by the Arbitrator.
>
> 30 An inquiry into an industrial matter will, where that industrial matter is affected by other legislation, or where the actions of persons involved in the industrial matter are, in some respect, governed by other legislation, involve an inquiry into what was done, in that legislative context. In order to determine how to 'deal with' an industrial matter, the Arbitrator must find relevant facts. If it is the case that a relevant factual finding suggests that a person has been guilty of unlawful or improper conduct, that is a finding which it is open to the Arbitrator to make, not as an end in itself, but as a step in determining how the industrial matter is to be dealt with.

31 Where, as is presently the case, the way in which officers in the public service deal with each other is the subject of principles and requirements contained in legislation such as the PSM Act, it will often be desirable for the Arbitrator to consider whether the behaviour of individuals involved in the industrial matter has been in conformity with those principles and requirements. Again, findings of that kind would not be made as an end in themselves, but would be made in order to determine how, in the broad statutory context, it would be appropriate to deal with the industrial matter.

32 It will on occasion, as part of that process, be necessary for the Arbitrator to undertake a consideration of the relevant statutes, so as to ascertain how they apply to the facts as found. That exercise is undertaken, not in order authoritatively to declare the meaning of the statutory provision, but again as a step in the process of ascertaining what is required, in the statutory context, to deal with the industrial matter.

33 Those conclusions may on occasion lead to the view that it is necessary in order to deal appropriately with the industrial matter, to nullify, modify, or vary an action or decision of an employer, pursuant to s 80E(5). That subsection does not confer any independent jurisdiction to quash those decisions, but only to do so to the extent necessary to ensure that the industrial matter is dealt with as contemplated by s 80E(1). Similarly, the word 'reviewed' in s 80E(5) is plainly not intended to confer some independent power to review any decision of an employer, but only a power to review (and, if necessary, to differ from) the decision where it is necessary to do so as part of the process of dealing with an industrial matter.

34 When s 80E(1) and (5) are understood in the way in which we have endeavoured to explain, the controversy about the Arbitrator's power of 'judicial review' simply disappears. There is plainly no such independent power. Equally plainly, however, some of the questions which would be determined by a Court undertaking judicial review of the actions of government officers may be questions which it is necessary for an Arbitrator to consider and determine in order to deal with an industrial matter relating to those government officers. Those questions are dealt with by the Arbitrator, however, not in order to make an authoritative and binding determination concerning them, but as steps in the process of determining how the industrial matter is to be dealt with.

57 Thus, the Arbitrator has no power to nullify, modify, or vary an action or a decision of any other person other than an employer. The s 22B Disposition Notice was not made by the employer of any employees (or future employees) the subject of the matters referred to the Arbitrator.

58 Consequently, in this matter, is not open to make a collateral attack on the s 22B Disposition Notice. Until the s 22B Disposition Notice is set aside, in appropriate proceedings before a Court of competent jurisdiction, it is to be presumed valid.

59 It is for these reasons I am of the opinion that to the extent that leave to appeal part of the decision is necessary, it should be refused and an order be made to dismiss the appeal.

60 Even if it were within the power of the Arbitrator to determine whether the s 22B Disposition Notice was effective to 'dispose' of the employees in question to the Department of Communities, I would not be persuaded the Arbitrator erred in rejecting the union's argument.

61 It is a modern rule of statutory construction that an Act of Parliament is to be read as a whole. The object of statutory construction is to construe the meaning of words used in a section in the context of the language and the legislation as a whole, to try to discern the intention of the legislature: ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby & Hayne JJ).

62 Section 22B must be read in context with pt 3 of the PSM Act. Pursuant to s 34 of the PSM Act the Public Service is constituted by:

(a) departments;

(b) SES organisations, insofar as any posts in them, or persons employed in them, or both, belong to the Senior Executive Service; and

(c) persons employed under pt 3, whether in departments or in the Senior Executive Service in SES organisations, or otherwise.

63 Pursuant to s 35(1) of the PSM Act, the Governor may, on the recommendation of the Public Sector Commissioner, establish and designate departments; and amalgamate or divide existing departments and designate the resulting department or departments. The Governor may also under s 35(1) alter the designations of existing departments.

64 Under s 36 of the PSM Act an employing authority of a department or an organisation may, in relation to the department or organisation, create, transfer or abolish offices.

65 Only departments can be established, designated, amalgamated or have their designations altered under s 35 of the PSM Act. Yet, the power to make a disposition order in respect of employees and offices, under s 22B of the PSM Act, extends not only to public service officers employed under pt 3 of the Act and their offices, posts and positions but also to other employees and offices, posts and positions in the public sector. This provision contemplates application not only to departments but also to organisations that may or may not employ public service officers. Plainly, this provision is capable of application to the Housing Authority.

66 The power conferred on the Public Sector Commissioner by s 22B is not restricted to the disposition of offices, posts, positions and employees of only the department or organisation that has been replaced or amalgamated. The power conferred is very wide and as such enables the disposition of offices, posts, positions and employees and such other consequential changes as appear necessary to give effect to a change in departments or organisations. If a disposition can only be made to organisation(s) or department(s) that have been replaced or amalgamated, the words 'as appear necessary to give effect to' would have no work to do. These words are wide enough to confer the power to order the disposition of employees etc from

any department or organisation to a newly created or amalgamated organisation, provided that such a disposition is necessary to give effect to the change in departments or organisations.

KENNER ASC:

67 The dispute at first instance giving rise to this appeal was in relation to the employment practices of the respondent. The kernel of it related to allegations that the respondent improperly employed public service officers on fixed term contracts and orders were sought requiring the respondent to progress employees towards permanent appointment, subject to certain conditions being complied with. This dispute preceded major changes to the organisation of the public sector in this State, introduced on 1 July 2017. Those changes, described as 'machinery of government' changes, resulted in the abolition and amalgamation of many government departments in accordance with the terms of the *Public Sector Management Act 1994* (WA).

68 To give effect to these changes, s 22B of the PSM Act enables the Public Sector Commissioner to move employees from one organisation to another through the disposition of offices and positions. A notice was issued on 30 June 2017 under s 22B, with the effect that all employees and offices of the respondent, except for the chief executive officer, became employees and offices of a new Department of Communities. As there were then no longer any employees of the respondent, affected by the original application to the Arbitrator, the respondent sought an order under s 27(1)(a)(ii) of the Act, that the Arbitrator refrain from further hearing the matter or dismiss the matter in the public interest.

69 As a part of its argument in response to the s 27(1)(a)(ii) application, the appellant at first instance, on various legal grounds, attacked the validity of the s 22B notice issued by the Public Sector Commissioner. Largely the same issues were raised by the appellant on this appeal. In determining the s 27(1)(a)(ii) application brought by the respondent, the learned Arbitrator was invited to and did deal with the validity of the s 22B notice, along with other matters. In doing so, the learned Arbitrator dismissed the dispute insofar as it related to the circumstances of future employees, as set out in par 7 of the referral. She refrained from further hearing the remainder of the issues in dispute.

70 The grounds of appeal challenged the learned Arbitrator's decision in relation to s 22B of the PSM Act. The appellant also maintained that the learned Arbitrator was in error in not joining the Department of Communities to the dispute and further maintained that she was in error in her approach to the application of s 27(1)(a)(ii) of the Act, in any event. As the appeal to the Full Bench is against a finding made by the learned Arbitrator which did not finally dispose of the matters in dispute, leave is not to be given by the Full Bench under s 49(2a) of the Act, unless the matter is of importance in the public interest. Leave should not be granted in this case. I would dismiss the appeal.

71 To the extent that the learned Arbitrator embarked upon a consideration of the validity of the s 22B notice that accompanied the relevant machinery of government changes, which was unrelated to the ultimate issue of the merits or otherwise of the fixed term tenure of the then employees of the respondent, it was not, with respect, permissible for her to do so: ***Director General Department of Justice v The Civil Service Association of Western Australia Incorporated*** [2005] WASCA 244; (2005) 86 WAIG 232. The Arbitrator's jurisdiction is not at large such as to enable the examination of the legality of steps taken, not necessary for inquiring into and dealing with the relevant industrial dispute. This is particularly so in circumstances where the steps taken or outcomes achieved, have been performed by a person who was not the employer and not party to the relevant dispute, in this case, the Public Sector Commissioner. The validity of the s 22B notice had to be assumed for the purposes of the matter at first instance.

72 As to the other matters raised by the appellant concerning the relevant principles to apply under s 27(1)(a) of the Act and whether the Department of Communities should have been joined as a party to the dispute, there was no merit in those submissions on the appeal. The learned Arbitrator made no error as to those issues. In addition to the above matters, given that the respondent no longer employed any relevant employees after 1 July 2017, the learned Arbitrator was entirely correct to find at first instance that it would not be in the public interest to proceed further with such a dispute. For this same reason too, the appellant could not establish that the appeal was in the public interest.

MATTHEWS C:

73 I have had the benefit of reading the draft reasons of Her Honour, the Acting President. I agree with those reasons and adopt [53] to [59] and agree the appeal ought to be dismissed.

2018 WAIRC 00193

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPELLANT** **-and-** DIRECTOR GENERAL, HOUSING AUTHORITY **RESPONDENT**
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 21 MARCH 2018
FILE NO/S	FBA 14 OF 2017
CITATION NO.	2018 WAIRC 00193

Result	Leave to appeal refused - Appeal dismissed
Appearances	
Appellant	Mr B Cusack and with him Mr H McGregor
Respondent	Mr R Andretich (of counsel) and with him Ms A Woods

Order

This appeal having come on for hearing before the Full Bench on 8 February 2018, and having heard Mr B Cusack and with him Mr H McGregor on behalf of the appellant, and Mr R Andretich (of counsel) and with him Ms A Woods on behalf of the respondent, and reasons for decision having been delivered on 15 March 2018, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. Leave to appeal against order 2 of the decision is refused.
2. The appeal be dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Application for Alteration of Rules—

2018 WAIRC 00248

APPLICATION PURSUANT TO S.62 - ALTERATION OF REGISTERED RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2018 WAIRC 00248
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
HEARD	**:**	TUESDAY, 3 APRIL 2018
DELIVERED	**:**	WEDNESDAY, 11 APRIL 2018
FILE NO.	**:**	FBM 1 OF 2017
BETWEEN	**:**	THE UNITED FIREFIGHTERS UNION OF AUSTRALIA WEST AUSTRALIA BRANCH Applicant AND (NOT APPLICABLE) Respondent

CatchWords	**:**	Industrial Law (WA) - Application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) for the Full Bench to authorise registration of alterations to registered rules - Name of organisation - Statutory criteria satisfied - Application granted
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(b)(ii); s 55(4)(c), s 55(4)(d), s 55(4)(e), s 55(5), s 56(1), s 59(1), s 59(2), s 62(2) *Industrial Relations Commission Regulations* 2005 (WA) reg 69(5)
Result	**:**	Order made
Representation:		
Applicant	**:**	Mr T Nolan and with him Ms L Anderson

Reasons for Decision

THE FULL BENCH:

Introduction

1 This is an application by the United Firefighters Union of Australia West Australian Branch, filed on 10 November 2017, made pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act). The applicant, as a registered organisation under the Act, seeks the authorisation of the Full Bench for the Registrar to register alterations to its rules to change the name of the

organisation from the United Firefighters Union of Australia West Australian Branch to The United Professional Firefighters Union of Western Australia.

2 As the proposed alterations seek to alter the name of an organisation, the alterations sought cannot be registered by the Registrar unless the registration is authorised by the Full Bench.

3 After hearing Mr Nolan and Ms Anderson on behalf of the applicant on 3 April 2018, the Full Bench was satisfied the requirements of the Act that regulate alterations of rules of an organisation had been met and made the following order:

> The Registrar is hereby authorised to register the alterations to the existing title and r 1 and r 30 of the rules of the applicant as published in the Western Australian Industrial Gazette on Wednesday, 28 February 2018 ([2018] WAIRC 00144; (2018) 98 WAIG 95).

4 These reasons set out the reasons why the Full Bench formed the view that the proposal to register the alterations to the rules of the applicant to change its name should be authorised.

5 In this application, the applicant seeks to alter the title of its registered rules, rule 1 – Name and rule 30 - Ballots, in particular r 30(4)(c)(1) and r 30(4)(c)(2).

6 The reason why the name of the organisation is sought to be changed is to differentiate between the State registered organisation and the Western Australian Branch of the Federal union (its counterpart Federal body). Under the current rules, the name of the State organisation and the counterpart Federal body are the same. The proposed name change is also sought to reflect more accurately the constitutional coverage and operation of the State organisation.

The applicant's rules about alterations

7 Pursuant to s 62(2) of the Act, the requirements of s 55(4) of the Act must be satisfied before the Full Bench can approve a rule alteration application to change the name of an organisation. Section 55(4) of the Act provides that the Full Bench shall refuse an application by an organisation under s 55(4) unless it is satisfied that:

> (a) the application has been authorised in accordance with the rules of the organisation; and
>
> (b) reasonable steps have been taken to adequately inform the members —
>
> (i) of the intention of the organisation to apply for registration; and
>
> (ii) of the proposed rules of the organisation; and
>
> (iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,
>
> and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection; and
>
> (c) in relation to the members of the organisation —
>
> (i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or
>
> (ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;
>
> and
>
> (d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and
>
> (e) rules of the organisation relating to elections for office —
>
> (i) provide that the election shall be by secret ballot; and
>
> (ii) conform with the requirements of section 56(1),
>
> and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

8 Pursuant to s 55(4) of the Act, the Full Bench is required to refuse a rule alteration application, unless it has been authorised by the organisation in accordance with its rules. Rule 40 of the rules of the applicant provides for the steps to be followed to alter its rules. Rule 40 provides:

> (1) No amendment, repeal or alteration of the Rules of the Union shall be made unless the amendment, repeal or alteration has been passed and approved by a vote of the majority of Members of the Union present in person at a general meeting, special general meeting or annual general meeting of the Union so called by a minimum of fourteen (14) days previous notice specifying the time, place and detail and reason therefore of the amendment, repeal or alteration to be considered by the meeting has been given by publishing a copy of a notice thereof in a newspaper circulating generally in the district in which the office of the Union is situated, by posting a copy of the notice in a conspicuous place outside that office and by posting a copy of the notice at all places of work.
>
> (2) The Secretary shall publicise any Rule change adopted by a general meeting, special general meeting or annual general meeting of the Union, the reasons therefore and that the Members or any of them can object to the proposed alteration by forwarding a written objection to the Registrar within 14 days after the date of resolution by written notices thereof being displayed and made available to the Members at the registered office of the Union, on the Union's website and at all places of work and in other ways likely to come to the attention of Members.
>
> (3) Notwithstanding anything contained in this Rule where the Branch is required by law to amend its Rules such amendment when endorsed by a simple majority of the Committee of Management shall be deemed to have been made in compliance with the procedural requirements of this Rule.

9 Pursuant to r 40(1), the approval of an amendment, repeal or alteration of rules can be passed and approved at a general meeting. Rule 14(1) requires the applicant to hold a half yearly general meeting in September of each year. Where an amendment to the rules is sought, r 14(1) and r 40(1), when read together, requires that a general meeting is to be called by posting a notice at all places of work 14 days prior to the date of the said meeting, stating the time, place and the business to be transacted.

10 The facts supporting the applicant's submission that it complied with its rules and the statutory requirements of the Act (including s 55(4)(a)) are set out in a statutory declaration made by Lea Anderson (secretary of the applicant) on 10 November 2017, which evidences the following matters:

(a) A notice of a half yearly general meeting that complies with r 14(1) and r 40(1) was provided to members on 7 September 2017. The notice was sent by email to all branch committee members, delegates, stations and workplaces and by facsimile to all stations and workplaces. The notice was also posted to the applicant's website, as well as laminated and affixed to the front door of the office of the applicant from 7 September 2017 until after the meeting on 27 September 2017. The notice stated the time of the meeting was to be held at 1900 hours on 27 September 2017 at the applicant's office at 21 View Street, North Perth. The notice also set out the business to be transacted. In particular, the notice set out the proposed amendment to change the name of the applicant and the reasons for the change.

(b) As required by r 40(1), the notice was published in the public notices of the weekend West Australian newspaper of September 9 - 10, 2017.

(c) Whilst it was not required, the members were provided with a reminder circular, drawing their attention to the previous notice and the proposed rule changes. The reminder circular was emailed and facsimiled to all stations and workplaces in addition to being placed on the applicant's website on 21 September 2017.

