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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Industrial Magistrate—

2017 WAIRC 00983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NAM THANH NGUYEN
	APPELLANT
	-and-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 5 DECEMBER 2017
FILE NO/S	FBA 15 OF 2017
CITATION NO.	2017 WAIRC 00983

Result	Order issued

Order

WHEREAS the appellant informed the Full Bench by email dated 29 November 2017 that the appellant requires an extension of time until close of business on Tuesday, 5 December 2017 to file the appeal books;

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

The appellant lodge and serve the appeal books in FBA 15 of 2017 by close of business on Tuesday, 5 December 2017.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2018 WAIRC 00285

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NAM THANH NGUYEN
	APPELLANT
	-and-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER T EMMANUEL
DATE	MONDAY, 7 MAY 2018
FILE NO/S	FBA 15 OF 2017
CITATION NO.	2018 WAIRC 00285

Result Appeal discontinued

Order

WHEREAS on 7 November 2017, the appellant filed a notice of appeal to the Full Bench; and

WHEREAS on 1 May 2018, the appellant informed the Commission by email that he wishes to discontinue the appeal;

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

THAT the appeal be and is hereby discontinued by leave.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

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

2018 WAIRC 00296

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	
DATE	THURSDAY, 10 MAY 2018
FILE NO/S	APPL 25 OF 2018
CITATION NO.	2018 WAIRC 00296

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 22 November 2017;

(b) on the Commission's website on 1 November 2017;

(c) to The Shop, Distributive and Allied Employees' Association of Western Australia on 1 November 2017;

(d) to Elders Limited on 9 March 2018;

(e) to Goodman Fielder Consumer Foods Pty Ltd trading as Goodman Fielder on 16 March 2018; and

(f) to Inghams Enterprises Pty Limited on 9 April 2018

inviting any person with a sufficient interest to object to the cancellation of the agreements in the Schedule. The other employers were not contacted because they appeared to be no longer operating.

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 10 May 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,
[L.S.] Chief Commissioner.

SCHEDULE

1. Arthur Yates and Co Limited Canning Vale Western Australia Site Agreement, AG 86 of 1994
2. Atkins Carlyle Ltd (Belmont Warehouses) Enterprise Agreement 1995, AG 89 of 1995
3. Australian Wool Handlers (Albany) Enterprise Agreement, 2000, AG 240 of 2000
4. Australian Wool Handlers (Spearwood) Enterprise Agreement, 1998, AG 145 of 2000
5. Broadway Fresh and SDA Agreement 2003, AG 230 of 2003
6. Bunnings Forest Products Pty Ltd Storepersons Enterprise Agreement 1996, AG 300 of 1996
7. Bunnings (Non Warehouse Stores)/SDA Agreement 2002, AG 10 of 2003
8. City Gems Perth and SDA Agreement 2003, AG 229 of 2003
9. Coles Distribution Centre Enterprise Agreement 1994, No. AG 38 of 1995
10. Coles Variety City Store Rostering Agreement 1993, AG 68 of 1993
11. Coles Myer Logistics Pty. Ltd. Myer Distribution Centre Carousel Road Cannington Site Agreement 1999, AG 63 of 1999
12. Dewsons Cooloongup and SDA Agreement 2004, AG 103 of 2004
13. Dyson's Packaging Pty Ltd Enterprise Agreement 1995, No. AG 212 of 1995
14. Elders Limited (Spearwood Wool Store) Enterprise Agreement 1995, No. AG 235 of 1995
15. Elders Limited (Spearwood Wool Store) Enterprise Agreement 1996, No. AG 332 of 1996
16. FAL and SDA Enterprise Agreement 1994, AG 178 of 1994
17. Feeding Frenzy Perth and SDA Agreement 2003, AG 231 of 2003
18. Fish Feast Canning Vale SDA Agreement 2003, AG 57 of 2004
19. Fish Feast Gosnells SDA Agreement 2002, AG 14 of 2003
20. Fish Feast Greenmount SDA Agreement 2002, AG 12 of 2003
21. Fish Feast Halls Head SDA Agreement 2003, AG 51 of 2004
22. Fish Feast Joondalup SDA Agreement 2002, AG 13 of 2003
23. Fish Feast Kardinya SDA Agreement 2002, AG 11 of 2003
24. Fish Feast Kelmscott SDA Agreement 2002, AG 17 of 2003
25. Fish Feast Lathlain SDA Agreement 2002, AG 15 of 2003
26. Fish Feast Malaga SDA Agreement 2003, AG 56 of 2004
27. Fish Feast Maylands SDA Agreement 2002, AG 16 of 2003
28. Goodman Fielder Consumer Foods (Canningvale) Enterprise Agreement 2004/2005, AG 85 of 2004
29. Gordon & Gotch Limited Enterprise Bargaining Agreement 1996, AG 35 of 1996
30. Gordon & Gotch Limited Enterprise Bargaining Agreement 1997, No. AG 43 of 1997.
31. Inghams Enterprise Storemen's Agreement 1994, AG 22 of 1994
32. Inghams Enterprises Pty Ltd Distribution Enterprise Bargaining Agreement 2000, AG 268 of 2000
33. Inghams Enterprises (Telesales) Enterprise Bargaining Agreement 2003, AG 90 of 2003
34. Kebab Company – Joondalup Perth and SDA Agreement 2003, AG 232 of 2003

INDUSTRIAL MAGISTRATE—Claims before—

2018 WAIRC 00265

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	
CORAM	**:**	INDUSTRIAL MAGISTRATE M FLYNN
HEARD	**:**	WEDNESDAY, 1 NOVEMBER 2017, THURSDAY, 2 NOVEMBER 2017
DELIVERED	**:**	THURSDAY, 26 APRIL 2018
FILE NO.	**:**	M 44 OF 2017
BETWEEN	**:**	VANESSA EDEL D'CRUZ, DEPARTMENT OF COMMERCE