(d) Pursuant to r 14(4), at a general meeting a quorum to constitute a valid meeting is to be at least one fortieth of the financial members of the applicant and the chairperson shall have an ordinary vote but in the event of an equality of votes the motion shall be deemed to have failed. At the date of the September 2017 half yearly general meeting, the applicant's membership stood at 1,250, which resulted in a quorum required of 32 members (being one fortieth = 31.25 members). Thus, a quorum was present at the September 2017 general meeting as 52 members were in attendance.

(e) The minutes of the September 2017 general meeting records not only the number who attended but also that Ms Anderson outlined that the need to change the applicant's name (to differentiate between it and its counterpart Federal Body) had existed for some time, although the applicant had been waiting for several years for the Federal union to enact changes to the Federal rules following a review. She also informed the meeting that this process had stalled so the applicant was moving to ensure that it has a distinct identity to the counterpart Federal body and a name that more accurately reflects the constitutional coverage of the applicant.

(f) The minutes also record that a motion was moved, seconded and carried unanimously that the special general meeting endorse a name change in the applicant's registered name from 'The United Firefighters Union of Australia, West Australian Branch' to 'The United Professional Firefighters Union of Western Australia'.

(g) Following the half yearly meeting, pursuant to r 40(2), Ms Anderson published a circular to all members to notify them of the rule changes adopted by the September 2017 general meeting. As required by r 40(2), the circular set out the rule changes that were endorsed and the reasons for the changes. The circular also advised the members that they could object to the proposed alterations by lodging a written objection to the proposed rule changes to the Registrar of the Commission within 21 days of the circular.

(h) Whilst r 40(2) only requires that the members be given 14 days to object to any proposed alteration, s 55(4)(b)(ii) of the Act when read with reg 69(5) of the *Industrial Relations Commission Regulations 2005* (WA) requires that any person who wishes to object to the alteration of a rule must be given 21 days of the publication of the proposed alteration in the required manner. In these circumstances, the applicant notified its members in the circular that they had 21 days to object.

(i) The circular was sent by email to all branch committee members, delegates, stations and workplaces and by facsimile to all stations and workplaces. It was also posted on the applicant's website and affixed to the applicant's front door on 28 September 2017 until 19 October 2017.

11 Having regard to this evidence, the Full Bench was satisfied that the application to alter the rules of the applicant had been authorised in accordance with its rules. We were also satisfied that the members of the applicant had been provided with a reasonable opportunity to make an objection to the alterations and we noted that no member of the applicant had objected to the making of the application or the proposed alterations to change the name of the organisation.

12 For these reasons, we were satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act had been complied with. We were also satisfied that the requirements of s 55(5) of the Act do not arise as the proposed rule changes do not change or seek to alter in any way the eligibility of persons eligible to be members of the organisation. Section 55(4)(e) and s 56(1) of the Act relate to procedural rules for election of office, including secret ballots. The applicant's rules currently provide for the procedures required for these provisions of the Act and the alterations sought in this matter do not deal with the matters specified in these provisions of the Act. Consequently, no issue arises in this application in relation to the requirements of s 55(4)(e) and s 56(1) of the Act.

13 The Full Bench was also satisfied that s 59(1) of the Act had been complied with. The proposed name of the applicant is not a name already in use by another registered organisation, and the proposed name alteration does not resemble another organisation's name.

14 In addition, we were satisfied that s 59(2) of the Act had been complied with. Section 59(2) requires the registered name of an organisation to clearly indicate whether the organisation is an organisation of employers or an organisation of employees. We accepted the submission made on behalf of the applicant that by retaining the reference to 'firefighters' in the proposed name alteration, the applicant is clearly marked as an organisation of employees.

15 For these reasons, the application was granted and the order was made to effect the change in name of the organisation.

2018 WAIRC 00211

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE UNITED FIREFIGHTERS UNION OF AUSTRALIA WEST AUSTRALIA BRANCH
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 3 APRIL 2018
FILE NO/S	FBM 1 OF 2017
CITATION NO.	2018 WAIRC 00211

Result	Order made
Appearances	
Applicant	Mr T Nolan

Order

This matter having come on for hearing before the Full Bench on 3 April 2018, and having heard Mr T Nolan and with him Ms L Anderson on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

> The Registrar is hereby authorised to register the alterations to the existing title and r 1 and r 30 of the rules of the applicant as published in the Western Australian Industrial Gazette on Wednesday, 28 February 2018 ([2018] WAIRC 00144; (2018) 98 WAIG 95).

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Declarations made under Section 71—

2018 WAIRC 00191

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 21 MARCH 2018
FILE NO/S	FBM 1 OF 2018
CITATION NO.	2018 WAIRC 00191

Result Application discontinued

Order

WHEREAS on 31 January 2018, the applicant filed a notice of application to the Full Bench; and

WHEREAS on 15 March 2018, the applicant advised by email that they wish to discontinue the application;

NOW THEREFORE, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and reg 103A of the *Industrial Relations Commission Regulations 2005*, hereby orders —

THAT the application be discontinued by leave.

By the Full Bench

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

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2018 WAIRC 00203

HOSPITAL WORKERS (GOVERNMENT) AWARD NO. 21 OF 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD, THE PEEL HEALTH SERVICES BOARD AND THE WA COUNTRY HEALTH SERVICES BOARD, HON. MINISTER FOR HEALTH, THE BOARD OF MANAGEMENT SIR CHARLES GAIRDNER HOSPITAL AND OTHERS

RESPONDENTS

CORAM CHIEF COMMISSIONER P E SCOTT

DATE FRIDAY, 23 MARCH 2018

FILE NO/S APPL 11A OF 2018

CITATION NO. 2018 WAIRC 00203

Result Award varied

Representation **(by written correspondence)**

Applicant Ms N Kefford of counsel

Respondents Mr B Chapman of counsel

Order

1. This is an application pursuant to s 40 of the *Industrial Relations Act 1979* for variation of allowances in the *Hospital Workers (Government) Award No. 21 of 1966* referred to the Commission on 25 January 2018.

2. The applicant and the employers agree that the allowances ought to be increased and that the increases are in accordance with Principles 4 and 6 of the Statement of Principles – July 2017 ([2017] WAIRC 00355; (2017) 97 WAIG 714). The parties have also requested that the Commission deal with the proposed variations on the papers.

3. The Commission is of the opinion that it is appropriate for this application to be dealt with on the papers.

4. The Commission is satisfied that the proposed increases in allowances are consistent with the current Statement of Principles, and hereby orders –

   THAT the *Hospital Workers (Government) Award No. 21 of 1966* be varied in accordance with the following Schedule and that such variations shall have effect from the beginning of the first pay period commencing on or after the 23 March 2018.

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

SCHEDULE

1. Clause 15. – Overtime: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work, the employee shall be provided with a meal free of cost, or shall be paid the sum of $11.20 as meal money.

2. Clause 16. – Shift Work: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) Subject to subclause (2) of this clause, a loading of **$**3.03 per hour or pro rata for part thereof shall be paid for time worked on afternoon or night shift as defined hereunder:

(2) A loading of $4.58 per hour or pro rata for part thereof shall be paid for time worked on permanent afternoon or night shift.

3. Clause 17. – Weekend Work: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) In addition to the ordinary rate of wage prescribed by this award an employee shall be paid a loading of $12.24 per hour or pro rata for part thereof for ordinary hours worked between midnight on Friday and midnight on Saturday.

(2) In addition to the ordinary rate of wage prescribed by this award an employee shall be paid a loading of $24.43 per hour or pro rata for part thereof for ordinary hours worked between midnight on Saturday and midnight on Sunday.

4. Clause 19. – Allowances and Special Provisions: Delete this clause and insert the following in lieu thereof:

19.- ALLOWANCES AND SPECIAL PROVISIONS

In addition to the rates prescribed in Clause 39. - Wages of this award, the following allowances shall be paid:

(1) (a) Employees handling foul linen in the course of their duties shall be paid $1.33 per hour or any part thereof, to a maximum of $4.20 per day.

(b) Employees handling materials such as carpet tiles, curtains, sealed bags or fabrics, which have become soiled in the same manner as foul linen as defined in Clause 5. - Definitions, shall be paid an allowance according to subclause (1)(a) of this clause.

(2) Orderlies employed on boiler firing duties - $2.75 per day.

(3) Orderlies required to handle a cadaver - $2.38 per hour with a minimum payment of one hour.

(4) Orderlies - Sir Charles Gairdner Hospital, sterilising sputum mugs - $2.75 per day.

(5) (a) A storeman required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk-beside power operated high lift stacker in the performance of his/her duties shall be paid an additional 61 cents per hour whilst so engaged.

(b) A storeman required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties shall be paid an additional 79 cents per hour whilst so engaged.

(6) A Food Service Attendant who is required to reconstitute frozen food and/or reheat chilled food, in addition to or in substitution of their normal duties, shall be paid an allowance of 99 cents per hour or part thereof whilst so engaged.

5. Clause 21. – Public Holidays: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Any employee who is required to work on a day observed as a public holiday shall be paid a loading of $36.80 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage or if the employer agrees be paid a loading of $12.24 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage and be entitled to observe the holiday on a day mutually acceptable to the employer and employee.

6. Clause 22. – Public Holidays – Graylands and Selby Lodge/Lemnos Hospitals: Delete subclause (3)(c) of this clause and insert the following in lieu thereof:

(c) Any employee who is required to work on the day observed as a holiday as prescribed in this clause in his/her normal hours work or ordinary hours in the case of a rostered employee shall be paid a loading of $12.24 per hour or pro rata for part thereof and be entitled to observe the holiday on a day mutually acceptable to the employer and the employee.

Provided that in any specified 12 monthly period, after an employee has accumulated five days in lieu of public holidays, by agreement between the employee and the employer, the employee may be paid for work performed on a day observed as a holiday as prescribed in this clause a loading of $36.80 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage in lieu of the foregoing provisions of this subclause.

7. Clause 28. – Uniforms: Delete subclause (8)(d) of this clause and insert the following in lieu thereof:

(d) All washable clothing forming part of the uniforms supplied by the employer shall be laundered free of cost to the employee. Provided that in lieu of such free laundering the employer may pay the employee $2.50 per week to partly cover the cost of same.

8. Clause 39. – Wages: Delete subclause (4)(b) of this clause and insert the following in lieu thereof:

(b) Except where this clause specifies classifications which require the employee to be in charge of other employees, any employee who is placed in charge of:

(i) not less than three and not more than ten other employees shall be paid $28.60 per week in addition to the ordinary wage prescribed by this clause;

(ii) more than 10 and not more than twenty other employees shall be paid $42.50 per week in addition to the ordinary wage prescribed by this clause;

(iii) more than 20 other employees shall be paid $56.80 per week in addition to the ordinary wage prescribed by this clause.

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2017 WAIRC 00749

INTERPRETATION OF CLAUSE 12(5) OF WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 23 AUGUST 2017
FILE NO.	P 1 OF 2017
CITATION NO.	2017 WAIRC 00749

Result	Direction issued
Representation	
Applicant	Mr C Fordham as agent
Respondent	Mr R Bathurst of counsel and with him Ms D Southcott

Direction

HAVING heard Mr C Fordham as agent on behalf of the applicant and Mr R Bathurst 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 to the extent that the parties maintain that the terms of cl 12(5) of the *Western Australia Police Industrial Agreement 2014* are ambiguous:

(a) THAT evidence in chief in this matter be adduced by signed witness statements which will stand as evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.

(b) THAT the applicant file and serve any signed witness statements upon which it intends to rely by no later than 28 September 2017. Copies of documents referred to in the witness statement should be annexed.

(c) THAT the respondent file and serve any signed witness statements upon which it intends to rely by no later than 24 October 2017. Copies of documents referred to in the witness statement should be annexed.

(4) THAT the applicant file and serve an outline of submissions and any authorities upon which it intends to rely by no later than 26 October 2017.

(5) THAT the respondent file and serve an outline of submissions and any authorities upon which it intends to rely by no later than 2 November 2017.

(6) THAT the matter be listed for hearing on a date to be fixed.

(7) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2017 WAIRC 00933

INTERPRETATION OF CLAUSE 12(5) OF WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 10 NOVEMBER 2017
FILE NO	P 1 OF 2017
CITATION NO.	2017 WAIRC 00933

Result	Order issued
Representation	
Applicant	Mr P Hunt
Respondent	Mr T Clark

Order

HAVING heard Mr P Hunt on behalf of the applicant and Mr T Clark on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the application be and is hereby adjourned sine die and the hearing listed on 13 November 2017 be and is hereby vacated.

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

2018 WAIRC 00153

INTERPRETATION OF CLAUSE 12(5) OF WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 2 MARCH 2018
FILE NO/S	P 1 OF 2017
CITATION NO.	2018 WAIRC 00153

Result	Discontinued by leave
Representation	
Applicant	Mr P Hunt
Respondent	Mr T Clark

Order

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

THAT the application be and is hereby discontinued by leave.

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

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

2018 WAIRC 00246

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 10 APRIL 2018
FILE NO/S	APPL 4 OF 2018
CITATION NO.	2018 WAIRC 00246

Result Agreements cancelled

Order

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

(a) in the Western Australian Industrial Gazette on 22 November 2017 (97 WAIG 1804);

(b) on the Commission's website on 18 October 2017; and

(c) in *The West Australian* newspaper on 15 November 2017 (page 110),

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

The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch (the Union) was served with a copy of the notice by post on 18 October 2017. On 19 March 2018, the Union advised that it did not object to the cancellation of the agreements listed in the Schedule.

The Registrar also contacted the employer parties to advise them of the Commission's intention to cancel the agreements.

As at 10 April 2018, no objections have been made to the cancellation of the industrial agreements listed in the Schedule.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met and that there is no employee to whom these industrial agreements apply. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

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

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

SCHEDULE

1. Allect Services (Bentley WA) Enterprise Agreement 2005 – No. AG 13 of 2006
2. ANI Wear Resistant Products Division Enterprise Bargaining Consent Agreement 1998 – No. AG 236 of 1998
3. BP Refinery - Kwinana VDU2 Stage 1 Upgrade - Project Agreement 1998 – No. AG 117 of 1998
4. Cape Modern Workshop Employees' Agreement – No. AG 257 of 2003
5. The City of Canning and Engineering Workshop Employees Enterprise Bargaining Agreement 1996 – No. AG 312 of 1996
6. Cleanaway Technical Services Forrestdale Enterprise Bargaining Agreement 1997 – No. AG 134 of 1997
7. The Cleanaway Technical Services Brookdale Enterprise Bargaining Agreement 2000 – No. AG 185 of 2000
8. Cockburn Hire Engineering Enterprise Agreement – No. AG 96 of 1996
9. Crane Aluminium Systems Balcatta Enterprise Bargaining Agreement 2000 – No. AG 3 of 2001
10. Cryeng Pty Limited Industrial Agreement 2003 – No. AG 280 of 2003
11. Electrolux Home Products - Spare Parts and Service Belmont W.A. Enterprise Agreement 2001 – 2004 – No. AG 202 of 2002
12. Electrolux Home Products - Spare Parts and Service Belmont W.A. Enterprise Agreement 2003-2006 – No. AG 236 of 2003
13. Eltin Surface Mining Pty Ltd Boddington Gold Mine Maintenance Agreement 1996 – No. AG 206 of 1996
14. Email Limited Major Appliance Group - Osborne Park Service Technicians Enterprise Agreement 1997 – No. AG 258 of 1997
15. Enterprise Bargaining Agreement Crane Aluminium Systems Employees of the company – No. AG 99 of 2002

16. Fluor Daniel Diversified Plant Services Argyle Diamond Mine Enterprise Agreement 1999 – No. AG 64 of 1999
17. Fluor Daniel Power & Maintenance Services Maintenance Services Power Plant Maintenance Enterprise Agreement 1998 – No. AG 101 of 1998
18. Fluor Global Services Power Plant Maintenance Enterprise Agreement 2000-2003 – No. AG 204 of 2000
19. Forward Engineers Agriculture Workshop Enterprise Agreement 1999 – No. AG 116 of 1999
20. Fremantle Foundry & Engineering Co Pty Ltd Enterprise Bargaining Agreement 1999 – No. AG 163 of 1999
21. Harnischfeger of Australia Pty Ltd Western Region Workshop, Repair, Manufacture and Field, Assembly, Repair and Maintenance Agreement 2003 – No. AG 38 of 2004
22. Inghams (Osborne Park) Shift Work Enterprise Agreement 2003 – No. AG 113 of 2003
23. Inghams Poultry Processing (Osborne Park) Enterprise Agreement 2003 – No. AG 101 of 2004
24. Inghams Poultry Processing (Osborne Park) Enterprise Agreement 2004 – No. AG 169 of 2004
25. IPC Industrial Maintenance Pty Ltd Kwinana Shutdown Agreement – No. AG 54 of 2005
26. James Hardie Building Services Ltd. trading as Quell Fire & Safety Products, Perth, Portable Service Certified Agreement 1996 – No. AG 260 of 1996
27. JFK Engineering Pty Ltd Enterprise Agreement 1996 – 1997 – No. AG 198 of 1996
28. JFK Engineering Pty Ltd Enterprise Agreement 1998 – 1999 – No. AG 164 of 1998
29. Kewdale Engineering & Construction Enterprise Bargaining Agreement No 4 – 1998 – No. AG 174 of 1998
30. Printing (Institute of Technology - Apprentices) Industrial Agreement – No. AG 1 of 1969

2018 WAIRC 00212

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 3 APRIL 2018
FILE NO/S	APPL 22 OF 2018
CITATION NO.	2018 WAIRC 00212

Result Industrial agreements cancelled

Order

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

(a) in the Western Australian Industrial Gazette on 27 December 2017;

(b) on the Commission's website on 15 December 2017;

(c) to the Health Services Union of Western Australia (Union of Workers) and the Department of Health on 18 December 2017; and

(d) to Amaroo Village (formerly Amaroo Cottages for Senior Citizens Inc), Baptistcare (formerly WA Baptist Hospital & Homes Trust Inc), Bethanie on the Park (formerly Churches of Christ Homes & Community Services Inc), Bethesda Health Care (formerly Churches of Christ Homes & Community Services Inc), Global Diagnostics (formerly Imaging the South), Independent Living Centre WA Inc, Juniper (formerly Uniting Church Homes), Ramsay Health Care Limited, St John of God Health Care, Therapy Focus and VisAbility Ltd (formerly Association for the Blind of WA Inc) on 19 December 2017,

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

A number of the organisations listed above advised that they had no objection to the cancellation of the industrial agreements that related to them.

As of 3 April 2018, the Commission has received no objections to the cancellation of the industrial agreements.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met and that there is no employee to whom these industrial agreements apply. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

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

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

SCHEDULE

1. Amaroo Cottages for Senior Citizens (Inc), Hospital Salaried Officers Association (Union of Workers) Enterprise Agreement 2003, AG 294 of 2003
2. Association for the Blind of Western Australia Salaried Officers' Enterprise Agreement 2003, AG 268 of 2003
3. Bethesda Hospital (HSU) Administrative Staff Enterprise Agreement 2005, AG 279 of 2005
4. Churches of Christ Homes and Community Services Incorporated (HSU) Enterprise Agreement 2004, AG 196 of 2004
5. Hospital Salaried Officers Boddington District Hospital Board Enterprise Agreement 1999, No. PSAAG 57 of 2000
6. Hospital Salaried Officers Brookton Health Service Enterprise Agreement 1999, PSAAG 56 of 2000
7. Hospital Salaried Officers Coolgardie Health Centre Enterprise Bargaining Agreement 1996, PSAAG 26 of 1996
8. Hospital Salaried Officers Gnowangerup District Hospital Enterprise Bargaining Agreement 1999, PSAAG 33 of 2000
9. Hospital Salaried Officers Hawthorn Hospital Enterprise Bargaining Agreement 1996, PSAAG 45 of 1996
10. Hospital Salaried Officers HealthCare Linen Enterprise Bargaining Agreement 1996, PSAAG 47 of 1996
11. Hospital Salaried Officers Menzies Nursing Post Enterprise Bargaining Agreement 1996, PSAAG 65 of 1996
12. Hospital Salaried Officers Mt Henry Hospital Enterprise Bargaining Agreement 1997, PSAAG 3 of 1997
13. Hospital Salaried Officers Perth Dental Hospital Enterprise Bargaining Agreement 1996, PSAAG 86 of 1996
14. Hospital Salaried Officers Royal Perth Hospital Enterprise Bargaining Agreement 1996, PSAAG 94 of 1996
15. Hospital Salaried Officers Telfer Nursing Post Enterprise Bargaining Agreement 1996, PSAAG 100 of 1996
16. Hospital Salaried Officers Wanneroo Hospital Enterprise Bargaining Agreement 1996, PSAAG 103 of 1996
17. Hospital Salaried Officers Warburton Range Hospital Enterprise Bargaining Agreement 1996, PSAAG 104 of 1996
18. Hospital Salaried Officers West Kambalda Nursing Post Enterprise Bargaining Agreement 1996, PSAAG 106 of 1996
19. Hospital Salaried Officers Wooroloo District Hospital Enterprise Bargaining Agreement 1996, PSAAG 111 of 1996
20. HSU Peel Health Campus Administrative, Clerical and Allied Health Staff Agreement 2004, AG 6 of 2005
21. Imaging The South Enterprise Agreement 2005, AG 181 of 2005
22. Independent Living Centre of WA Incorporated Salaried Officers' Industrial Agreement 2005, AG 264 of 2005
23. Mercy Hospital Mount Lawley Health Services Union Enterprise Bargaining Agreement 2004, AG 153 of 2004
24. Ramsay Healthcare WA Hospitals Health Services Union Enterprise Agreement 2005, AG 24 of 2005
25. St John of God Hospital Geraldton (HSU) Caregiver Agreement 2006, AG 41 of 2006
26. St John of God Hospital Murdoch (HSU) Caregiver Agreement 2006, AG 34 of 2006
27. St John of God Hospital Subiaco (HSU) Caregiver Agreement 2006, AG 35 of 2006
28. Therapy Focus Enterprise Bargaining Agreement 2004, AG 4 of 2005
29. Uniting Church Homes, Health Services Union Enterprise Agreement 2004, AG 189 of 2004
30. WA Baptist Hospital and Homes Trust Incorporated, Health Services Union (Union of Workers) Enterprise Agreement 2004, AG 27 of 2004

2018 WAIRC 00201

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 23 MARCH 2018
FILE NO/S	APPL 21 OF 2018
CITATION NO.	2018 WAIRC 00201

Result Industrial agreements cancelled

Order

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

(a) on the Commission's website on 30 November 2017;

(b) to the Catholic Education Commission of Western Australia on 1 December 2017;

(c) to the Anglican Schools Commission (Inc) on 1 December 2017;

(d) to the Association of Independent Schools of Western Australia on 1 December 2017;

(e) in The West Australian newspaper on 13 December 2017;

(f) in the Western Australian Industrial Gazette on 27 December 2017; and

(g) to United Voice on 26 January 2018,

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

On 6 December 2017, the Chief Executive Officer of the Anglican Schools Commission wrote to the Registrar advising they had no objection to the agreements being cancelled.

On 7 December 2017, the Association of Independent Schools of Western Australia wrote to the Registrar advising that they did not object to any of the agreements being cancelled.

As at 23 March 2018, no other objections have been received by the Commission.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met and that there is no employee to whom these industrial agreements apply. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

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

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

SCHEDULE

1. Bakewell Morley Casual Employees Agreement 1997, No. AG 184 of 1997
2. Certificate II Composites (Traineeship) Agreement 1997, No. AG 211 of 1997
3. Certificate II Composites (Traineeship) Agreement, No. AG 86a of 1998
4. Certificate II Composites (Traineeship) Agreement, No. AG 86b of 1998
5. Certificate II Composites (Traineeship) Agreement, No. AG 86c of 1998
6. Certificate II Composites (Traineeship) Agreement, No. AG 86d of 1998
7. Certificate II Composites (Traineeship) Agreement, No. AG 86e of 1998
8. Certificate II Composites (Traineeship) Agreement, No. AG 86f of 1998
9. CSR Ltd Gyprock Bradford Welshpool Enterprise Bargaining Agreement 1993, No. AG 77 of 1993
10. Jobskills Trainee (School Employees - Groundsperson's) Agreement, 1994, No. AG 27A of 1994
11. Jobskills Trainee (School Employees - Groundsperson's) Agreement, 1994, No. AG 27B of 1994
12. Jobskills Trainee (School Employees - Groundsperson's) Agreement, 1994, No. AG 27C of 1994
13. Jobskills Trainee (Hospitality Group Training (WA) Inc.) Agreement, 1994, No. AG 36 of 1994
14. Jobskills Trainee (School Employees - Teacher Aide) Anglican Schools Commission Agreement, 1994, No. AG 190 of 1994
15. Jobskills Trainee (School Employees - Teacher Aide) Association of Independent Schools Agreement, 1994, No. AG 192 of 1994
16. Jobskills Trainee (Child Care) Agreement 1994, No. AG 63 of 1994
17. JOBSKILLS Trainee School Employees (Canteen Assistant) Agreement, 1995, No. AG 294 of 1995
18. Jobskills Trainee (Children's Services Private) Agreement 1996, No. AG 116 of 1996
19. JobSkills Trainee Katanning Kids Child Care Centre Agreement 1996, No. AG 133 of 1996
20. JobSkills Trainee Ragamuffins Child Care Centre Agreement 1996, No. AG 134 of 1996
21. JobSkills Trainee Little Whalers Child Care Centre Agreement 1996, No. AG 135 of 1996
22. Jobskills Trainee Plastic Injection Co. (Employer Name) Agreement 1996, No. AG 233 of 1996
23. Jobskills Trainee Nally (WA) Pty Ltd (Employer Name) Agreement, 1996, No. AG 234 of 1996
24. Jobskills Trainee Monopak Pty Ltd (Employer Name) Agreement, 1996, No. 235 of 1996
25. Jobskills Trainee Plas-Pak (WA) Pty Limited (Employer Name) Agreement, 1996, No. AG 236 of 1996
26. Jobskills Trainee Plas-Pak (WA) Pty Limited (Employer Name) Agreement, 1996, No. AG 237 of 1996
27. Peters (WA) Limited (Balcatta Security Officers) Enterprise Bargaining Agreement 1995, No. AG 50 of 1995
28. St John Ambulance Australia Enterprise Agreement 1995, No. AG 2 of 1996
29. Thermofabrication Traineeship Agreement, No. AG 68 of 1998
30. West Australian Newspapers Limited (Enterprise Bargaining) Security Officers and Cleaners Agreement 1994, No. AG 106 of 1994
31. West Australian Newspapers Limited (Enterprise Bargaining) Security Officers and Cleaners Agreement 1995, No. AG 6 of 1996

NOTICES—Award/Agreement matters—

2018 WAIRC 00244

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. APPL 11B of 2018

APPLICATION FOR VARIATION OF AWARD

"HOSPITAL WORKERS (GOVERNMENT) AWARD NO. 21 OF 1966"

NOTICE is given that an application has been made to the Commission by the *Department of Health* under the *Industrial Relations Act 1979* for variation of the area and scope clause of the above named Award.

As far as relevant, those parts of the proposed Award which relate to area of operation and scope are published hereunder.

3. – AREA AND SCOPE

This Award will apply throughout the State of Western Australia to:

(1) All health service providers established pursuant to section 32(1)(b) of the Health Services Act 2016, including the Child and Adolescent Health Service, East Metropolitan Health Service, Health Support Services, North Metropolitan Health Service, South Metropolitan Health Service and WA Country Health Service; and

(2) All authorised hospitals under the Mental Health Act 2014.

A copy of the proposed variation may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

23 March 2018

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2018 WAIRC 00222

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHERYL CATHERINE CASSIDY-VERNON
	APPLICANT
	-v-
	YOUTH LEGAL SERVICE INC
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 6 APRIL 2018
FILE NO/S	U 148 OF 2017
CITATION NO.	2018 WAIRC 00222

Result	Application dismissed
Representation	
Applicant	Ms S McLeod of counsel
Respondent	Mr R Tozer of counsel

Order

1. This matter is a claim for unfair dismissal referred to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* on 27 November 2017.

2. On 23 February 2018, the respondent advised the Commission that the parties had reached agreement to settle the matter.

3. The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 6 April 2018.

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

THAT this matter be, and is hereby dismissed.

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

2018 WAIRC 00205

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL COOK
	APPLICANT
	-v-
	HARMONY FOREST ENTERPRISES / HARMONY FOREST VILLAS P/L
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 26 MARCH 2018
FILE NO/S	B 132 OF 2017
CITATION NO.	2018 WAIRC 00205

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) that was listed for a show cause hearing on 26 March 2018;

AND WHEREAS at the hearing on 26 March 2018 there was no appearance for or by the applicant and the Commission proceeded in the absence of the applicant;

AND HAVING given reasons for the decision during the hearing on 26 March 2018;

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 00168

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00168
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 1 MARCH 2018
DELIVERED	**:**	WEDNESDAY, 7 MARCH 2018
FILE NO.	**:**	U 4 OF 2018
BETWEEN	**:**	MR JADE DE-ABREU
		Applicant
		AND
		MR ALLEN SAVILL
		SAVILL'S PAINTING & PROPERTY MAINTENANCE SERVICE
		Respondent

Catchwords	**:**	*Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal - Whether it would be unfair not to accept the application out of time - Principles applied - Application dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Mr A Savill

Case(s) referred to in reasons:

Jade De-Abreu v Allan Savill and Brendan Savill T/A Savill's Painting & Property Maintenance Service [2015] FWC 8464

Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 84 WAIG 683

Reasons for Decision

1 The applicant maintained that he commenced employment as a painter and decorator with the respondent in late 2010, early 2011. He further maintained that his employment came to an end in late 2012 or early 2013. The applicant claims that he was dismissed unfairly by his employer as he was, without warning, dismissed in a telephone call from Mr Savill, the respondent's principal. The applicant maintained that he was given no reasons for his dismissal but was simply told that he would not be coming back to work for the business. Given that the unfair dismissal claim brought by the applicant was not filed until 3 January 2018, the delay in commencing these proceedings is inordinate. The Commission listed the application to consider whether it should accept the applicant's claim out of time, in accordance with s 29(3) of the *Industrial Relations Act 1979* (WA).

2 The respondent opposes the application. It contended that contrary to the applicant's assertion, whilst the applicant commenced employment on or about 6 February 2011, his employment came to an end in July 2011. This would mean that the applicant's claim has been filed some six years and six months after the termination of his employment. Not only did the respondent oppose the extension of time, it also maintained that the applicant's employment was terminated because he attended for work on his last day of employment in an unfit state, failed to obtain relevant clearances in a timely way and in any event, that the applicant was a contractor rather than an employee. The respondent also denied that the applicant was dismissed over the telephone; rather any discussions between the respondent and the applicant were in person.

3 The applicant submitted that there were several reasons for the extensive delay in commencing his claim. In 2012 he was involved in a serious traffic accident that left him incapacitated for some time. He did not recover until late 2012. Sometime later, the applicant thought in about May 2013, he was assaulted and fell from a balcony, suffering a head injury, resulting in him being hospitalised for some time. The applicant said that due to this injury, he has suffered some cognitive problems and had blackouts. Later in 2013, in about August, the applicant was imprisoned on remand for about two years. In about August 2015 or thereabouts, the applicant was sentenced to a term of imprisonment of ten years. The applicant did commence proceedings for unfair dismissal in the Fair Work Commission on 15 September 2015. By a decision dated 10 December 2015, the Fair Work Commission dismissed the applicant's claim on the basis that the respondent was not a national system employer: *Jade De-Abreu v Allan Savill and Brendan Savill T/A Savill's Painting & Property Maintenance Service* [2015] FWC 8464. In that matter, the Fair Work Commission did not need to decide the issue of an extension of time.

4 The applicant informed the Commission that he thought in about March 2016, he spoke to the Department of Commerce to get some advice in relation to jurisdiction. Later, in September 2016, he said he contacted the Employment Law Centre. Nothing further appears to have been progressed by the applicant until the formal commencement of these proceedings in January 2018.

5 The relevant principles in relation to extensions of time under s 29(3) of the Act are well settled. As was said by Steytler J in *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683 at par 26:

> 26 Like E M Heenan J, I consider that the principles enunciated by Marshall J in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298 are apposite. As E M Heenan J has said, Marshall J there identified the following six "principles" (at 299 - 300):
>
> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."
>
> 27 Those "principles" or considerations are not exhaustive and, putting to one side the uncontestable proposition that there must be something positively to satisfy the Court that it would be unfair not to accept the referral out of time, none of them is necessarily decisive and each case will turn upon its own individual facts and circumstances.