CLAIMANT

AND

SHAUN HOGAN

FIRST RESPONDENT

TERRI HOGAN

SECOND RESPONDENT

CatchWords	**:**	Alleged breach of *Building Trades (Construction) Award 1987* – Clause 41 rates of pay – Clause 13 paid rostered days off – arrangement to defer paid rostered day off - Clause 22 annual leave – Clause 15 overtime – Employer sets off alleged cash payment to employee against award entitlement – Employer alleges employee wrongfully absent and deducts amounts from award entitlements
Legislation	**:**	*Vocational Education and Training Act 1996* (WA) *Industrial Relations Act 1979* (WA) *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) *Industrial Relations (General) Regulations 2015*
Instrument	**:**	*Building Trades (Construction) Award 1987*
Result	**:**	Judgement for the Claimant
Case(s) referred to in reasons	**:**	***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 ***Palace Tandoori Indian Restaurant Pty Ltd & Anor*** [2012] FMCA 258 ***Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate*** [2015] FCAFC 99 ***James Turner Roofing Pty Ltd v Peters*** [2003] WASCA 28 ***Young v Queensland Trustees Ltd*** [1956] HCA 51 ***Barber v Carrier Air Conditioning Pty Ltd*** [2004] VSC 475
Representation:		
Claimant	**:**	Mr D. Anderson as instructed by the State Solicitor of Western Australia
First Respondent	**:**	No appearance
Second Respondent	**:**	In person

REASONS FOR DECISION

1 Mr Martin Hlavaty started work on 14 August 2012 as an apprentice plumber and gas fitter. He was employed by Mr Shaun Hogan (the First Respondent) and Mrs Terri Hogan (the Second Respondent) (together, 'the Respondents') in a business trading as 'Parkerville Plumbing and Gas Fitting'. His employment was subject to the *Vocational Education and Training Act 1996* (WA) and the *Building Trades (Construction) Award 1987* (the Award). On 21 August 2014 Mr Hlavaty informed Mr Hogan that he wished to resign with effect as soon as practicable. On 22 August 2014, he wrote to the Respondents confirming his resignation and stating his intention to finish work on 25 August 2014 which, in fact, occurred.

2 Ms Vanessa D'Cruz (the Claimant) is an industrial inspector under the *Industrial Relations Act 1979* (WA) (IR Act). An industrial inspector may apply to this court for the enforcement of a provision of an award where it is alleged that an employer has contravened or failed to comply with the award: s 83(1) IR Act. In such proceedings the court may, if the contravention or failure to comply is proved, issue a caution or impose a penalty or dismiss the application: s 83(4) IR Act. Further, if in such proceedings it appears to the court that an employee has not been paid an amount which the employee was entitled under an award, the court must order that the employer pay the employee the amount which has been underpaid: s 83A(1) IR Act.

3 Ms D'Cruz alleges that, in the employment of Mr Hlavaty, the Respondents have failed to comply with the following provisions of the Award:

- Clause 41 on rates of pay; underpayment alleged to be $1,126.51;

- Clause 13 on paid rostered days off; underpayment alleged to be $1,276.89;
- Clause 22 on annual leave; underpayment alleged to be $2,397.66;
- Clause 15 on overtime; underpayment alleged to be $1,713.69.

It is convenient to identify the issues that arise for determination in this case by reference to each of the above clauses of the Award. This is undertaken below at paragraphs 5 – 15.

4 The court is not bound by any rules of evidence or procedure and may inform itself on any matter and in any manner as it thinks fit: *Industrial Magistrates Courts (General Jurisdiction) Regulations* 2005, Reg 35(4). Although the court is not bound by rules of evidence, it remains necessary for the Claimant to prove the claims made on the balance of probabilities and the court will only act on evidence having rational probative force: ***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 [7]. The First Respondent did not appear at the trial. There is evidence (exhibit 1) that he has suffered from a serious medical condition for the past three years and that the condition prevents him from participating in the trial of these proceedings. He did not seek an adjournment of the trial and the Claimant did not seek judgment in default of his appearance. His illness did not prevent him from preparing a substantial witness statement that was signed by him on 1 November 2017 (exhibit 8). The Claimant's case and evidence against him and the Second Respondent are identical. The expedient course has been to consider the case against the First Respondent on the basis of all of the evidence adduced at the trial, including his witness statement. Where there is a dispute about a significant fact, I have noted that the weight to be accorded to the witness statement of the First Respondent must reflect the fact that he was unavailable for cross-examination at the trial.

Clause 41 on rates of pay: was there a cash payment of the tool allowance?

5 The Claimant alleges and the Respondents admit that, compared to the weekly wage provided for in cl 8(2) and cl 41(1) of the Award and the weekly industry and tool allowance provided for in cl 8(3), (6) and cl 41(1)(d) of the Award, there was an underpayment to Mr Hlavaty in each of 100 weeks between 14 August 2012 and 16 August 2014. The *admitted* contravention reflected the fact that the Respondents:

- In the period between 14 August 2012 and 6 July 2013, did not make a *weekly* payment of a tool allowance in the amount of $25.10 as required by cl 8(6) of the Award ($1,079.30); and
- Made arithmetic errors when converting the weekly rates provided by the Award to an hourly rate and when 'rounding'.

The Respondents case in answer to this part of the claim is to admit a failure to comply with cl 41 in each of 100 weeks between 14 August 2012 and 16 August 2014 but to allege that a substantial portion of the resulting underpayment (being the weekly tool allowance payable from August 2012 – July 2013) was remedied by a cash payment to Mr Hlavaty of $1,080 on 23 September 2013. Mr Hlavaty denies the offer or receipt of any such cash payment. The issue for me to determine, relevant to my determination on whether there is an outstanding underpayment to Mr Hlavaty and relevant also to the issue of any quantum of penalty is whether the payment of cash alleged by the Respondents was made ('Issue 1'). For the reasons set out below (at paragraph 16 and following), I am *not* satisfied of any cash payment having been made to Mr Hlavaty. *Orders will be made reflecting my finding of the contravention of clause 41 of the Award in each of 100 weeks resulting in an underpayment to Mr Hlavaty of $1,126.51.*

Clause 13 on paid rostered days off: was there a failure by the Respondents to comply and; if so, what amount has been underpaid?

6 Clause 13(1) of the Award provides for a 38 ordinary hour working week to be worked in a 20 day, four week cycle. Each 20 day cycle comprised 19 days of eight hours work between 7.00 am and 6.00 pm with 24 minutes of each day accruing as an entitlement to take the fourth Monday in each cycle as a paid day off. As a result, over the *whole* period of his employment, Mr Hlavaty accrued an entitlement to 192 hours to be taken as paid days off on each fourth Monday. Early in his period of employment, Mr Hlavaty and the Respondents orally agreed that Mr Hlavaty's entitlement to a paid rostered day off could be deferred from the date of entitlement (each fourth Monday per the Award), to be taken on a future date that was mutually convenient to Mr Hlavaty and the Respondents ('the Deferred Rostered Day Off Arrangement').