6 Applying those principles then to this case leads to the following conclusions. The delay in the commencement of these proceedings is plainly inordinate. I regard the respondent's wages record attached to its notice of answer as a more reliable guide as to when the applicant's employment terminated, that being in July 2011. That being so, as I have noted above, the application for unfair dismissal in this jurisdiction, has been commenced about six years and six months out of time. I accept that the applicant did challenge his dismissal in the Fair Work Commission, but I note that that claim was not brought until September 2015. Even accepting that at that time, the applicant was either on remand or was a sentenced prisoner and as such, the practicalities in communicating to get advice and commence proceedings can be problematic, the delay in commencing those proceedings was inordinate. I note also that the applicant maintained that even though he said he recovered from his

accident in late 2012, there was nothing before the Commission to indicate that he took any steps to challenge his dismissal between then and when the applicant maintained he suffered a further injury in June 2013.

7 Given the inordinate delay in the commencement of these proceedings, there is an obvious prejudice to the respondent, which it indeed raised, in having to face an unfair dismissal claim many years after the termination of the employment. The respondent noted the difficulty in being able to recollect relevant events after so many years. Furthermore, it is the case that under the Act in this jurisdiction, reinstatement or re-employment is the primary remedy, if an applicant is successful. As the applicant has been sentenced to a lengthy term of imprisonment, obviously that remedy is no longer able to be pursued. Whilst I do not regard this as an overwhelming factor, it is a factor to be weighed in the balance. As to the merits, there is really very little before the Commission as to the relevant events. It would seem however, that the termination of the applicant's employment if he was employed, was summary and without warning. If so, this would require the respondent to establish that the applicant had engaged in misconduct to warrant summary dismissal without notice. There may well be some issues for the Commission to enquire into in this respect.

8 Overall however, given the magnitude of the delay, the obvious prejudice to the respondent, combined with the periods of time on the applicant's own case, when no steps seem to have been taken to challenge his dismissal, I am not persuaded that the Commission's discretion to accept the application out of time under s 29(3) of the Act should be exercised in this case.

9 Accordingly, the application must be dismissed.

2018 WAIRC 00169

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR JADE DE-ABREU
	APPLICANT
	-v-
	MR ALLEN SAVILL
	SAVILL'S PAINTING & PROPERTY MAINTENANCE SERVICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 7 MARCH 2018
FILE NO/S	U 4 OF 2018
CITATION NO.	2018 WAIRC 00169

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr A Savill

Order

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

THAT the application be and is hereby dismissed.

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

2018 WAIRC 00147

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN ERIC FOSTER
	APPLICANT
	-v-
	FREMANTLE HOSPITAL
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 26 FEBRUARY 2018
FILE NO/S	U 99 OF 2017
CITATION NO.	2018 WAIRC 00147

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Mr M Aulfrey

Order

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

THAT the application be and is hereby discontinued by leave.

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

2018 WAIRC 00149

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00149
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 2 FEBRUARY 2018
DELIVERED	**:**	WEDNESDAY, 28 FEBRUARY 2018
FILE NO.	**:**	B 138 OF 2017
BETWEEN	**:**	JON GOLDARACENA
		Applicant
		AND
		MOTHERWELL MARKETING PTY LTD
		Respondent

Catchwords	**:**	*Industrial Law (WA) - Contractual benefits claim - Whether applicant had a contractual entitlement to an annual bonus payment and whether it was denied to him - Principles applied - Application upheld*
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Application upheld
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr R Jones as agent

Case(s) referred to in reasons:

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

Brett Arthur King v Griffin Coal Mining Company Pty Ltd [2017] WAIRC 00102; (2017) 97 WAIG 527

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

Reasons for Decision

Claim and facts

1 The applicant, Mr Goldaracena, commenced work for the respondent, Motherwell Marketing Pty Ltd as its business development manager on 25 August 2014. Motherwell is engaged in the business of engineering professional services and information technology hardware. Mr Goldaracena's position as the business development manager required him to develop new and existing customer relationships. The parties entered into a written contract of employment dated 24 July 2014. This set out Mr Goldaracena's remuneration and other terms and conditions of employment. A copy of the contract was exhibit A1.

2 In addition to the terms and conditions of employment set out in exhibit A1, there was a second letter to Mr Goldaracena from Motherwell dated 15 August 2014, a copy of which was tendered as exhibit A2. This set out a further term of the applicant's contract of employment, which followed discussions between Mr Goldaracena and Motherwell. As this document is controversial, I will set it out in full as follows:

Private and confidential

15th August 2014

Jon Goldarazena

126 Dampier Avenue

Mullaloo

WA 6027

Dear Jon,

Motherwell Marketing Pty Ltd trading as Motherwell Automation can confirm that as part of your terms of employment in the role of ***Business Development Manager*** the following conditions apply;

- A guaranteed $15K annual bonus payment.
- $10K annual incentive based bonus. This bonus will be measured by individual sales performance criteria.

We look forward to having you as part of the sales team.

Yours Sincerely,

Mark Hearne

General Manager

Motherwell Marketing Pty Ltd

3 This document is controversial because Mr Goldaracena resigned from his employment with Motherwell effective on 30 August 2017. Mr Goldaracena maintained that the "guaranteed $15K annual bonus payment" was denied to him on the termination of his employment. He maintained that the $15,000 bonus was paid to him in September 2015 and October 2016 and he should have been paid it on the same terms for 2017. On the other hand, Motherwell contended that the annual bonus payment was in the form of a "retention bonus", only payable if Mr Goldaracena remained in employment for the following year. As Mr Goldaracena gave notice of his resignation in August 2017, he did not intend to remain in employment with Motherwell and therefore no bonus was payable.

4 Evidence was led from both Mr Goldaracena and Mr Hearne who was the general manager of Motherwell. Mr Goldaracena testified that he had discussions with Mr Hearne and Mr Sule, who became his direct manager, prior to him commencing employment. These discussions took place in the interview process. Mr Goldaracena testified that he did not consider that the base salary that was being offered by Motherwell for his proposed position was sufficient. The notion of a performance bonus was discussed between the parties and a figure of $25,000 was raised. However, this was of concern to Mr Goldaracena because Motherwell had not proposed at that point, clear guidance as to how the performance bonus would be assessed. Therefore, he considered that there was a risk to agree on these terms. Ultimately, this led to a split in the $25,000 figure, with $10,000 per annum to be paid as a performance bonus and $15,000 to be paid as an annual amount, not linked to performance. It was these discussions between Mr Goldaracena and Motherwell that led to exhibit A2.

5 In his evidence, Mr Goldaracena disputed any notion that it was agreed between himself and Motherwell that the annual bonus payment was a form of retention payment, only payable if he remained in employment in the year following its payment to him. He testified that no such discussions took place with him, involving either Mr Hearne or Mr Sule. According to Mr Goldaracena, he received the annual bonus payment in each of the years 2015 and 2016 in September and October respectively. Exhibits A3 and A4, pay slips for these periods, show the 2015 bonus was paid on 24 September 2015 and the second for 2016, was paid on 24 October 2016. In 2016, the amount was $17,914.38 for this year. Mr Goldaracena said this was because of a makeup payment for that year, following a reduction in salaries that had occurred due to a downturn in the economy. Mr Goldaracena said that he recalled raising the timing of the 2016 payment because it was not paid in September as had been the case for the 2015 bonus. As far as he could recall, Mr Hearne told him that it would be paid but not until October.

6 Motherwell's version of the events as put by Mr Hearne was not materially different in most respects to that outlined by Mr Goldaracena, except as to the purpose of the $15,000 bonus payment. Mr Hearne confirmed in his testimony that Mr Goldaracena did not agree to a bonus of $25,000 to be based solely on performance. This led to the split of the payment into the two components set out in exhibit A2. It was Mr Hearne's evidence that it was his "expectation" that the $15,000 bonus was for the retention of Mr Goldaracena in his employment. This was discussed between himself and Mr Sule, but Mr Hearne conceded that this was never mentioned to Mr Goldaracena prior to his commencing employment and no mention is made of it in exhibit A2 itself. There was no subsequent discussion either, between Mr Hearne and Mr Goldaracena, about this matter.

7 Motherwell's formal response to Mr Goldaracena's request for the payment of the bonus was set out in a letter from Mr Hearne to Mr Goldaracena dated 19 October 2017, a copy of which was exhibit A8. In it Mr Hearne stated that there was no reference to the time for the payment of the annual bonus other than it was payable in September. As Mr Goldaracena was not in employment in September 2017, as he had resigned effective on 30 August 2017, no entitlement to the bonus arose. No mention was made in this letter to the annual bonus as a retention payment, requiring Mr Goldaracena to be employed in the following year in 2018.

8 I find accordingly.

Relevant principles

9 To establish his claim, Mr Goldaracena must, on the balance of probabilities, establish that he had an entitlement to an annual bonus payment under his contract of employment and that it had been denied to him: *Hotcopper Australia Ltd v David Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704. I have no doubt in this case on the evidence, that Mr Goldaracena had a contractual entitlement to an annual bonus. What is in dispute in this case, is the terms under which the bonus was payable. This involves the interpretation of the contract. I referred to the relevant principles in relation to the construction of contracts in

Brett Arthur King v Griffin Coal Mining Company Pty Ltd [2017] WAIRC 00102; (2017) 97 WAIG 527. At pars 11-14 I set out these principles as follows:

> 11 Some rules have been developed in the cases as to the approach to adopt in construing the terms of a contract. A recent summary of the relevant principles to be applied was set out by the Court of Appeal (WA) in *Black Box Control Pty Ltd* v *Terravision Pty Ltd* [2016] WASCA 219. In this case, Newnes and Murphy JJA and Beech J observed at par 42:
>
> **Construction of contracts: general principles**
>
> 42 The principles relevant to the proper construction of instruments are well known, and were not in dispute in this case. In summary:
>
> (1) The process of construction is objective. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean.[50]
>
> (2) The construction of a contract involves determination of the meaning of the words of the contract by reference to its text, context and purpose.[51]
>
> (3) The commercial purpose or objects sought to be secured by the contract will often be apparent from a consideration of the provisions of the contract read as a whole.[52] Extrinsic evidence may nevertheless assist in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding of the genesis of the transaction, its background, the context and the market in which the parties are operating.[53]
>
> (4) Extrinsic evidence may also assist in determining the proper construction where there is a constructional choice, although it is not necessary in this case to determine the question of whether matters external to a contract can be resorted to in order to identify the existence of the constructional choice.[54]
>
> (5) If an expression in a contract is unambiguous and susceptible of only one meaning, evidence of surrounding circumstances cannot be adduced to contradict its plain meaning.[55]
>
> (6) To the extent that a contract, document or statutory provision is referred to, expressly or impliedly, in an instrument, that contract, document or statutory provision can be considered in construing the instrument, without any need for ambiguity or uncertainty of meaning.[56]
>
> (7) There are important limits on the extent to which evidence of surrounding circumstances (when admissible) can influence the proper construction of an instrument. Reliance on surrounding circumstances must be tempered by loyalty to the text of the instrument. Reference to background facts is not a licence to ignore or rewrite the text.[57] The search is for the meaning of what the parties said in the instrument, not what the parties meant to say.[58]
>
> (8) There are also limits on the kind of evidence which is admissible as background to the construction of a contract, and the purposes for which it is admissible. Insofar as such evidence establishes objective background facts known to the parties or the genesis, purpose or objective of the relevant transaction, it is admissible. Insofar as it consists of statements and actions of the parties reflecting their actual intentions and expectations it is inadmissible. Such statements reveal the terms of the contract which the parties intended or hoped to make, and which are superseded by, or merged into, the contract.[59]
>
> (9) An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience.[60] However, it must be borne in mind that business common sense may be a topic on which minds may differ.[61]
>
> (10) An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable.[62] If possible, each part of an instrument should be construed so as to have some operation.[63]
>
> (11) Definitions do not have substantive effect. A definition is not to be construed in isolation from the operative provision(s) in which the defined term is used. Rather, the operative provision is ordinarily to be read by inserting the definition into it.[64]
>
> 12 One question addressed in this matter was the most recent debate in the cases in relation to the need for ambiguity or differences in meaning, in order for a court to have regard to extrinsic evidence. This arises from the principles discussed in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. In this case, Mason J, in what is described as the "true rule" said at par 22:
>
> 22 The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.
>
> 13 As to the application of the "true rule", in *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29 McLure P observed as follows at pars 74-80:
>
> **The scope of the "true rule" of construction**
>
> 74 Both parties rely on extrinsic material in support of their submissions as to the proper construction of the 1984 and 1989 Agreements. Accordingly, it is necessary to enlarge on the scope of the "true rule" in *Codelfa*.

75 The role of the court in construing a written contract is to give effect to the common intention of the parties. The common intention of the parties is to be ascertained objectively. That is, the meaning of the terms of a contract in writing is to be determined by what a reasonable person would have understood them to mean: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165. The subjective intention or actual understanding of the parties as to their contractual rights and liabilities are irrelevant in the construction exercise.

76 The practical limitation flowing from the Codelfa true rule is that surrounding circumstances cannot be relied on to give rise to an ambiguity that does not otherwise emerge from a consideration of the text of the document as a whole, including whatever can be gleaned from that source as to the purpose or object of the contract.

77 The word "ambiguous", when juxtaposed by Mason J with the expression "or susceptible of more than one meaning", means any situation in which the scope or applicability of a contract is doubtful: *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 456 - 457. Ambiguity is not confined to lexical, grammatical or syntactical ambiguity.

78 Moreover, the extent to which admissible evidence of surrounding circumstances can influence the interpretation of a contract depends, in the final analysis, on how far the language of the contract is legitimately capable of stretching. Generally, the language can never be construed as having a meaning it cannot reasonably bear. There are exceptions (absurdity or a special meaning as the result of trade, custom or usage) that are of no relevance in this context.

79 Further, on my reading of Codelfa, pre-contractual surrounding circumstances are admissible for the purpose of determining whether a term is implied in fact. That may be because the stringent test for the implication of a term in fact excludes any possibility of an implied term contradicting the express terms.

80 If extrinsic evidence is admissible, the next issue is the scope of the "surrounding circumstances" for the purpose of construction. Mason J in Codelfa also answered that question. He said:

> "Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although … if the facts are notorious knowledge of them will be presumed.
>
> It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable (352)."

14 I respectfully adopt this summary and the above observations of McLure P in *Hancock Prospecting*, for the purposes of these reasons.

Consideration

10 The terms of exhibit A2 are to be construed in view of these principles. Other than by way of background, the terms of exhibit A1, Mr Goldaracena's letter of appointment, do not shed light on the meaning to be given to the words "A guaranteed 15K$ annual bonus". The meaning to be accorded to the second dot point in exhibit A2 is plain. The $10,000 payment was to be performance based. The words used to describe the $15,000 payment however, are instructive. The use of the word "guaranteed", in its ordinary and natural sense, means to "undertake the performance of a legal act (etc); that it shall be duly carried out; … to assure the existence of or persistence of": *Shorter Oxford English Dictionary*.

11 The use of the word "annual", in its ordinary sense, means "A. of belonging to, or reckoned by, the year; yearly. 2. Recurring once every year… 3. Repeated yearly …:" *Shorter Oxford English Dictionary*. When read together, the words mean Motherwell undertook to pay to Mr Goldaracena, as a legal obligation, the sum of $15,000 each year. As a matter of plain meaning too, there are no express qualifications in exhibit A2, that would cause me to construe the language of the contract in any other way. The term for a guaranteed annual payment is also entirely consistent with the objective background facts, that Mr Goldaracena had some concerns about how the $25,000 bonus would operate. This was overcome by the addition of a term into the contract, for Motherwell to make the $15,000 payment to Mr Goldaracena each year, as a separate payment, not linked to performance.