7 The Claimant alleges that as a result of the Deferred Rostered Day Off Arrangement, Mr Hlavaty had deferred and not yet taken an accrued entitlement to 77.2 hours as paid day(s) off when, on 25 August 2014, his employment ended. The Claimant alleges a contravention of cl 13(1) of the Award for each and every fourth Monday which Mr Hlavaty did not take as a paid day off and calculates an underpayment of $1,276.89 being 77.2 hours untaken as a paid day off at the ordinary rate applicable as at 25 August 2014 ($16.54 per hour).

8 The Respondents case is to identify, primarily by reference to the work diaries of the First Respondent, 114 hours (i.e. 15 days at 7.6 hrs per day) which are alleged to have been taken by Mr Hlavaty as paid rostered days off pursuant to the Deferred Rostered Day Off Arrangement and which have not been brought to account by the Claimant. The Respondents contend that, when these 114 hours is brought to account, they are a complete answer to the Claimant's allegation of a 77.2 hour deficiency.

9 The issue for me to determine (relevant to a calculation of Mr Hlavaty 's entitlements), is how many paid rostered days off were taken and (relevant to any penalty for contravention), whether the Deferred Rostered Day Off Arrangement resulted in any contravention of clause 13 ('Issue 2'). For the reasons set out below at paragraph 24 and following, I conclude that, as a result of there being no agreement in writing for the taking of 'another alternative day in the current or next four week cycle', the Deferred Rostered Day Off Arrangement resulted in a contravention of clause 13 of the Award. I also conclude that the underpayment to Mr Hlavaty arising from the contravention of cl 13 of the Award is $1,276.89. *Orders will be made reflecting my finding of the contravention of clause 13 of the Award and an underpayment to Mr Hlavaty of $1,276.89.*

Clause 22 on annual leave: was there a contravention by the Respondents in making certain deductions from the accrued entitlement of Mr Hlavaty and, if so, what amount has been underpaid?

10 It is accepted by the Second Respondent that, between 24 December 2012 and 11 January 2014 and as a result of factors including converting weekly rates to hourly rates and not applying an annual leave loading, the Respondents made underpayments to Mr Hlavaty with respect to annual leave that was taken during this period.[1] In the result there was a contravention of cl 22(7) on six occasions and a resulting total underpayment of $193.92.[2] It is also accepted by the Second Respondent that, at the end of his employment Mr Hlavaty, had accrued (untaken) annual leave that equated to an entitlement, pursuant to cl 22(4) of the Award, to the sum of $2,203.74 and that this amount was not paid to him.[3] While the Respondents accept the accrued entitlement to annual leave, they seek to deduct from that entitlement the following items:

- An amount of $2,214.46 which was said to be a conditional payment made by the Respondents to Mr Hlavaty to reimburse TAFE tuition fees paid by him. The Respondents submit that Mr Hlavaty was required to refund the payment because of the non-fulfilment of a relevant condition, namely, completion of his *whole* apprenticeship as an employee of the Respondents. The Second Respondent referred to the reimbursement as a 'Completion Incentive Payment'. Mr Hlavaty agreed that the Respondents paid him $2,214.46 to reimburse TAFE tuition fees paid by him. However, Mr Hlavaty denies that the payment was conditional on him remaining an employee of the Respondents for the duration of his apprenticeship. It will be necessary to determine whether the payment was 'conditional' as alleged by the Respondents and, if so, whether the Respondents are entitled to deduct it from Mr Hlavaty's accrued annual leave entitlement ('Issue 3').
- Amounts paid to Mr Hlavaty for attending TAFE or work on specified dates when, it is alleged by the Respondents, he did not attend TAFE or work and was inexplicably absent from those places. Mr Hlavaty asserts that he attended TAFE as required and was available for work as required. It will be necessary to determine whether the Respondent's have proven those allegations of non-attendance at TAFE or work ('Issue 4').

For the reasons set out below at paragraph 35 (and following), I am *not* satisfied that reimbursement of TAFE tuition fees by the Respondents was a conditional payment and I am not satisfied that Mr Hlavaty was inexplicably absent from TAFE or work on any of the days alleged by the Respondents. *Orders will be made reflecting my finding of the contravention of clause 22(7) of the Award in each of six weeks and of cl 22(4) of the Award at the end of his employment resulting in underpayments to Mr Hlavaty of $193.92 and $2,203.74 respectively.*

Clause 15 on overtime: was there a failure by the Respondents to comply and, if so, what amount has been underpaid?

11 Clause 15(1) of the Award provides that all time worked in excess of 'ordinary time of work' is paid at the rate of 1.5 times ordinary rates for the first two hours and double time thereafter. 'Ordinary time of work' is calculated in accordance with cl 13(1) of the Award and results in overtime being payable for each hour in excess of eight hours each day *and* 152 hours over the first 19 days of a 20 day work cycle. The Claimant's allegation of an underpayment of a total of $1,713.69 in overtime is the sum of underpayments in two categories on 82 separate pay dates.

12 First, as a result of the Deferred Rostered Day Off Arrangement, when Mr Hlavaty worked or attended TAFE on the twentieth day of the 20 day work cycle, the Claimant alleges that he became entitled to overtime in accordance with cl 15 for that whole day and this was not paid. The result was an underpayment of overtime in the sum of $1,393.33 corresponding to the following 15 pay dates: 5 October 2012 (9.5 hours); 30 November 2012 (7.6 hours); 25 January 2013 (11 hours); 22 March 2013 (7.6 hours); 17 May 2013 (10.5 hours); 14 June 2013 (eight hours); 6 September 2013 (10 hours); 4 October 2013 (nine hours); 29 November 2013 (7.6 hours); 24 January 2014 (8.5 hours); 21 March 2014 (nine hours); 16 May 2014 (11 hours); 13 June 2014 (eight hours); 11 July 2014 (9.5 hours); 8 August 2014 (10.25 hours). As a result of my conclusion that the Respondents have failed to satisfy me that Mr Hlavaty took a rostered day off (RDO) on any of these days (see below at paragraph 31), the Claimant must succeed on this aspect of the claim.

13 The second category arises from when Mr Hlavaty worked in excess of eight hours per day and he became entitled to overtime for those hours in accordance with cl 15 of the Award. This was not calculated correctly by the Respondents on various dates between 14 August 2012 and 25 August 2014. The result was an underpayment of overtime in the sum of $320.36. These underpayments occurred primarily as a result of a combination of one or more of: a failure to include a tool allowance in calculations; incorrectly converting a weekly rate payable under the Award to an hourly rate; failing to account for a change in Award rates. The dates of the underpayments were: 28 pay dates between 14 August 2012 and 6 July 2013; six pay dates between 7 July 2013 to 13 August 2013; 30 pay dates between 14 August 2013 to 5 July 2014; two pay dates between 6 July 2014 and 13 August 2014 and one pay date between 14 - 25 August 2014. I have already noted that the Second Respondent accepts that errors were made by the Respondents with respect to the tool allowance and conversion of weekly to hourly rates.

14 I am satisfied that the Claimant must succeed on the second category ($320.36). The Claimant's calculations in the previous two paragraphs, accepted by me, are based upon: hours worked by Mr Hlavaty as revealed by timesheets supplied by the Respondents to the Claimant; amounts paid by the Respondents to Mr Hlavaty as revealed by payslips supplied by the Respondents to the Claimant or, where an anomaly appears, on the basis of bank records of Mr Hlavaty; and setting off (i.e. deducting) any overpayments made by the Respondents to Mr Hlavaty during the same pay period (e.g. the period ending 6 October 2012).

15 I am satisfied that the Respondents have contravened cl 15 of the Award in each of 82 weeks and the resulting underpayment to Mr Hlavaty was $1,713.69. *Orders will be made reflecting my finding of the contravention of cl 15 of the Award in each of 82 weeks resulting in an underpayment to Mr Hlavaty of $1,713.69.*

Issue 1: Was there a cash payment of the tool allowance (clause 41)?

16 I noted in the introduction to these reasons that the Respondents admit to not properly accounting for the weekly tool allowance provided by the Award ($25.10 per week) until August 2013 and also admit arithmetic errors when converting the

weekly rate provided by the Award to an hourly rate for the purposes of calculating pay to Mr Hlavaty. I also noted that the Respondents' case in answer to this claim is to allege that the underpayment of the tool allowance was remedied at the earliest reasonable opportunity by a cash payment to Mr Hlavaty of $1,080 on 23 September 2013.

17 The Second Respondent's evidence on this issue was to the following effect:[4]

> *[W]hen I'd finished the audit … on 14 August [2013], I thought, 'Gee, … the second year rate is a lot higher than the first year rate'. And I initially thought it was to do with the change in the tax rate because there'd been a reduction in tax. But I realised, when I checked … the first year rate, and I realised that … incorporating the $25.10 tool allowance into the hourly rate, when I'd set up payroll .. there'd been a miscalculation, it hadn't actually gone into the hourly rate. So, what I realised was that Martin, for all of first year, had not been receiving tool allowance. I spoke with Shaun about that, that evening, and let him know and we felt, you know, we felt we wanted to rectify it immediately. And Shaun suggested that we give him, offer cash to Martin. … Shaun said, 'Well, look, we'll offer Martin cash', which is what we did. So on the Monday morning, I presented Martin with all of the payslips with the new tax being accounted for. And Shaun - well, I let I him know what happened about the tool allowance and we offered him cash and he accepted it. … I didn't get a receipt … …*
> *[[H]ow much was paid?] $1,080.*
> *[And who was present when it was paid?] Shaun, Martin and myself.*
> *[And where did this take place?] This took place at 255 Iron Road in Stoneville.*
> *Is there anything else that you wanted to say about that? Um, oh, the calculation was based on, um - I think I'd calculated it out at - from memory, it was 44 weeks, um, or maybe more. And then I - I did a rough calculation on reduction of tax, what that would be, um, and I worked out that it was around about $1,080. …*

18 The witness statement of the First Respondent records that he recalled talking with Mr Hlavaty on a Monday in August 2013 when Mr Hlavaty accepted a $1,080 cash payment on account of an unpaid tool allowance.[5]

19 Mr Hlavaty's evidence on this issue was to the effect that he did not receive a cash payment of $1,080 on 23 September 2013 or, indeed, *any* cash payment on *any* date from the Respondents. He stated that the only payments to him by the Respondents were by way of electronic transfer to his bank account. He stated that the only cash transaction between himself and the Respondents was an occasion when he made a cash payment to the Respondents of $900 being a refund of an overpayment to him.[6]

20 I note that if there was a cash payment on 23 September 2013, the Respondents have failed to adduce evidence of compliance with the obligations upon them imposed by cl 28 of the Award to 'keep a record (electronic or mechanical), for each employee, from which can be readily ascertained the *specific allowances paid* each pay week (my emphasis); and cl 34(5) of the Award whereby any allowance paid in cash must be in an envelope or accompanied by a statement containing the proscribed details (date of payment, period covered by the payment, amount of *allowances* paid etc.). The importance of an employer complying with legal obligations to maintain records of payments to employees has been the subject of relevant comment by Reithmuller FM (albeit in a different statutory context) in ***Palace Tandoori Indian Restaurant Pty Ltd & Anor*** [2012] FMCA 258:

> *Whilst the record keeping obligation with respect to pay slips only appears in the Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is calculated and therefore easily obtain advice. Pay slips provide the most practical check on false record keeping and underpayments, and allow for genuine mistakes or misunderstandings to quickly be identified. Without proper pay slips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated [67].*

21 I also note that the work diary of the First Respondent for 23 September 2013 does not contain a reference to a cash payment to Mr Hlavaty.

22 The onus is upon the Respondents to prove the discharge of the Award obligation by way of a cash payment: ***Young v Queensland Trustees Ltd*** [1956] HCA 51; (1956) 99 CLR 560 at 569; ***Barber v Carrier Air Conditioning Pty Ltd*** [2004] VSC 475. The Second Respondent and Mr Hlavaty each gave confident, plausible evidence supporting their respective (contradictory) accounts concerning the alleged cash payment. The First Respondent was not available for cross-examination. There is no reason to prefer the account of the Respondents over the account of Mr Hlavaty, not least because the Respondents have not adduced any documentation in support of their account. The Respondents have failed to satisfy me that it is more probable than not that the cash payment was made.

23 There will be an order that the Respondents have contravened clause 41 of the Award in each of 100 weeks. There will also be an order that the Respondents pay to Mr Hlavaty the sum of $1,126.51 in respect of that contravention.

Issue 2: Was there a failure to comply with clause 38 on paid rostered days off and, if so, what amount has been underpaid?

24 I noted in the introduction to these reasons that: Mr Hlavaty accrued an entitlement to 192 hours to be taken as paid days off on each fourth Monday; early in his period of employment, Mr Hlavaty and the Respondents entered the Deferred Rostered Day Arrangement;[7] and the Claimant alleges that Mr Hlavaty had deferred and not yet taken an accrued entitlement to 77.2 hours when his employment ended on 25 August 2014.