12 As to the contention of Motherwell that the $15,000 payment was intended to be some form of retention payment, this must be rejected. This is so for several reasons. Firstly, and importantly, as Mr Hearne rightly conceded, exhibit A2 makes no reference to this. To construe the language of the contract in this way, would require the insertion of words not present and would go well beyond the meaning that the words used in the contract, in their ordinary sense, could bear. Secondly, the evidence of Mr Hearne's "expectation" as to the operation of exhibit A2, as a retention payment type of arrangement, falls foul of the legal principles set out above. This was evidence of the subjective intention of one party to the contract. It is not admissible to contradict the plain language used by the parties when they concluded their bargain. Thirdly, whilst not of great moment, it is also inconsistent with Motherwell's formal response to Mr Goldaracena's claim, as set out in Motherwell's letter of 19 October 2017. There is no mention made in that letter of the $15,000 annual payment as being a retention payment or some such arrangement, requiring Mr Goldaracena to be employed in a following year, in this case 2018. Finally, nor would there be any basis on which a term to this effect could be implied. The contract is quite efficacious without it and to imply such a term, would also be inconsistent with the plain language used by the parties: *BP Refinery (Westernport) Pty Ltd v The Shire of Hastings* (1977) 16 ALR 363 at 376.

13 In the context of the present dispute, the issue then is when is such a payment to be made? The contract does not refer to any date on when the bonus payment was due. However, the use of the word "annual", ordinarily understood, meaning once each year and reckoned by the year, logically, in the context of an employment contract, must mean once each year after Mr Goldaracena's commencement in employment. Mr Goldaracena commenced employment with Motherwell in August 2014. In my view, it is entirely consistent with the terms of the contract, construed as I consider it should be, to take Mr Goldaracena's date of commencement in employment, as the datum point for the annual payment. It obviously could not be any time prior. In the absence of any other words in the contract by which the timing of such payment may be reckoned, as a matter of common sense, it is difficult to see any other construction open. In my view, this clause refers to an entitlement to a payment of $15,000 by Motherwell to Mr Goldaracena, for each year of service under his employment contract, on the anniversary date of his appointment. Mr Goldaracena had completed a year of service by the time of the termination of his contract on 30 August 2017.

14 The fact that the payment was not physically made by Motherwell to Mr Goldaracena until September and October for the years 2015 and 2016, does not alter this entitlement as expressed in the contract as set out in exhibit A2. Had there been many years of payment of the amount on a certain and consistent date year in and year out, then there may be an argument as to the implication of a term by custom and practice. However, no such finding is open on the evidence in this case.

Conclusion

15 I consider that Mr Goldaracena has been denied a contractual benefit in the form of a bonus payment of $15,000. Additionally, as the notice of application cites Mr Hearne as a respondent, despite Motherwell being the employer, an amendment is required. The Commission will order accordingly.

2018 WAIRC 00155

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JON GOLDARACENA
	APPLICANT
	-v-
	MOTHERWELL MARKETING PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 2 MARCH 2018
FILE NO/S	B 138 OF 2017
CITATION NO.	2018 WAIRC 00155

Result	Application upheld
Representation	
Applicant	In person
Respondent	Mr R Jones as agent

Declaration and Order

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

(1) DECLARES that the respondent has denied the applicant a contractual benefit in the form of an annual bonus payment.

(2) ORDERS the respondent to pay to the applicant the sum of $15,000 gross within 21 days.

(3) ORDERS that the name of the respondent be amended by deleting the name "Mark Hearne Motherwell Marketing Pty Ltd" and inserting in lieu thereof the name "Motherwell Marketing Pty Ltd".

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

2018 WAIRC 00204

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW HALLS
	APPLICANT
	-v-
	PERTH MINT REFINERY
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 23 MARCH 2018
FILE NO/S	U 163 OF 2017
CITATION NO.	2018 WAIRC 00204

Result	Dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	No appearance required

Order

THERE having been no appearance on behalf of the applicant and there being no compulsion for the respondent to attend, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of prosecution.

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

2018 WAIRC 00157

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KENNETH DANIEL KELLY
	APPLICANT
	-v-
	GREAT SOUTHERN EMPLOYMENT DEVELOPMENT SERVICE COMMITTEE INCORPORATED
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 6 MARCH 2018
FILE NO/S	U 93 OF 2017
CITATION NO.	2018 WAIRC 00157

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Mr M Stirling of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

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

2018 WAIRC 00150

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN MCCANN
	APPLICANT
	-v-
	CONSTRUCTION SKILLS CENTRE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 28 FEBRUARY 2018
FILE NO/S	B 92 OF 2017
CITATION NO.	2018 WAIRC 00150

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Mr M Buchan

Order

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

THAT the application be and is hereby discontinued by leave.

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

2018 WAIRC 00220

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00220
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	WRITTEN SUBMISSIONS: 12 FEBRUARY 2018, 14 FEBRUARY 2018, 7 MARCH 2018 AND 19 MARCH 2018
DELIVERED	**:**	FRIDAY, 6 APRIL 2018
FILE NO.	**:**	U 111 OF 2017
BETWEEN	**:**	MICHAEL MIROSEVICH Applicant AND EAST METROPOLITAN HEALTH SERVICE Respondent

CatchWords	**:**	Industrial law (WA) – Interaction between the jurisdiction of the Commission and the jurisdiction of constituent authorities – Whether a casual employee can be a government officer – Definition of 'salary' and 'salaried staff' – Definition of 'government officer'
Legislation	**:**	*Industrial Relations Act 1979* (WA): s 22A, s 23(1), s 23(3)(d), s 29(1), s 29(1)(b)(i), s 80C(1)(b), s 80E(1), s 80I
Result	**:**	Application dismissed
Representation		
Applicant	**:**	Ms K Jones (of counsel)
Respondent	**:**	Mr P Heslewood (as agent)

Cases referred to in reasons:

Gerad McGinty v Department of Corrective Services [2012] WAIRC 00054; (2012) 92 WAIG 190

Joyce Capewell v Department of Corrective Services [2013] WAIRC 00390; (2013) 93 WAIG 1454

Re Shine; Ex parte Shine [1892] 1 QB 522

Ronald Thomas Bellamy v Chairman, Public Service Appeal Board (1986) 66 WAIG 1579

The Totalisator Agency Board v Edith Fisher (1997) 77 WAIG 1889

Reasons for Decision

1 Mr Mirosevich was employed as a security officer at Royal Perth Hospital and Bentley Hospital by East Metropolitan Health Service (**EMHS**) and its predecessor as a casual employee for about three years. In August 2017, following an investigation, EMHS found Mr Mirosevich had committed a breach of discipline under the *Health Services Act 2016* (WA). Mr Mirosevich was reprimanded and told he would not be offered any more casual shifts by EMHS. Mr Mirosevich then filed an unfair dismissal claim and the parties have since been unable to resolve the matter through conciliation.

2 EMHS objects to the Commission hearing Mr Mirosevich's unfair dismissal claim. It says Mr Mirosevich was a government officer because he was employed on the salaried staff of EMHS and government officers come within the exclusive jurisdiction of the Public Service Arbitrator. Because Mr Mirosevich was a government officer who is appealing his dismissal, he should appeal to the Public Service Appeal Board and not the Commission.

3 Mr Mirosevich says he did not receive a salary, he was not a government officer and the Commission should hear his unfair dismissal claim.

4 Mr Mirosevich does not appear to dispute EMHS' submission that government officers come within the exclusive jurisdiction of the Public Service Arbitrator: s 80E(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**) and appeals by government officers in relation to their dismissal are heard and determined by the Public Service Appeal Board: s 80I of the IR Act.

Question to be decided

5 To resolve this matter, I must decide whether Mr Mirosevich was 'employed on the salaried staff' of EMHS and was therefore a government officer.

6 If Mr Mirosevich was a government officer, then his claim must be dismissed for lack of jurisdiction.

7 The parties asked the Commission to decide this matter on the papers. They filed a statement of agreed facts and agreed documents including Mr Mirosevich's contract of employment, payslips and rosters.

Was Mr Mirosevich 'employed on the salaried staff'?

8 Relevant to this matter is the definition of government officer in s 80C(1)(b) of the IR Act:

> ***government officer*** means —
>
> (b) every other person employed on the salaried staff of a public authority;

9 EMHS says Mr Mirosevich was a government officer as defined in s 80C(1)(b) of the IR Act. The parties agree that EMHS is a public authority but they disagree about whether Mr Mirosevich was employed on the salaried staff of EMHS.

10 EMHS says the WA Health – HSUWA – PACTS Industrial Agreement 2016 (**PACTS Agreement**) applied to Mr Mirosevich at the time his employment ended. All employees covered by the PACTS Agreement are paid a salary, whether they are permanent, fixed term or casual.

11 EMHS says the reference in Mr Mirosevich's contract of employment to the 'HSU – Health Services Union Award' is a reference to the WA Health – HSU Award 2006 (**Award**). Though EMHS says the Award is superseded by the PACTS Agreement, it notes the scope of the Award extends to '[a]ll salaried employees engaged in professional, administrative, clerical, technical, and supervisory capacities – including those employed in the callings listed in "Schedule B – Classes and/or Groups and/or Callings Covered"' (**Schedule B**). It is clear from Schedule B that security officer is included in the list of 'professional, administrative, clerical, technical and supervisory' employees.

12 EMHS says the role of security officer is 'well codified and has been within the structure of a salaried workforce, in accordance with a roster, a Job Description Form and other policy and administrative instruments that regulate the employment of hospital salaried officers'. Further, it says it is clear from Mr Mirosevich's contract and the PACTS Agreement that Mr Mirosevich has been remunerated at an hourly rate, derived from an annual salary amount.

13 Mr Mirosevich says the Commission has jurisdiction to hear his unfair dismissal claim under s 23(1) of the IR Act because he has referred his claim under s 29(1) of the IR Act and it relates to an industrial matter, namely that he has been harshly, oppressively or unfairly dismissed.

14 Mr Mirosevich says he was not a government officer and therefore Division 2 of Part IIA of the IR Act does not apply.

15 Mr Mirosevich says when construing 'salary', the ordinary meaning should be applied and the dictionary definition considered. He argues he cannot be said to have received a salary because:

> a. he did not receive a 'fixed periodical payment';
>
> b. he was paid a wage for actual hours worked and those hours varied from fortnight to fortnight; and
>
> c. his position involved manual work, which traditionally falls within the category of 'blue collar' worker and 'generally does not fit within the administrative, technical and professional ranks of the public sector'.

16 Mr Mirosevich says he was not a 'salaried officer' because he was employed as a casual on a 'needs basis', placed in a casual pool and paid an hourly rate. He had no guaranteed minimum hours or any guaranteed hours. Rather, Mr Mirosevich was paid for the actual hours he worked and not a regular fortnightly payment for a set number of hours.

17 Mr Mirosevich concludes that he could not be employed on the salaried staff because he did not receive a salary.

18 Mr Mirosevich says his contract of employment provided that the terms and conditions of his employment 'are governed by, but not limited to: HSU - Health Services Union Award and General Agreement' and argues that the Commission must, in the absence of evidence, therefore reject EMHS' submission that Mr Mirosevich was subject to the PACTS Agreement.

Consideration

19 'Salaried staff' is not defined in the IR Act. The parties agree that the starting point is the ordinary meaning of the words, however EMHS says in order to determine whether an employee is employed 'on the salaried staff', 'all of the relevant circumstances of their employment' should be considered, rather than simply whether or not the employee was remunerated in accordance with the ordinary dictionary meaning of 'salary'.

20 The Macquarie Dictionary defines 'salary' as 'a fixed periodical payment paid to a person for regular work or services, especially work other than that of a manual, mechanical, or menial kind.'

21 Mr Mirosevich and EMHS rely on ***The Totalisator Agency Board v Edith Fisher*** (1997) 77 WAIG 1889 (***TAB***), ***Gerad McGinty v Department of Corrective Services*** [2012] WAIRC 00054; (2012) 92 WAIG 190 (***McGinty***) and ***Joyce Capewell v Department of Corrective Services*** [2013] WAIRC 00390; (2013) 93 WAIG 1454 (***Capewell***) in support of their arguments.

22 It is clear from Mr Mirosevich's payslips that he was paid by the hour and the number of hours he worked varied from week to week. Mr Mirosevich seems to contend that 'salary' must be a fixed amount of money, rather than fixed by reference to a particular hourly rate and number of hours worked.

23 Anderson J in ***TAB*** said that 'although it can be helpful to see how words have been defined in other cases, the starting point is the ordinary meaning of the words.' In that case, reference was made to several dictionary definitions, with Anderson J noting there was not much difference between them. Anderson J said that the money received by the employee in ***TAB*** was

> … not a "fixed periodical payment" or a "fixed regular payment". It was a commission on the turnover achieved in the betting shop. The amount of money the respondent would receive did not depend on any fixed hourly, daily or weekly rate of remuneration, but on how much betting took place at the premises. It might be a lot one week and little the next. Neither was the money paid for "regular work or services" or "in return for work" (1891).

24 Anderson J quoted from the judgments in ***Re Shine; Ex parte Shine*** [1892] 1 QB 522: 'At 529 Bowen LJ said – 'Salary, I think, must mean a definite payment for personal services arising under some contract, and (to borrow an expression of my brother Fry) computed by time' (1891).

25 In ***Re Shine*** Fry LJ said at 531 'Whenever a sum of money has these four characteristics – first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time; and fourthly, that it is payable at a fixed time – I am inclined to think that it is a salary'.

26 Scott J in ***TAB*** said 'the judgment of Fry LJ in ***Re Shine***… gives an indication of the criteria that may be looked at in determining whether or not a particular payment is a "salary". The four characteristics to which Fry LJ refers at 531 are a valuable guide in determining whether or not any payment is a "salary" for the purpose of a particular statute' (1891). Further, he said 'it is sufficient to say that in my opinion, [the appellant in ***TAB***] was not being paid for her services in a manner computed by time and that is sufficient to dispose of the matter' (1891).

27 Consistent with the reasoning in ***TAB***, a 'salary' may be an amount that varies depending on hours worked. Here Mr Mirosevich was rostered to work and paid a casual rate in accordance with the number of hours he worked. It is clear from his contract and payslips that Mr Mirosevich's casual rate of pay was fixed according to time and derived from the annual full-time salary of a level G4 security officer.

28 Mr Mirosevich was paid at regular intervals by EMHS for the services he rendered under his contract of employment, computed by time. I find Mr Mirosevich received a salary.

29 Historically a distinction has been made between 'blue collar' wages employees, who come within the Commission's general jurisdiction and 'white collar' salary employees, who come within the Public Service Arbitrator's exclusive jurisdiction. To the extent that it is necessary to characterise Mr Mirosevich's position as 'white collar' or 'blue collar', I consider that it was 'white collar'.

30 A job description titled 'Security Officer' was document nine in the hardcopy bundle of agreed documents filed by the parties on 12 February 2018 (**Job Description**). That document forms part of the index to the agreed documents at tab one but it is missing from the covering index which is signed by the parties' representatives. It was also not part of the agreed documents which were filed electronically. Accordingly it is not clear to me that the Job Description is an agreed document. Mr Mirosevich says he 'has never been provided with a job description as referred to in the submissions of EMHS'. However he does not submit that the Job Description is inaccurate, did not apply to him or that some other job description applied to him. In the circumstances, I accept that the Job Description provided to the Commission is the job description for Mr Mirosevich's position.

31 I am satisfied that much of the work performed by security officers is professional and administrative in nature, rather than manual, mechanical or menial. Schedule B to the Award referred to in Mr Mirosevich's contract is consistent with that conclusion.

32 The parties do not agree about which industrial agreement applied to Mr Mirosevich during his employment. As set out at [9], EMHS says the PACTS Agreement applied, while in his application Mr Mirosevich says the Government Services (Miscellaneous) General Agreement 2016 applied to his employment. However, it is clear from Clause 5 – Application and Parties Bound and Schedule 9 – List of Respondents of the Government Services (Miscellaneous) General Agreement 2016 that EMHS is not a respondent to that industrial agreement and therefore it could not have applied to Mr Mirosevich's employment. Further, an industrial agreement applies as a matter of law. That Mr Mirosevich's contract does not refer to the PACTS Agreement does not mean the PACTS Agreement did not apply to his employment. In any event, I do not consider that it is necessary to resolve the issue of which industrial agreement, if any, applied to Mr Mirosevich in order to decide EMHS' jurisdictional objection, because whether Mr Mirosevich was employed on the salaried staff of EMHS does not depend on which industrial agreement, if any, applied.

33 I find Mr Mirosevich received a salary and was not a wages employee. He was employed on the salaried staff of EMHS and was therefore a government officer.