25 The Respondents' case is that, in alleging a 77.2 hour deficiency in Mr Hlavaty's paid rostered day off entitlement, the Claimant has failed to account for the following 15 days (114 hours) said to have been taken by Mr Hlavaty as a paid day off pursuant to the Deferred Rostered Day Off Arrangement and evidenced by diary entries (exhibit 10) made by the First Respondent ('the 15 Extra RDO Days'):

- Wednesday 28 September 2012 (work diary states, 'R.D.O');
- Tuesday 16 October 2012 (work diary states, 'R.D.O');

- Monday 5 November 2012 (work diary states, 'R.D.O');
- Tuesday 13 November 2012 (no relevant entry. A yellow 'post-it' note states, 'No Show TAFE');
- Monday 11 February 2013 (work diary states, 'R.D.O');
- Thursday 7 March 2013 (work diary states, 'R.D.O');
- Thursday 28 June 2013 (work diary states, 'Martin Day Off' and 'R.D.O');
- Friday 16 August 2013 (work diary states, 'R.D.O');
- Monday 4 November 2013 (work diary states, 'R.D.O');
- Monday 16 December 2013 (work diary states, 'R.D.O');
- Monday 23 December 2013 (work diary states, 'R.D.O');
- Tuesday 24 December 2013 (work diary states, 'R.D.O' and 'Martin Work?');
- Tuesday 28 January 2014 (work diary states, 'R.D.O');
- Monday 24 February 2014 (work diary states, 'R.D.O'); and
- Monday 31 March 2014 (work diary states, 'R.D.O?' A yellow 'post-it' note states, 'Marked Sick on T – Sheet').

26 13 November 2012 and 16 December 2013. The First Respondent records in his witness statement[8] that 13 November 2012 and 16 December 2013 were included among the 15 Extra RDO Days as a result of the Respondents' discovery, *after* the Claimant commenced these proceedings, of unexplained TAFE absences by Mr Hlavaty on those dates. The Respondents' determined to 'allocate' a paid rostered day off to those dates. It is unclear to me whether the diary entry of 'R.D.O' for those dates was made before or after the commencement of these proceedings. The significance of alleged unexcused TAFE absences will be considered below at paragraph [40]. It is not appropriate to consider those dates in calculations for the purpose of the Claimant's allegation of a contravention of cl 13 of the Award on paid rostered days off.

27 The 15 Extra RDO Days were not accounted for by the Claimant because the payslips supplied by the Respondents to the Claimant, *before* the Claimant commenced proceedings, did *not* refer to a paid rostered day off for any of those dates and timesheets relevant to those dates were either not supplied to the Claimant at all (28 September 2012, 5 November 2012, 13 November 2012, 4 November 2013, 16 December 2013, 23 December 2013, 24 December 2013, and 20 August 2014) or did *not* refer to a paid rostered day off. If the dates included in the list of the 15 Extra RDO Days were in fact taken as paid rostered days off, the Respondents have failed to produce records of that fact in the form which is required of: s 49D of the IR Act (employer must ensure details are recorded of all leave taken by the employee); Regulation 4 of the *Industrial Relations (General) Regulations 2015* (employer must make entries for each pay period in the form originally recorded and is not to alter the record unless the alteration is annotated to identify the nature and date of the alteration); and the following clauses of the Award: cl 28 (time records) and cl 34 (pay packet details). The diary entries do not satisfy the record keeping obligations imposed by statute and the Award.

28 The First Respondent records that for the first six weeks of Mr Hlavaty's employment, he checked the time sheets of Mr Hlavaty and noted that they were correct. [9] Subsequently, the Respondents' claim that: (i) Mr Hlavaty did *not* record on his time sheet each paid rostered day off that was taken by him; (ii) they did *not* record on Mr Hlavaty's payslip each paid rostered day off that was taken by him. The First Respondent recorded that he had a practice of completing, in advance, a diary entry showing every fourth Monday (or subsequent day after a public holiday 'Monday') as 'RDO' for 'all apprentices I employ'. These dates were taken as paid rostered days off unless changed by agreement and he changed his diary to reflect the agreement. The First Respondent recalls the circumstances of agreed changes that resulted in paid rostered days off being taken by Mr Hlavaty on the following dates: 28 September 2012 (short notice to allow quotation to be done by Mr Hogan); 11 October 2012 (son's wedding); three days being 28 June 2013, 1 July 2013, and 2 July 2013 (Melbourne trip); three days being 10 October 2013, 11 October 2013 and 21 October 2013 (Thailand trip).

29 Mr Hlavaty records that he did not maintain his own personal record of days taken as paid rostered days off.[11] However, he claimed to be accurate in his completion of weekly timesheets, including on ticking the box on the timesheet marked 'RDO' when he took a rostered day off.[12] Mr Hlavaty recalled taking rostered days off in June or July 2013 to go to Melbourne. (I note that the Claimant has accounted for the following as 'rostered days off': 1 July, 2 July and 29 July 2013.) He also stated that he anticipated using rostered days off attributable to April, May and June 2014 for a trip to Melbourne from 28 August to 1 September 2014 and the Second Respondent had, by email on 13 June 2014, approved this proposal. Mr Hlavaty was generally resilient in cross-examination on these matters. Isolated examples of inaccurate timesheets were identified and put to Mr Hlavaty by Mr Terri Hogan. He admitted the inaccuracy and, in my view, satisfactorily rejected the suggestion that those few inaccurate sheets were emblematic of systemic errors by him. He also satisfactorily rejected a suggestion put to him that the terms of an email exchange in June 2014 contained an admission that his accrued entitlement at that date was no more than three days. My view is that the ordinary meaning of the text of the relevant emails bear out his evidence.

30 The Claimant identified inaccuracies in the diaries of the First Respondent. Some dates show 'RDO' and the Respondents do not assert those dates should be accounted for as unpaid rostered day off: e.g. 5 August 2013, 2 December 2013 and 7 April 2014. Some dates do not reflect an agreement made by email in June 2014, see the entries for May, June and July 2014.

31 Weighing the factors noted above, and particularly placing weight on the payslips created by the Respondents *before* the claim was filed as well as the timesheets created by Mr Hlavaty, I am *not* satisfied that any of the 15 Extra RDO Days was taken as paid leave as required by the Award or pursuant to the Deferred Rostered Day Off Arrangement. The result is an underpayment of $1,276.89 to Mr Hlavaty being 77.2 hours untaken as a paid day off at the ordinary rate applicable as at 25 August 2014 ($16.54 per hour).

32 The Respondents' case is considered above on the question of the calculation of Mr Hlavaty's entitlements. However, the Deferred Rostered Day Off Arrangement also resulted in a contravention of the Award. Clause 13 of the Award provides for the possibility of agreement to an alternative to each fourth Monday being the paid rostered day off.[13] However, the Award proscribes that the agreement must be in writing and that the alternative day must be *in the four week cycle.* The Award does provide for a *deferred* paid rostered day off after the four week cycle. The existence of the Deferred Rostered Day Off Arrangement is no answer to the rights and obligations found in cl 13 except insofar as it resulted in an agreement in writing on an alternate day *in the four week cycle.* The Respondents have not adduced evidence of *any* written agreement except for email exchanges of 1 October 2012 and 13 June 2014. None of those agreements resulted in an alternate rostered day off within the relevant four week cycle.

33 There will be an order that the Respondents have contravened cl 13 of the Award. There will also be an order that the Respondents pay Mr Hlavaty the amount of $1,276.89 being the underpayment resulting from the contravention.

Issues 3 and 4: Was there a contravention of cl 22 of the Award on annual leave when the Respondents made certain deductions from the accrued entitlement of Mr Hlavaty and, if so, what amount has been underpaid?

34 In the introduction to these reasons I noted that, as a result of converting weekly award rates to hourly rates and not applying an annual leave loading, the Second Respondent accepts that, between 24 December 2012 and 11 January 2014, the Respondents made underpayments with respect to annual leave of $193.92. I also noted that the Second Respondent accepts that, at the end of his employment, Mr Hlavaty had an entitlement to $2,203.74 in untaken annual leave (per cl 22(4) of the Award) and that the Respondents purport to deduct from that entitlement:

(i) a 'Completion Incentive Payment' being a refund of the amount of $2,214.46 paid to Mr Hlavaty to reimburse TAFE tuition fees paid by him to TAFE; and

(ii) the wages paid to Mr Hlavaty for days when, in breach of his obligations under the Award he did not attend TAFE or make himself available for work.

35 **Issue 3: 'Completion Incentive Payment'.** The Respondents allege that at the commencement of Mr Hlavaty's employment, he entered into an oral agreement to the effect that TAFE tuition fees would be reimbursed on condition that Mr Hlavaty complete his four year apprenticeship with Parkerville Plumbing. The Second Respondent gave evidence of the making of this agreement during a conversation around the time of the commencement of his employment and on the occasion of the signing of his 'training contract' and of using the phrase 'Completion Incentive Payment' in that conversation.[14] The First Respondent avers to the same conversation in his witness statement.[15] The Respondents contend that the amount of $2,214.46 paid by them to Mr Hlavaty during the course of his employment to reimburse TAFE tuition fees must now be repaid by Mr Hlavaty to them as a result of him initiating the termination of his employment before the completion of his apprenticeship. The Respondents seek to set-off this amount against the entitlements of Mr Hlavaty at the end of his employment, including his entitlement to accrued annual leave.

36 Mr Hlavaty admits receipt of $2,214.46 from the Respondents on account of reimbursement of TAFE tuition fees paid by him. However, he denies the terms of the agreement as alleged by the Respondents or the use of the phrase 'Completion Incentive Payment'. Mr Hlavaty gave evidence to the effect of an agreement that he would be reimbursed TAFE tuition fees paid by him on condition only that he passed each block to which the fee related. Mr Hlavaty also adduced an email from the Second Respondent to him dated 12 December 2012 and said by Mr Hlavaty to be in connection with the first occasion of reimbursement stating, '[B]y the way we are happy to pay for your TAFE fees if you would like to forward me the invoice.'

37 For two alternative reasons, the Respondents case with respect to what is describes as the 'Completion Incentive Payment' must fail.

38 Firstly, for similar reasons to those expressed above on whether there had been a cash payment of the tool allowance, the Respondents have failed to satisfy me that there was an agreement in terms as alleged by them. The Second Respondent and Mr Hlavaty each gave confident, plausible evidence supporting their respective contradictory accounts of an oral conversation. Each was resilient in cross-examination. The First Respondent was not available for cross-examination. The email from the Second Respondent to Mr Hlavaty of 12 December 2012 is consistent with the account of Mr Hlavaty insofar as it omits any reference to the phrase 'Completion Incentive Payment'. The onus is on the Respondents, as the proponents of an agreement that would entitle them to deduct an amount from the Award entitlements of Mr Hlavaty, to prove the existence of the agreement in the terms alleged. The Respondents have failed to satisfy me that it is more probable than not that it was agreed with Mr Hlavaty that the $2,214.46 paid to him was conditional upon him *completing* his four year apprenticeship at Parkerville Plumbing.

39 Secondly, if the agreement was in terms as alleged by the Respondents (contrary to my finding):

(i) The Respondents are not entitled to set-off any 'above-award' payments for TAFE tuition re-imbursement against the accrued annual leave entitlements of Mr Hlavaty payable in accordance with cl 22(4) of the Award. A payment by an employer 'expressly or impliedly to cover a particular obligation (e.g. TAFE re-imbursement) cannot be claimed as a set off against monies payable under the Award to cover some other incident of employment' [18];

(ii) The Respondents may be entitled to bring a claim for the same amount in a court with jurisdiction to determine the claim. Insofar as the Respondents seek to overcome the prohibition on set off by asserting a counterclaim for recovery of the same amount, this court does not have jurisdiction to determine such a counterclaim. This court is a 'court of record' created by s 81 of the IR Act. However, unlike the Magistrates Court of Western Australia, this court does not have a general civil law jurisdiction.[19] The jurisdiction of this court is proscribed by s 81A and s 81AA of the IR Act. Nothing in those provisions would confer jurisdiction on this court to determine a counterclaim of the nature of the agreement alleged by the Respondents.