34 As her Honour Smith AP states in the recent unanimous decision of the Full Bench ***Matthew Crowley v Chief Executive Officer, Department of Commerce*** [2017] WAIRC 00262; (2017) 97 WAIG 454:

> 32. … The scheme of the provisions of the IR Act are clear. Firstly, where an industrial matter is raised in any application before the Commission which 'relates to a government officer' the general jurisdiction of the Commission under s 23(1) of the IR Act is expressly excluded by s 80E(1) of the IR Act.
>
> …
>
> 40. The conferral of exclusive jurisdiction in respect of industrial matters that relate to a 'government officer' is found in the express power in s 80E(1) of the IR Act which provides:
>
> > Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.
>
> 41. The ousting of the general jurisdiction of the Commission in s 23(1) of the IR Act by s 80E(1) by the exclusive jurisdiction of the constituent authorities, one of which is the Public Service Arbitrator, is put beyond doubt by the expressed intention in the definition of 'industrial matter' in div 2 by operation of s 22A of the IR Act. Section 22A and s 23(1) are both found in div 2 of pt II of the IR Act. Section 22A provides:
>
> > In this Division and Divisions 2A to 2G —
> >
> > ***Commission*** means the Commission constituted otherwise than as a constituent authority;
> >
> > ***industrial matter*** does not include a matter in respect of which, subject to Division 3, a constituent authority has exclusive jurisdiction under this Act.

35 Further, it is well established that the Commission's general jurisdiction to determine a claim for unfair dismissal under s 29(1)(b)(i) of the IR Act cannot be exercised where there is a special jurisdiction under s 80I of the IR Act to hear and determine an appeal by a government officer from a decision to dismiss: s 23(3)(d) of the IR Act; ***Ronald Thomas Bellamy v Chairman, Public Service Appeal Board*** (1986) 66 WAIG 1579.

36 Accordingly, EMHS' objection is upheld and Mr Mirosevich's claim must be dismissed.

2018 WAIRC 00221

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL MIROSEVICH
	APPLICANT
	-v-
	EAST METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 6 APRIL 2018
FILE NO/S	U 111 OF 2017
CITATION NO.	2018 WAIRC 00221

Result	Application dismissed
Representation	
Applicant	Ms K Jones (of counsel)
Respondent	Mr P Heslewood (as agent)

Order

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

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

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

2018 WAIRC 00195

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FELICITY ANNE SHALLCROSS
	APPLICANT
	-v-
	SOUTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 23 MARCH 2018
FILE NO/S	U 159 OF 2017
CITATION NO.	2018 WAIRC 00195

Result	Application discontinued
Representation (by correspondence)	
Applicant	In person
Respondent	N/A

Order

WHEREAS on 12 March 2018 Ms Shallcross informed the Commission by telephone she would discontinue her claim;

AND WHEREAS on 12 March 2018 Ms Shallcross confirmed by email that a *Form 14 – Notice of withdrawal or discontinuance* (**Form 14**) had been filed in the Registry,

AND WHEREAS the Form 14 was received by Registry on 12 March 2018;

AND WHEREAS on 12 and 15 March 2018 deficient statutory declarations of service of the Form 14 were received by Registry;

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, discontinued.

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

2017 WAIRC 00740

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VAUGHN WALLIS
	APPLICANT
	-v-
	COUNTRY CARRIERS CONSORTIUM PTY LTD TRADING AS COUNTRY CARRIERS
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 21 AUGUST 2017
FILE NO/S	B 89 OF 2017
CITATION NO.	2017 WAIRC 00740

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr P Scott

Order

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

THAT the name of the applicant be amended by deleting the name "Vaughn Wallace" and inserting in lieu thereof the name "Vaughn Wallis".

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

2017 WAIRC 00881

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VAUGHN WALLIS
	APPLICANT
	-v-
	COUNTRY CARRIERS CONSORTIUM PTY LTD TRADING AS COUNTRY CARRIERS
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 18 OCTOBER 2017
FILE NO/S	B 89 OF 2017
CITATION NO.	2017 WAIRC 00881

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr P Scott

Order

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

THAT the application be and is hereby adjourned to a date to be fixed and the hearing listed on 16 October 2017 be and is hereby vacated.

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

2018 WAIRC 00187

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VAUGHN WALLIS
	APPLICANT
	-v-
	COUNTRY CARRIERS CONSORTIUM PTY LTD TRADING AS COUNTRY CARRIERS
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 16 MARCH 2018
FILE NO/S	B 89 OF 2017
CITATION NO.	2018 WAIRC 00187

Result	Discontinued by leave
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr P Scott

Order

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

THAT the application be and is hereby discontinued by leave.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Christoper Bouzidis	Eastern Goldfields Ltd	B 1/2018	Senior Commissioner S J Kenner	Discontinued
Gerald F Gojanovich	Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police	U 126/2016	Commissioner T Emmanuel	Discontinued
Haakon Nielssen	Michael Fotios Executive Chairman Eastern Goldfields Limited	B 100/2017	Commissioner D J Matthews	Discontinued
Lili Liu	Gold Valley Corporation Pty Ltd	B 162/2016	Commissioner T Emmanuel	Discontinued
Meni Zini	Monte Fiore Cafe	B 182/2016	Commissioner T Emmanuel	Discontinued
Michael Coleman	North Metro TAFE	U 11/2018	Commissioner D J Matthews	Discontinued
Michel Angelo Amati	The State School Teachers' Union of W.A. (Incorporated)	B 166/2017	Commissioner D J Matthews	Discontinued
Mohamad Zaki Mohamed Yusoff	Earthcreations	U 84/2017	Commissioner D J Matthews	Discontinued
Mohamad Zaki Mohamed Yusoff	Earthcreations	B 84/2017	Commissioner D J Matthews	Discontinued
Sebastian Levy	Print Hall, Sebasten Lepoittevin, General Manager	B 156/2015	Commissioner D J Matthews	Discontinued

CONFERENCES—Matters arising out of—

2018 WAIRC 00219

DISPUTE RE RETURN TO WORK OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	SHELTER WA INC
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 6 APRIL 2018
FILE NO/S	C 16 OF 2017
CITATION NO.	2018 WAIRC 00219

Result Application discontinued

Representation (by correspondence)

Applicant Ms A Nyariel (as agent)

Respondent N/A

Order

WHEREAS on 19 January 2018 Ms A Nyariel (as agent) advised the Commission that the applicant wished to discontinue application C 16 of 2017;

AND WHEREAS on 22 January 2018 and 13 March 2018 Ms Nyariel was asked by email to file a *Form 14- Notice of withdrawal or discontinuance* (**Form 14**) in the Registry;

AND WHEREAS the Commission has received no response from Ms Nyariel and no Form 14 has been filed;

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, discontinued.

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

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 26/2017	N/A	Dispute re alleged breach of discipline	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	North Metropolitan Health Service	Emmanuel C	C 27/2017	19/09/2017	Dispute re alleged breach of Clause 25 and Clause 26 of the WA Health System - Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses - Industrial Agreement 2016	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	Wayne Salvage Chief Executive North Metropolitan Health Service	Emmanuel C	C 19/2016	14/10/2016	Dispute re procedural fairness	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	North Metropolitan Health Service	Emmanuel C	C 24/2016	21/11/2016	Dispute re clause 38 (1) (b) and (c) of the WA Health System - Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses - Industrial Agreement 2016	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	North Metropolitan Health Service	Emmanuel C	C 18/2016	07/10/2016	Dispute re grievance of union member	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Australian Nursing Federation, Industrial Union of Workers Perth	East Metropolitan Health Service	Emmanuel C	C 15/2016	19/08/2016	Dispute re process addressing alleged behavioural concerns	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	East Metropolitan Health Service	Emmanuel C	C 22/2016	08/11/2016	Dispute re employment contracts	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	East Metropolitan Health Service	Emmanuel C	C 25/2016	01/12/2016	Dispute re paid parental leave of union member	Discontinued
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (AWU)	Department of Biodiversity, Conservation and Attractions	Matthews C	C 21/2017	18/08/2017	Dispute re level of classification of union member	Discontinued
Western Australian Police Union of Workers	Commissioner of Police	Kenner SC	PSAC 13/2017	20/06/2017 21/06/2017 29/06/2017 20/07/2017 18/08/2017 22/09/2017 27/09/2017 10/10/2017 23/01/2018	Dispute re bargaining	Discontinued
Western Australian Prison Officers' Union of Workers	The Minister for Corrective Services	Matthews C	C 13/2017	N/A	Dispute re alleged inappropriate use of the Performance Appraisal and Development System (PADS)	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00194

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MARIO GEORGIOU

APPLICANT

-v-

THE COMMISSIONER OF POLICE

RESPONDENT

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

DATE WEDNESDAY, 21 MARCH 2018

FILE NO. APPL 4 OF 2017

CITATION NO. 2018 WAIRC 00194

Result Direction and Order issued

Direction and Order

1. This is an appeal pursuant to s 33P of the *Police Act 1892* against a decision of the Commissioner of Police to take removal action, referred to the WAIRC on 4 January 2017.
2. On Friday, 16 March 2018, the WAIRC wrote to the appellant directing that he advise the WAIRC of the timeframe within which he anticipates being able to comply with reg 92 of the *Industrial Relations Commission Regulations 2005*.
3. On Tuesday, 20 March 2018, the appellant requested a further three months to comply with reg 92.
4. The WAIRC has considered the circumstances of this request, including that:
   (a) Regulation 92 requires an appellant to file and serve the documents within 28 days of service of the Commissioner of Police's documents;
   (b) The Commissioner's documents were filed and served on 1 February 2017;
   (c) The appellant has now had the benefit of meeting with the Deputy Registrar on 14 March 2018 and received an explanation of the procedural requirements to comply with reg 92; and
   (d) By his letter of 16 February 2018, Dr Wu said that it would take no longer than a further three months for the appellant to comply with reg 92.

Therefore, the WAIRC –

1. DIRECTS THAT the appellant is to comply with reg 92 of the *Industrial Relations Commission Regulations 2005* by no later than **4.30 pm** on **Thursday, 17 May 2018**.
2. ORDERS THAT if the appellant does not comply with reg 92 by 4.30 pm on Thursday, 17 May 2018, the appeal be, and is thereby taken to have been withdrawn.

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

2018 WAIRC 00190

HOSPITAL WORKERS (GOVERNMENT) AWARD NO. 21 OF 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD, THE PEEL HEALTH SERVICES BOARD AND THE WA COUNTRY HEALTH SERVICES BOARD, HON. MINISTER FOR HEALTH, THE BOARD OF MANAGEMENT SIR CHARLES GAIRDNER HOSPITAL AND OTHERS

RESPONDENTS

CORAM CHIEF COMMISSIONER P E SCOTT

DATE MONDAY, 16 APRIL 2018

FILE NO/S APPL 11 OF 2018

CITATION NO. 2018 WAIRC 00190

Result Application divided

Representation

Applicant Ms N Kefford of counsel

Respondent Mr B Chapman

Order

This is an application pursuant to s 40 of the *Industrial Relations Act 1979* to vary the *Hospital Workers (Government) Award No. 21 of 1966* (the Award) filed on 25 January 2018.

Having heard from Ms Kefford for the applicant and Mr Chapman for the respondents, the Commission is satisfied that it is appropriate to order that this application be divided, and hereby orders:

THAT this application be divided into –

APPL 11A of 2018 being: all matters related to the adjustment of allowances; and

APPL 11B of 2018 being: all matters related to the employers' proposed changes to the area and scope of the award.

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

2017 WAIRC 00359

DISPUTE RE BARGAINING

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 21 JUNE 2017
FILE NO.	PSAC 13 OF 2017
CITATION NO.	2017 WAIRC 00359

Result	Recommendation issued
Representation	
Applicant	Mr P Hunt and with him Mr C Fordham
Respondent	Mr A Chapple and with him Mr T Clark

Recommendation

WHEREAS on 2 June 2017 the applicant applied for a conference in accordance with the *Industrial Relations Act 1979* in connection with enterprise bargaining negotiations for a replacement industrial agreement. The *Western Australia Police Industrial Agreement 2014* expires on 30 June 2017;

AND WHEREAS the applicant informed the Arbitrator that the parties have been in discussions regarding the applicant's log of claims and good faith bargaining was formally initiated in accordance with s 42 of the Act on 18 April 2017;

AND WHEREAS on 12 May 2017 the State Government announced its new Public Sector Wages Policy with immediate effect. The Policy limits increases in industrial agreement wages and associated conditions to $1,000 per annum. The applicant informed the Arbitrator that following a meeting on 15 May 2017, the applicant sought clarification from the respondent and representatives of the State Government as to the implications of the Policy on their negotiations for a replacement industrial agreement. It was their expectation that as the Policy took effect in the course of negotiations, previous indications of a 1.5% wage offer would be met;

AND WHEREAS the Arbitrator was further informed that despite seeking clarification of the application of the Policy, as at the date of the application to the Arbitrator, none had been provided and no formal offer in relation to the negotiations had been received;

AND WHEREAS at the conference the respondent informed the Arbitrator that it was bound by the Policy and outlined orally, terms of the respondent's offer for a new industrial agreement, confirmed in writing by letter dated 20 June 2017. The offer is in accordance with the Policy;

AND WHEREAS as a result the Arbitrator requested that the parties confer and the applicant to formally consider and respond to the respondent's offer, with the dispute to be progressed at a further conciliation conference;

AND WHEREAS the Arbitrator was requested to urgently re-list the compulsory conference, as the respondent had become aware of a work-to-rule and safety campaign being launched by the applicant, effective from 7.00 am Wednesday, 21 June 2017. The terms of the campaign are set out in a media release from the applicant of the same date, a copy of which has been provided to the Arbitrator. The work-to-rule and safety campaign refers to not only the respondent's offer in accordance with the Policy, but also two further issues, they being the provision of stab proof ballistic vests for police officers and a commitment to the engagement of additional police officers by the State Government;

AND WHEREAS the respondent informed the Arbitrator that the work-to-rule campaign is premature, given the matters are now before the Arbitrator and furthermore, that some aspects of the campaign may impact on community safety, an allegation denied by the applicant;

AND WHEREAS the Arbitrator informed the parties that it intended to make recommendations in relation to the issues presently in dispute;

NOW THEREFORE, the Arbitrator having regard for the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question, pursuant to the powers vested in it by the Act, hereby recommends -

(1) THAT the issues of stab proof ballistic vests for police officers and a commitment to additional police officers be progressed with the respondent as separate issues from those forming part of the bargaining dispute for a new industrial agreement.

(2) THAT the applicant and police officers' members of and those eligible to be members of the applicant cease their work-to-rule campaign and continue to perform duties in accordance with work practises immediately prior to 21 June 2017.

(3) THAT the parties resume negotiations and confer in relation to the respondent's offer of a proposed industrial agreement under the auspices of the Arbitrator.

(4) THAT a further conciliation conference is to proceed as listed on 29 June 2017.