40 **Issue 4: Alleged Unexplained Absences: TAFE.** The Respondents rely upon attendance records obtained from South Metropolitan TAFE to allege that Mr Hlavaty was absent from TAFE without satisfactory explanation on three dates, justifying deduction from his entitlement to accrued annual leave entitlements of amounts paid to Mr Hlavaty in wages for those dates: 13 November 2012; 2 April 2014 (half day); and 1 July 2014. A letter from a Paul Hardman, Manager Apprenticeships and Trainee Support Unit of South Metropolitan TAFE, was admitted into evidence and, consistent with the case of the Respondents, states that attendance records of TAFE indicate absence on the following dates: 13 November 2012; 2 April 2014 ('Partial absence'); and 1 July 2014.[21] The Second Respondent gave evidence recalling conversations between Mr Hlavaty and the First Respondent regarding a TAFE absence in November 2012 in which Mr Hlavaty promised to be diligent in the future and the Respondents agreed to reimburse Mr Hlavaty's TAFE tuition fees for the block just completed and to take no further action in relation to the absence.[22] The Second Respondent also gave evidence of inconsistent practices of Mr Hlavaty concerning timesheets that were used to account for his attendance at TAFE.[23] The witness statement of the First Respondent contains: a detailed account of conversations with each of Mr Hlavaty and the Second Respondent in December 2012 regarding a TAFE absence on 13 November 2012 (consistent with the evidence of the Second Respondent);[24] the observation that he assumed that Mr Hlavaty attended TAFE as required on 2 April 2014;[25] a detailed account of Mr Hlavaty having informed him that his TAFE obligations had ended on 26 June 2014 and the First Respondent recalling that Mr Hlavaty 'worked hours with Parkerville Plumbing on 27 June 2014, 30 June 2014 and 1 July 2014'.[26]

41 Mr Hlavaty gave evidence that he attended TAFE as required. He was unable to specifically recall what he was doing on 13 November 2012, 2 April 2014 and 1 July 2014 and noted that, in his experience, TAFE attendance records were not always completed as required.[27]

42 The Respondents have failed to satisfy me of a right to reduce the entitlements arising from being absent from TAFE as alleged. *If* Mr Hlavaty was absent from TAFE on 13 November 2012, the evidence of the Respondents reveals a promise by them to waive any right to deduct wages in exchange for a promise by Mr Hlavaty to be diligent about future TAFE attendance. The payment of Mr Hlavaty's TAFE tuition fees for the block including 13 November 2012 is consistent with that waiver. The Respondents have failed to satisfy me that Mr Hlavaty was not at TAFE for a half day on 2 April 2014. I note the plausible evidence of Mr Hlavaty on the inaccuracy of TAFE attendance records. The Respondents have failed to satisfy me that Mr Hlavaty was not at work on 1 July 2014. I note the evidence of the First Respondent to the effect that Mr Hlavaty completed TAFE obligations on 26 June 2014 and subsequently attended work.

43 **Alleged Unexplained Absences: Work**. The Respondents allege that Mr Hlavaty was inexplicably absent from work on the following dates, justifying deduction from his entitlement to accrued annual leave entitlements of amounts paid to Mr Hlavaty in wages for those dates: 16 – 21 December 2013; 20 – 22 August 2014.

44 16 – 21 December 2013. The Respondents case regarding 16 – 21 December 2013 is that, after informing the Second Respondent that he was required to attend TAFE in the week commencing 16 December 2013, Mr Hlavaty failed to attend TAFE and failed to attend to work for Parkerville Plumbing. The evidence relied upon by the Respondents includes TAFE records showing Mr Hlavaty was last required to attend on 13 December 2013 and the (admitted) failure of Mr Hlavaty to lodge a timesheet for the relevant week. The Second Respondent gave evidence of having been told by the First Respondent that Mr Hlavaty would have a rostered day off on 16 December 2013 and spend the rest of the week in 'the workshop' and that she was then told by Mr Hlavaty (around 13 December 2014) of a requirement to attend TAFE in the week starting 16 December 2013.[28] The Second Respondent stated that she did not sight Mr Hlavaty during that week. The First Respondent records that he travelled overseas between 7 – 21 December 2013 and left instructions for Mr Hlavaty to 'take an RDO on 16 December 2013' and to complete work duties at the workshop between 17 – 20 December 2013.[29] It also refers to a conversation between the Respondents upon his return from overseas that is consistent with the evidence of the Second Respondent on earlier events. Mr Hlavaty gave evidence that in the period 16 – 21 December 2013 he recalled spending all or part of that week working on a bathroom extension at an address in Gum Glade Road, Mahogany Creek.[30] He recalled that the work commenced immediately following a TAFE block and he identified the relevant dates as the week commencing Monday 16 December 2013. Mr Hlavaty stated that he recalled working alone on the extension while the First Respondent was on holidays in Turkey and that he and the First Respondent had spent some time together preparing for the job before the First Respondent went overseas. Mr Hlavaty also recalled conversations with a TAFE lecturer about the job and recalled conversations with the Second Respondent (denied by her) about completing the job while the First Respondent was away. Mr Hlavaty stated (in cross-examination) that he may have divided his time during that week between Gum Glade Road and workshop duties.

45 The Respondents have failed to satisfy me that Mr Hlavaty was not available for work for them in the week of 16 December 2013. The detailed evidence of Mr Hlavaty on his activities during that week stands in contrast to the evidence of the Second Respondent relying upon the improbability of conversations attested by Mr Hlavaty. The Second Respondent also concedes the possibility that she was unaware of the presence of Mr Hlavaty in the workshop. The First Respondent was overseas during the critical period and he is unable to attest to whether Mr Hlavaty was at work. Mr Hlavaty's failure to lodge a timesheet is inexplicable. However, it does not follow that he was not available for work.

46 20 – 22 August 2014 The Respondents case regarding 20 - 22 August 2014 is that Mr Hlavaty failed to attend to work at all on 20 August 2014 and that, although Mr Hlavaty attended work on each of 21 August and 22 August 2014, he refused to carry out directions given by the First Respondent. The Respondents case is supported by the testimony of the Second Respondent and the witness statement of the First Respondent.[32] Mr Hlavaty gave evidence that the First Respondent consented to Mr Hlavaty's request made on 15 August 2014 for a 'day off' on 20 August 2014 on the occasion of his girlfriend's birthday.[33] Mr Hlavaty also gave evidence that he attended to his work as requested by The First Respondent on 21 and 22 August 2014.[34] It is not in dispute that Mr Hlavaty did not attend work on 20 August 2014. Contrary to the case for the Respondents, the Claimant has accounted for this non-attendance by counting 20 August 2014 as a 'rostered day off' for the purpose of

calculating whether there is any deficiency in Mr Hlavaty's entitlement, at the end of his employment, to any paid rostered days off.[35]

47 In circumstances where Mr Hlavaty has given detailed evidence of work undertaken by him on 21 – 22 August 2014, the Respondents have failed to satisfy me that Mr Hlavaty's conduct on any of those days constituted a repudiation of his contract of employment so as to amount to the unilateral termination of his employment. Mr Hlavaty is entitled to be paid for those days.