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

2017 WAIRC 00847

DISPUTE RE BARGAINING

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 27 SEPTEMBER 2017
FILE NO/S	PSAC 13 OF 2017
CITATION NO.	2017 WAIRC 00847

Result	Orders and recommendation issued
Representation	
Applicant	Mr P Hunt and with him Ms A Wyllie and Mr R Yates of counsel
Respondent	Mr A Chapple and with him Mr T Clark and Ms Southcott

Orders and Recommendation

WHEREAS on 21 June 2017 the Arbitrator issued a recommendation to the parties concerning the current enterprise bargaining negotiations for a replacement industrial agreement and refers to the recitals to the recommendation so made;

AND WHEREAS the Arbitrator recommended that the parties resume negotiations and confer in relation to the respondent's offer of a proposed industrial agreement under the auspices of the Arbitrator. The Arbitrator also recommended that the applicant and police officers members of and those eligible to be members of the applicant cease their work-to-rule campaign and continue to perform duties in accordance with work practices immediately prior to 21 June 2017. The recommendation in relation to the work-to-rule campaign was not accepted;

AND WHEREAS whilst the parties have continued to negotiate and confer in relation to a proposed industrial agreement, and despite numerous conciliation conferences before the Arbitrator and offers and counter-offers, no agreement has yet been reached. The applicant and police officers, members of and those eligible to be members of the applicant, have continued with their work-to-rule campaign and furthermore, since that time industrial action by the applicant has escalated. In early to mid-July police officers commenced issuing cautions instead of fines for minor traffic and liquor offences; are making themselves visible near speed cameras by turning on flashing lights and are failing to summons offenders to court until the State Budget is delivered on 7 September 2017;

AND WHEREAS on or about 15 August 2017 the applicant and its members have further escalated industrial action in the form of police prosecutors declining to request court costs be awarded to the State in prosecutions before magistrate's courts. The applicant has itself estimated and the respondent does not disagree, that the financial losses to the State of the applicant's current industrial action is significant and exceeds $300,000 per day;

AND WHEREAS at a further conference urgently convened on 27 September 2017, requested by both the applicant and the respondent, the Arbitrator was informed that industrial action continues and no agreement has been reached, despite further discussions between the parties. Escalated industrial action, in the form of a direction by the applicant to its members on the evening of 26 September 2017, to only leave their station or section to attend to emergencies or urgent tasks, took place. This action, constituting a clear potential risk to the safety and security of the public, only ceased some hours later, following an order from the respondent under reg 401 of the *Police Force Regulations 1979* (WA);

AND WHEREAS additionally, the applicant informed the Arbitrator that on the night of 26 September 2017, access to the respondent's email system provided to the President and Vice President of the applicant has been removed, thereby preventing communications between the applicant and its members during enterprise bargaining;

AND WHEREAS due to the parties' failure to reach agreement, and the circumstances of the present industrial action, the Arbitrator believes there has been a significant deterioration of industrial relations in respect of the present dispute. Actions by the applicant most recently, confirms this opinion;

AND WHEREAS having heard from the applicant and the respondent the Arbitrator has formed the view that steps need to be taken by the Arbitrator to prevent a further deterioration of industrial relations between the parties in respect of the present dispute;

NOW THEREFORE the Arbitrator having regard for the public interest and the interests of the parties directly involved and to enable conciliation or possibly arbitration to resolve the matters in dispute, pursuant to s 44(6)(ba) of the *Industrial Relations Act 1979*, hereby –

(1) ORDERS that the applicant, by its officers, agents and employees, presently engaged in industrial action as defined in s 7(1) of the Act concerning matters the subject of these proceedings, cease such industrial action by no later than 12 noon, Thursday 28 September 2017 and to thereafter refrain from commencing or taking part in any further industrial action as defined in s 7(1) of the Act in respect of this matter until this order is revoked.

(2) ORDERS that the applicant by its officers, agents and employees take all reasonable steps to ensure that all such industrial action ceases and police officers resume their normal duties, as performed prior to the commencement of the current dispute, in accordance with the terms of par (1) of this order.

(3) ORDERS that the respondent immediately reinstate to Messrs Tilbury and Shortland access to its computer and communications systems in order that the applicant can undertake its role and functions and subject to cl 43 of the *Western Australia Police Industrial Agreement 2014*, that there be no restrictions, limitations or interference with such access.

(4) ORDERS that the applicant or the respondent may, on giving 24 hours' notice to the other, apply to the Arbitrator to vary, revoke or otherwise set aside the terms of this order.

(5) RECOMMENDS that the parties confer without prejudice and with the assistance of the Arbitrator, as to possible matters that may be agreed for arbitration under s 42G of the Act, should the parties agree to that course. For this purpose, a further conciliation conference will be convened by the Arbitrator shortly on a date to be fixed.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Metropolitan Cemeteries Board (Western Australia) Cemetery Employees Industrial Agreement 2018 AG 6/2018	03/28/2018	Metropolitan Cemeteries Board	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Commissioner D J Matthews	Agreement Registered

PUBLIC SERVICE APPEAL BOARD—

2017 WAIRC 00874

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 31 JULY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MISS DEIRDRE MCQUILLAN

APPELLANT

-v-

DEPARTMENT OF MINES

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MR G LEE - BOARD MEMBER
MS T WILLIAMS - BOARD MEMBER

DATE TUESDAY, 17 OCTOBER 2017

FILE NO. PSAB 15 OF 2017

CITATION NO. 2017 WAIRC 00874

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

Direction

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

(1) THAT the appellant file and serve on the respondent further and better particulars of her claim by no later than 24 October 2017.

(2) THAT the respondent file and serve a notice of answer with full particulars in answer to the herein appeal by no later than 14 days from service of the appellant's further and better particulars of claim.

(3) THAT each party shall give an informal discovery by request.

(4) THAT the appeal be listed for hearing for two days on dates to be fixed.

(5) THAT the parties have liberty to apply on short notice.

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

2017 WAIRC 00932

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 31 JULY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MISS DEIRDRE MCQUILLAN
	APPELLANT
	-v-
	DEPARTMENT OF MINES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR G LEE - BOARD MEMBER
	MS T WILLIAMS - BOARD MEMBER
DATE	THURSDAY, 9 NOVEMBER 2017
FILE NO	PSAB 15 OF 2017
CITATION NO.	2017 WAIRC 00932

Result	Order issued
Representation	
Appellant	In person
Respondent	Mr E Fearis of counsel

Order

HAVING heard the appellant on her own behalf and Mr E Fearis of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

(1) THAT the respondent's application for summary dismissal filed on 26 October 2017 be and is hereby discontinued.

(2) THAT the appellant be granted leave to amend the relief sought in the notice of appeal by deleting "payment of lost income and redundancy" and inserting in lieu thereof "reinstatement without loss".

(3) THAT the name of the respondent be amended by deleting the name "Department of Mines" and inserting in lieu thereof the name "The Director General of the Department of Mines, Industry Regulation and Safety".

(4) THAT the date for compliance with direction 2 made on 17 October 2017 be and is hereby extended to 5 December 2017.

(5) THAT the parties have liberty to apply on short notice.

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

2018 WAIRC 00209

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 31 JULY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00209
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER- CHAIRMAN MR G LEE - BOARD MEMBER MS T WILLIAMS - BOARD MEMBER
HEARD	**:**	TUESDAY, 17 OCTOBER 2017, TUESDAY, 30 JANUARY 2018, WEDNESDAY, 31 JANUARY 2018
DELIVERED	**:**	THURSDAY, 29 MARCH 2018
FILE NO.	**:**	PSAB 15 OF 2017
BETWEEN	**:**	MISS DEIRDRE MCQUILLAN Appellant AND THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY Respondent

Catchwords	**:**	*Industrial Law (WA) - Appeal against decision of the respondent to terminate employment - Whether appellant was denied procedural fairness - Principles applied - Appeal dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Appeal dismissed
Representation:		
Counsel:		
Appellant	**:**	In person
Respondent	**:**	Mr E Fearis of counsel
Solicitors:		
Department	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Patrick Fels v Department of Agriculture and Food (2010) 90 WAIG 1485

Raxworthy v The Authority for Intellectually Handicapped Persons (1989) 69 WAIG 2266

Case(s) also cited:

Danijel Pantovic v Public Transport Authority of Western Australia (2011) 91 WAIG 2094

Deborah Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728

Krishna Thavarasan v The Water Corporation (2006) 86 WAIG 1434

Maria Elizabeth Re v The Inspector of Custodial Services (2013) 93 WAIG 1775

Paul Smith v Director General – Department of Transport (2013) 93 WAIG 60

Reasons for Decision

The appeal and brief background

1 The appellant Ms McQuillan was an employee of the former Department of Mines and Petroleum. She had been employed by the Department and its predecessors since August 1985. Ms McQuillan's most recent position was Assistant Project Officer Level 3, which she had held since September 2015. Ms McQuillan's position prior to this was as a Relieving Tenure Officer Level 4. Ms McQuillan was removed from this position following earlier disciplinary action.

2 In January 2016 breach of discipline allegations were made by the Department against Ms McQuillan. Those allegations led to an investigation which found the allegations established. As a result, Ms McQuillan's employment with the Department terminated on 31 July 2017. Ms McQuillan now appeals against the termination of her employment. She maintains she has been victimised, intimidated and was a scapegoat because of the behaviour of others. Ms McQuillan claims she should be reinstated without loss.

Approach to the appeal

3 Appeals to the Appeal Board of the present kind proceed as a hearing de novo. The Appeal Board has greater license to substitute its own views in relation to the merits of the case, based on the evidence before it. In cases such as this, in which allegations of misconduct are made, the Appeal Board is to be satisfied that the Department has established that the conduct complained of occurred: *Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266; *Patrick Fels v Department of Agriculture and Food* (2010) 90 WAIG 1485.

The January 2016 allegations, the investigation and the dismissal

4 The allegations leading to the dismissal of Ms McQuillan were set out in a letter to her from the Acting Director-General of the Department dated 12 January 2016. Three allegations were made and they were:

(a) That Ms McQuillan applied for jury duty leave for 27 February 2015 and 3 March 2015 to which she was not entitled and she did not perform jury duty; did not attend for work on these days; and failed to explain her absences;

(b) That Ms McQuillan, despite written requests on 29 October 2015 and 5 November 2015 and oral requests also, failed to return a mobile phone the property of the Department; and

(c) That Ms McQuillan, over an extended period, failed to respond to lawful and reasonable directions from management in relation to the correction of leave requests; to justify numerous absences from work; and to correct errors in time sheets and leave in relation to hours of work, as specifically directed by the Director-General of the Department in October 2015.

5 In letters of 27 January 2016, 12 February 2016 and 21 March 2016., Ms McQuillan responded to the allegations. In short, she denied that she had falsified claims for jury duty; said she had trouble removing personal information from the mobile phone but ultimately did not return it; did take appropriate steps to cancel leave applications but was treated disrespectfully by her supervisor; did not accept errors were made in her time sheet recording and generally accused her supervisors of intimidating behaviour. Ms McQuillan also informed the Department that she had been psychologically unwell, had sought the assistance of a psychiatrist and was receiving treatment, including medication.

6 In February 2016, the Department appointed an investigator to inquire into the allegations against Ms McQuillan. For medical reasons, the investigator was not able to interview Ms McQuillan. Because of this and Ms McQuillan's then medical condition, the disciplinary action was suspended as Ms McQuillan was deemed unfit for work from March 2016 until February 2017. Following a medical assessment directed by the Department, in January 2017 Ms McQuillan was deemed fit to return to work on a graduated basis, which she did on 13 February 2017. Ms McQuillan was also informed that the medical assessment considered her fit to participate in the disciplinary process previously suspended, which resumed at the same time. Despite the medical assessment, Ms McQuillan declined to participate further in the disciplinary investigation. She was informed that it would continue based on the material obtained by the investigator.

7 In an Investigation Report of 10 May 2017, it was found that the disciplinary breaches alleged against Ms McQuillan had been established.

8 By letter of 31 May 2017, the Director-General of the Department provided a copy of the Investigation Report to Ms McQuillan. She was informed that in view of the findings and the previous disciplinary action, some of which related to similar conduct, the Department proposed to terminate Ms McQuillan's employment. Ms McQuillan responded by letter of 23 June 2017. She did not explain her conduct in relation to the allegations and disputed the findings of the investigator. Ms McQuillan refused to acknowledge any shortcomings. Having considered Ms McQuillan's response, the Department dismissed her by letter of 10 July 2017.

9 We will consider each of the allegations in turn. Before doing so, we will briefly outline the prior disciplinary issues with Ms McQuillan, as they formed part of the Department's consideration in its decision to terminate Ms McQuillan's employment.

Prior disciplinary history

10 As noted at the outset of these reasons, Ms McQuillan had prior disciplinary actions taken against her by the Department. The first related to disciplinary action resulting from her improper use of a corporate credit card. Following an investigation which established the allegations, the Department initially proposed to terminate Ms McQuillan's employment due to the seriousness of the conduct. However, given Ms McQuillan's admissions, her remorse and her preparedness to undergo performance management, training and counselling, by letter of 3 September 2015, the Director-General imposed a penalty of a demotion to a Level 3 position. In addition, the Director-General required a commitment from Ms McQuillan to comply with all Departmental policies and procedures and undergo relevant training in relation to the Department's Code of Conduct.

11 The second action also occurred in 2015. This related to numerous failures by Ms McQuillan to properly record her hours of work in the Department's timesheets and to properly record leave. In response to Ms McQuillan's further commitment to comply with the Department's policies and procedures, by letter dated 2 October 2015, Ms McQuillan was issued with a formal warning and was directed by the Director-General to rectify the relevant errors and make the necessary adjustments in relation to her records of hours of work and leave. Ms McQuillan was also informed by the Director-General at that time, should there be other instances of the same conduct brought to his attention, they would be treated as disciplinary matters.

12 These matters were also the subject of evidence from the Department's General Manager of Human Resources, Ms Haasnoot. Ms Haasnoot testified that prior to and at the time of the disciplinary matters being dealt with, it had become apparent that Ms McQuillan had developed a poor relationship with her managers and supervisors. According to Ms Haasnoot, Ms McQuillan demonstrated a lack of cooperation in complying with requests and following directions in the workplace. It seems on the evidence, dealt with below, that this pattern of workplace behaviour continued.

Falsification of leave requests

13 Evidence from the Department on this issue was from Mr Diss, Ms McQuillan's then team leader (supervisor) in the Minerals Titles division of the respondent. Mr Diss became Ms McQuillan's supervisor from about May 2015. Her prior supervisor was a Mr Dawson. Mr Diss described his supervision of Ms McQuillan as "an ongoing battle": ts 36. The evidence of Mr Diss was that Ms McQuillan would constantly challenge her managers and supervisors and was very difficult and disruptive in the workplace. Mr Diss said that it took some time for Ms McQuillan to even agree to sign the Department's code of conduct; her attendance record was poor and he would often not know if Ms McQuillan was going to attend for work at all. She was regularly late. Ms McQuillan made numerous applications for leave when she had no entitlement to paid leave.

14 In relation to the jury duty issue, Mr Diss testified that the two dates in question were 27 February 2015 and 3 March 2015. A copy of Ms McQuillan's timesheet for the period 27 February 2015 to 26 March 2015 (exhibit R32) showed that Ms McQuillan claimed jury duty leave for these two days. The timesheet was signed by Ms McQuillan. In an email from Mr Diss to Ms McQuillan of 29 September 2015 (exhibit R33) he informed her that he had undertaken a review of her timesheets and leave application record. One item mentioned in the email was Ms McQuillan's claim that she was on jury duty on 27 February 2015 and 3 March 2015. Mr Diss requested Ms McQuillan provide him with a "Certificate of Attendance" from the Jury Services Section of the Sheriff's Office. Mr Diss said that his predecessor as Ms McQuillan's supervisor, Mr Dawson, had also sought proof from her that she had attended jury duty on Friday, 27 February 2015. None had been forthcoming. Mr Diss was following up on this.

15 Mr Diss testified that despite his request, Ms McQuillan did not furnish proof she had attended jury duty on this occasion. According to Mr Diss, a long time after this, Ms McQuillan sought to reverse the application for jury duty. Mr Diss also said that he provided relevant information to the investigator Mr Baskwell, for his investigation, in relation to Ms McQuillan's leave discrepancies as requested. Ms McQuillan maintained that for 27 February 2015, she was initially summoned for jury duty. She could not find a copy of the summons and no evidence to confirm she undertook jury duty was given to Mr Dawson. It seems that in a later response to the investigator, Ms McQuillan claimed that she was not summoned for jury duty on 27 February 2015, rather, she sought "witness leave" for this day. She had sought a violence restraining order against her former husband. Because of this, she considered she was entitled to leave. It was that matter that was being dealt with in court on 27 February 2015.

16 In her evidence, Ms McQuillan said that she did receive a summons for jury duty on 3 March 2015 which was dated 28 January 2015. She could not be sure when she received it. Her evidence was that she had moved from her then property where she was on the electoral roll, in about August 2012 and had mail redirected. Once she received the summons for jury duty on 3 March 2015, Ms McQuillan said that she applied for jury duty leave. She agreed that she probably applied for this leave on about 17 February 2015. By letter of 20 February 2015, from the Sheriff's Office, Ms McQuillan was informed that she was no longer required to attend for jury duty on 3 March 2015. Ms McQuillan maintained that she did not receive this letter, despite it bearing the same address as the summons, which was dated 28 January 2015, which she did receive. Ms McQuillan testified that she attended court on 3 March 2015 and was told that she was not required. She thought that because she had applied for jury duty leave, she could have the day off and did not go to work, despite not performing any jury duty.

17 As to the receipt of mail, Ms McQuillan testified that she had mail redirected. No evidence was produced to confirm this, apart from a sticker on a document tendered in evidence that referred to Ms McQuillan's son. Ms McQuillan suggested that despite this, Australia Post will use whatever mail redirection sticker they have on the day, irrespective of the name of the addressee. Ms McQuillan still maintained her denial of the receipt of the letter from the Sheriff's Office, cancelling the summons to jury duty on 3 March 2015.

18 In relation to these events, Ms McQuillan did not dispute that on or about 27 February 2015 she spoke to another employee of the Department, a Ms McKay, regarding "options for taking leave to deal with a private legal matter": ts 89. She also did not dispute that Ms McKay advised her that the only option in her circumstances, was to take unpaid leave. Ms McQuillan accepted that she did not go to work on either 27 February 2015 or 3 March 2015. She also accepted that she made a backdated jury duty application for 27 February 2015 on 23 April 2015. This was later cancelled on 7 January 2016. Ms McQuillan also agreed that despite not attending for jury duty on 3 March 2015, she never cancelled her jury duty leave request for this day. Ms McQuillan also maintained that even though she did not sit as a juror, she was still able to take these days as leave because "it was part of the award": ts 92.

19 Evidence of the Department's records in relation to Ms McQuillan making the jury duty leave application on 23 April 2015 and its subsequent cancellation on 7 January 2016 was from Ms Barrow, the Department's Manager Employee Benefits and Human Resource Systems. A copy of the relevant record was exhibit R43. Also, tendered as exhibit R42, was a copy of an email dated 26 February 2016 from Ms Barrow to the investigator Mr Baskwell, setting out various leave applications made by Ms McQuillan, when they were submitted and when they were approved. Ms Barrow also confirmed that no leave without pay applications from Ms McQuillan were on the Department's HR system for the period February and March 2015. As for the absence on 3 March 2015, Ms McQuillan did receive a summons for jury duty addressed to her. The subsequent letter of 20 February 2015 was sent to the same address as the summons.

20 We do not find Ms McQuillan's explanation in relation to the Australia Post redirection stickers as being credible. We find it difficult to accept that Australia Post would be cavalier with addressees of mail they are responsible to deliver. We consider it more likely that the letter was received as with the summons. Despite this however, on attending for jury duty on 3 March 2015, Ms McQuillan was told that she was no longer required. She did not go to work that day and took the day off. On 27 February 2015, she was informed by a colleague that the only option was to take leave without pay. Ms McQuillan was paid for this time as evidenced in her pay records. Plainly Ms McQuillan had no entitlement to be paid for jury duty when she did not sit as a juror. It defies common sense to think that one would be entitled to paid leave in those circumstances.

21 As to the absence on 27 February 2015 again, purportedly for jury duty leave, on that day Ms McQuillan had a personal legal matter to attend to, that being a violence restraining order application. It was clearly that matter that she attended court for on that day. Despite this, and in the context of the discussion with her work colleague prior to taking the day off on 27 February 2015 and being told the only option was leave without pay, Ms McQuillan made an application for jury duty leave on 23 April 2015.

22 On both occasions, Ms McQuillan took paid leave to which she was not entitled and she later attempted to explain away her conduct. We accept that she may have been somewhat confused in her changes of explanation to the investigator, for the absences. However, on both occasions, in particular on 27 February 2015, when no jury duty summons was produced and the real reason for Ms McQuillan's absence from work was to attend to a personal legal matter, in taking leave that she was plainly not entitled to Ms McQuillan was in breach of the Department's code of conduct and her contract of employment. Ms McQuillan knowingly took the benefit of paid leave to which she was not entitled. Also, Ms McQuillan failed to respond to Mr Diss' reasonable and lawful requests for her to substantiate her absences on both occasions. His approach to Ms McQuillan was proper and respectful. There was no evidence of intimidation or harassment. Mr Diss was simply doing his job.

Refusal to return mobile phone

23 Evidence as to this matter on behalf of the Department was primarily from Mr Wilde, the Acting General Manager Titles Compliance. At the material time, Mr Wilde had managerial responsibility for both Mr Diss and Ms McQuillan in 2015. In an overall sense, Mr Wilde, as with other witnesses for the Department, described Ms McQuillan as difficult to manage and an employee who did not take well to instructions from her supervisors and who could be obstructive.

24 When Ms McQuillan was in the position of Relieving Tenure Officer, she had the use of a mobile phone for work purposes. On Ms McQuillan's demotion to the Assistant Project Officer position in September 2015, she no longer had a mobile phone allocation as one was not required to perform her duties. On 29 October 2015, Mr Wilde sent an email to Ms McQuillan requesting that the mobile phone be returned. Mr Wilde said he received no response. As a result, the next day on 30 October 2015, Mr Wilde went to see Ms McQuillan and asked her to return the mobile phone. In the conversation, Ms McQuillan informed Mr Wilde that she had some personal information on the phone and this was not easy remove. In response, Mr Wilde informed her that if that was the case then the IT staff of the Department could help her. Mr Wilde requested that the mobile phone be returned on the following Monday. His evidence was that his tone was polite. Other staff were in the vicinity. They included Mr Diss and a Ms Melia.

25 Despite Mr Wilde's further request, the phone was not returned. On 5 November 2015, Mr Wilde again sent Ms McQuillan an email advising that as she had not responded to his prior requests to return the mobile phone, he would be taking steps the next day, Friday, 6 November, to have the phone disabled and have the service moved to a different SIM card to protect the Department's asset. As far as Mr Wilde was aware, the mobile phone was not returned to the Department by Ms McQuillan. It seemed on the evidence however, that on the urging of a friend, Ms McQuillan finally returned the mobile phone on 11 May 2017, some 18 months later.

26 Ms McQuillan did not deny the contentions put by the Department or the various failures to respond to Mr Wilde's requests for her to return the Department's property. However, Ms McQuillan did allege that on the occasion Mr Wilde spoke to her on 30 October 2015, she felt threatened. No report of this was made to the Department at the time. Mr Wilde said that he was respectful in his conversation with Ms McQuillan.

27 As mentioned, Mr Diss was present at the time of the exchange between Ms McQuillan and Mr Wilde on this occasion. He testified that he was aware that Ms McQuillan had a mobile phone that was not required for her position and despite repeated requests, she did not return it. Mr Diss said that at one point he did hear voices raised between both Ms McQuillan and Mr Wilde. Mr Wilde then walked away. Mr Diss also gave evidence that he saw Ms McQuillan speak to another employee Ms Melia, but he did not hear what was said. He did see Ms Melia raise her hands in the air and she "stormed off": ts 42. Mr Diss was later made aware that Ms Melia had then spoken to Mr Wilde in his office after this incident. We accept that Mr Wilde may have become frustrated in this exchange with Ms McQuillan.

28 In relation to this latter event, Mr Wilde recorded in an email to Ms Haasnoot of 30 October 2015 (exhibit R40), not only the continued failure of Ms McQuillan to return the mobile phone and her failure to respond to requests to do so, but also the interaction between her and Ms Melia referred to above. In the email, Mr Wilde recorded Ms Melia coming to see him and apologising for her outburst. Mr Wilde further recorded that Ms Melia was shaking and upset and she informed him that Ms McQuillan had tried to get her to agree that Mr Wilde had threatened her. Ms Melia requested to be moved to another location away from Ms McQuillan. When this was put to her, Ms McQuillan did not deny that she spoke to Ms Melia as contended. She did ask her to confirm that Mr Wilde had threatened her. Ms McQuillan also confirmed that Ms Melia was upset and later moved her work location away from Ms McQuillan.

29 We are satisfied that the Department has established its contentions in relation to this allegation, much of which is not disputed in any event. Whilst as we have said, we accept that Mr Wilde may have become somewhat frustrated in his dealings with Ms McQuillan, we are not satisfied of anything further than that. What this incident demonstrates however, is how Ms McQuillan, by her conduct and behaviour, turned what should have been a normal workplace interaction, over a relatively minor matter, into an entirely unnecessary and disruptive confrontation with not only her supervisor but also a co-worker. The conduct and attitude displayed by Ms McQuillan on this occasion, was an example of the overall description of Ms McQuillan in the workplace, by her supervisors and managers.

Failure to follow lawful and reasonable directions

30 The third and final allegation against Ms McQuillan related to an extensive history of her failing to follow directions from her supervisors to correct leave requests and timesheet errors and to explain numerous unauthorised absences from work. As a part of this allegation, it was specifically contended that Ms McQuillan failed to comply with directions by the then Director-General of the Department in October 2015, following the earlier disciplinary matters.

31 As we have already mentioned, Mr Diss, not long after he took over as Ms McQuillan's supervisor, performed an audit of her timesheets and leave records. The result of Mr Diss' audit was set out in two emails to Ms McQuillan. The first was dated 29 September 2015 (exhibit R33) and the second was dated 27 October 2015 (exhibit R34). Exhibit R33 records that from an analysis of Ms McQuillan's timesheets compared to the Department's HR management system, there were 21 occasions over the period 1 May 2015 to 4 September 2015, where Ms McQuillan was absent where no paid annual leave was available, despite repeated applications being made by her for annual leave. It also recorded 16 occasions between 9 March 2015 and 12 August 2015, where Ms McQuillan had been absent from work without authority as no leave applications were made and approved. In addition, exhibit R33 records three occasions where Ms McQuillan purported to take trade union training leave, without prior approval.

32 As to exhibit R33, Mr Diss testified that not only were Ms McQuillan's timesheets received regularly late, they contained numerous instances where she was absent from the workplace, while still being paid, without an appropriate leave approval in place. On the dates set out in the email of 29 September 2015, on some occasions Ms McQuillan was away from the workplace for the whole day or a half day, with no leave available to cover leave applications made by her. Many other occasions involved absences of shorter durations over some hours. Mr Diss understood that most, if not all, of the unauthorised absences, were not ultimately addressed by Ms McQuillan.

33 In relation to trade union training leave, Mr Diss said that he understood that under the relevant award, an employee had to give four weeks' notice to access such leave. This did not occur. Also, Mr Diss testified that he asked Ms McQuillan to provide some proof that she had been on trade union training leave on the dates alleged. Mr Diss said that despite this request, no evidence was provided by Ms McQuillan that she attended trade union training on these days. Whilst the request for trade union training leave for 28 July 2015 was subsequently cancelled by Ms McQuillan, this was not the case for the leave claimed on 18 August 2015 and 29 July 2015. It was Ms McQuillan's evidence that she simply could not remember what trade union training she undertook and could provide no evidence to support it. She did say however, that she may have been to the Union to discuss the prior disciplinary action.

34 In relation to exhibit R34 regarding leave applications, it was Mr Diss' evidence that again, no response was received from Ms McQuillan despite his request to rectify the leave requests and to apply for leave without pay. Also, in relation to this matter, reference was made in exhibit R34, for Ms McQuillan to contact the Department's HR staff to calculate repayments required to be made by her for the time she was absent from work when she had no paid leave available. There was no evidence that this occurred either.

35 Additionally, Mr Diss said that he discovered that Ms McQuillan was absent without approval on 20 November 2015 and 25 November 2015, to attend internal training courses. He said that on 27 November 2015, he raised these matters with Ms McQuillan in an email and requested an explanation. A copy of the email was exhibit R35. Mr Diss was concerned that on these occasions, no one knew where Ms McQuillan was. He also said that although the courses finished at 2:45pm, Ms McQuillan's normal finish time was 3:30pm and no one knew where she had gone after the completion of the course. Mr Diss also noticed that Ms McQuillan was attending a funeral and a "domestic violence march" on that same day, 27 November 2015 and no prior approval had been sought. Mr Diss' evidence also was that when he tried to speak to Ms McQuillan about these various matters, she either avoided him completely, or when he did speak with her, the responses he received were unclear and confusing.

36 As to the various requests to Ms McQuillan to correct errors and omissions and to apply for leave without pay for absences from the workplace, Ms McQuillan thought she may have responded to some of them. Ms McQuillan also accepted that she frequently absented herself from work without telling Mr Diss or Mr Wilde and she often came to work late. She said that she was not well at the time.

37 From the evidence in relation to these various matters, we are satisfied that the allegations by the Department are made out. It is the case that Ms McQuillan had numerous and repeated absences from work without approval or explanation. Reasonable and legitimate requests for her to explain and rectify records were either ignored or partially but inadequately responded to. It was almost as if Ms McQuillan came and went from the workplace as she pleased and did not consider that she had to account for her presence or absence to her supervisors. It seemed Ms McQuillan felt aggrieved by her demotion in September 2015, and may have harboured ill feeling towards her employer as a result. However, as part of the previous disciplinary process, she accepted the error of her ways and undertook to the Director-General to be compliant with her obligations in the future. An employee has obligations under their contract of employment to their employer. Whilst we also accept that towards the end of 2015 Ms McQuillan may have started to become unwell as she said, it was not open to her to largely ignore Mr Diss and Mr Wilde. She was their subordinate and was required, like all other employees, to be cooperative with them in their management of the workplace.

Procedural fairness

38 One further matter requires consideration. Due to concerns by the Department about Ms McQuillan's state of mental health, on 15 March 2016 she was referred for a medical assessment by Dr Ozanne, a consultant occupational physician. The assessment took place on 18 March 2016. Dr Ozanne assessed Ms McQuillan as not fit for work, nor to participate further in the disciplinary process. Ms McQuillan proceeded on leave. She was assessed on two further occasions in 2016. Ms McQuillan was finally assessed as fit to return to work on a graduated return to work program in January 2017. In his report of 30 January 2017, Dr Ozanne also concluded that Ms McQuillan was fit to resume participation in the disciplinary process.

39 In a letter of 3 February 2017, Ms McQuillan was informed of her return to work on a graduated return to work programme. The letter also informed her that the disciplinary process, which had previously been suspended in March 2016, would resume. Ms McQuillan gradually increased her work hours over some weeks. In relation to the disciplinary process, as earlier mentioned, Ms McQuillan was contacted by Mr Baskwell. She was invited to but choose not to participate any further.

40 Ms McQuillan complained that at the same time as the return to work process was underway, the disciplinary process was also resuming. She seemed to conflate the two processes, which were clearly separate and distinct. These matters were touched on in the evidence of Mr Bullen, the Department's General Manager Resource Access who was previously the General Manager of the Tenure and Native Title Branch, responsible for Ms McQuillan's then area. Mr Bullen referred to Ms McQuillan as raising the disciplinary action in meetings to discuss her return to work progress. He said that he explained to her the issues were separate and would proceed independent of one another.

41 I am not persuaded that there was any unfairness in the process adopted by the Department. Ms McQuillan was given very considerable time away from work to recover her health. The disciplinary process was suspended and not resumed, until she was assessed on medical evidence, as being fit to return to work and further participate. The return to work and disciplinary processes were quite separate, both in point of time and purpose. Ms McQuillan was given every reasonable opportunity to take part in the disciplinary process. She was provided all relevant material and a copy of the Investigation Report. We do not consider that the Department's approach in these matters was other than procedurally fair.

Conclusions

42 Having regard to the evidence before the Appeal Board, we are satisfied that the Department has established the disciplinary allegations against Ms McQuillan. The disciplinary matter the subject of this decision was not the first involving Ms McQuillan. In fact, it was the third set of disciplinary allegations in the space of two years or so. We are not persuaded that Ms McQuillan has established that the termination of her employment was such that the Appeal Board should interfere and adjust the Department's decision.

43 Accordingly, the appeal must be dismissed.

2018 WAIRC 00210

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 31 JULY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MISS DEIRDRE MCQUILLAN
	APPELLANT
	-v-
	THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR G LEE - BOARD MEMBER
	MS T WILLIAMS - BOARD MEMBER
DATE	THURSDAY, 29 MARCH 2018
FILE NO	PSAB 15 OF 2017
CITATION NO.	2018 WAIRC 00210

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Mr E Fearis of counsel

Order

HAVING heard the appellant on her own behalf and Mr E Fearis of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal board.

EMPLOYMENT DISPUTE RESOLUTION ACT 2008—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008.

Application Number	Award, order or industrial agreement varied	Parties	Commissioner	Matter	Dates	Result
APPL 60/2016	N/A	N/A	Matthews C	Request for mediation	16/11/2016	Concluded
APPL 63/2017	N/A	N/A	Matthews C	Request for mediation	09/06/2017	Concluded
APPL 22/2017	N/A	N/A	Matthews C	Request for mediation	N/A	Concluded
APPL 21/2017	N/A	N/A	Matthews C	Request for mediation	N/A	Concluded
APPL 64/2016	N/A	N/A	Emmanuel C	Request for mediation	N/A	Concluded