48 There will be an order that the Respondents have contravened cl 22(7) of the Award in each of six weeks and cl 22(4) of the Award at the end of Mr Hlavaty. There will also be an order that the Respondents pay Mr Hlavaty amounts of $193.92 and $2,203.74 in respect of those contraventions.

Conclusion

49 For the reasons set out above, I am satisfied that the Respondents have failed to comply with the following provisions of the Award:

- Clause 41 on rates of pay, resulting in an underpayment to Mr Hlavaty of $1,126.51;
- Clause 13 on paid rostered days off; resulting in an underpayment to Mr Hlavaty of $1,276.89;
- Clause 22 on annual leave, resulting in an underpayment to Mr Hlavaty of $2,397.66;
- Clause 15 on overtime, resulting in an underpayment to Mr Hlavaty of $1,713.69.

50 The total underpayment is $6,514.75. Formal orders relating to the contraventions and the underpayment will be made in due course. I will hear from the parties on pre-judgment interest and penalties.

M. FLYNN

INDUSTRIAL MAGISTRATE

[1] Transcript at page 48.

[2] $48.09 on 4/1/13, $30.03 on 12/1/13, $115.36 on 14/10/13 and, over December 2013-January 2014: $0.04, $0.18 and $0.22.

[3] Transcript at page239:
FLYNN IM: Ms Hogan, I will get you - I did confirm with this - this earlier with you but I'll get you to reconfirm, if you like. As I understand it, you don't take issue with the calculations done by Ms D'cruz in relation to the - what's called 'The Untaken Annual Leave'. So
HOGAN, MS: No, no issue at all.
FLYNN IM: All right. I just wanted to confirm that, all right, thank you.
HOGAN, MS: What we have issue with is the RDO and
FLYNN IM: I understand.
HOGAN, MS: Yes.
FLYNN IM: You say that they should be set off against that, the - some other payments?
HOGAN, MS: Yes ….

[4] Transcript at pages 183-184.

[5] Exhibit 8.

[6] Transcript at page 75.

[7] The circumstances of the creation of the Deferred Rostered Day Arrangement are detailed in the evidence of Mr Hlavaty and the witness statement of the First Respondent: see paragraphs 65 - 67 of the witness statement of Mr Hlavaty (exhibit 3) and, in the witness statement of the First Respondent (exhibit 8), the heading 'rostered days off'.

[8] Exhibit 8.

[9] Exhibit 8.

[10] Exhibit 3.

[11] Paragraph 74, exhibit 3.

[12] Paragraph 62, exhibit 3.

[13] Clause 13 provides:
A rostered day off shall be taken as follows -

On the 4th Monday in each four week cycle, except where it falls on a public holiday, in which case the next working day shall be taken in lieu unless another alternate day in the current or next four week cycle is agreed in writing between the employer and the employee (or the Employer Associations and the Building Trades Association of Unions of Western Australia (Association of Workers) to be the rostered day off, or to coincide with the public holiday.

Provided that by agreement in writing between an employer and his employee(s), an alternate day in the four week cycle may be substituted for the fourth Monday as the day off paid as though worked, and where such agreement is reached all provisions of this Award shall apply as if such day was the prescribed fourth Monday.

[14] The relevant evidence of the Second Respondent appears in her witness statement (exhibit 9), confirmed in her evidence at pages 181 – 182 transcript.

[15] Exhibit 8:
At paragraph 13(xiii) - (xiv): 'I recall letting Martin know Parkerville Plumbing offers a Completion Incentive Payment (TAFE Fees) to apprentices on the basis they aim to complete their 4 year training with Parkerville Plumbing…'
And at paragraph 15(i) - (ix) 'I did not tell Martin Hlavaty …that Terri and I were happy to pay his TAFE fees if he passed each block of classes. …'

[16] The evidence of Mr Hlavaty is at paragraphs of witness statement (exhibit 3) at paragraphs 18 – 23 and in cross-examination appears at pages 160 – 161.

[17] See 'MH2' attached to exhibit 3. See also exhibit 4.

[18] See ***Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate*** [2015] FCAFC 99 where the Full Court of the Federal Court reviewed the law on setoff of above Award payments made by an employer. The review included an assessment of the decision of the WA Industrial Appeal Court (Anderson, Scott and Parker JJ) in ***James Turner Roofing Pty Ltd v Peters*** [2003] WASCA 28. The judgment of North and Bromberg JJ in ***Linkhill*** place emphasis on the following passage of the judgement of Anderson J from ***James Turner Roofing***:

The payment of an amount as wages for hours worked in a period can be relied on by the employer in satisfaction of an award obligation to pay wages for that period whether in relation to wages for ordinary time, overtime, weekend penalty rates, holidays worked or any other like monetary entitlement under the award. This is so, whether the payment of the wages is made in contemplation of the obligations arising under the award or without regard for the award. However, if a payment is made expressly or impliedly to cover a particular obligation (whether for ordinary time, overtime, weekend penalty rates, fares, clothing or any other entitlement whether arising under the award or pursuant to the contract of employment) the payment cannot be claimed as a set off against monies payable to cover some other incident of employment. A payment made on account of say ordinary time worked cannot be used in discharge of an obligation arising on some other account such as a claim for overtime. Whether or not the payment was for a particular incident of employment will be a question of fact in every case [45].

[19] For example, see s 6 of the *Magistrates Court (Civil Proceedings) Act 2004* (WA).

[20] The relevant TAFE records were admitted into evidence as exhibits 11, 12, 13 and 14.

[21] Exhibit 12.

[22] Exhibit 9 at page 2, amplified by oral evidence recorded in the transcript at page 205ff.

[23] E.g. transcript at pages 79, 196; 206.

[24] Exhibit 8 at pages 12-14.

[25] Exhibit 8 at page 15.

[26] Exhibit 8 at page 19.

[27] The evidence of Mr Hlavaty in re-examination appears at page 167of the transcript.

[28] The evidence of the Second Respondent in examination in chief appears at pages 207 – 210 of the transcript.

[29] Exhibit 8 at pages 16 – 17.

[30] Transcript at pages 54 – 74.

[31] Exhibit 9 at pages 9 – 10.

[32] Exhibit 8 at pages 44 – 45.

[33] Exhibit 3 at paragraph 99 – 100.

[34] Exhibit 3 at paragraph 108 – 125.

[35] See exhibit 2, page 548 at row 109 '20 August 2014 has been treated as a rostered day off.'

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2018 WAIRC 00286

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL DARAN CHARLTON
	APPLICANT
	-v-
	WASTECO PARMELIA WA
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 7 MAY 2018
FILE NO/S	U 35 OF 2018
CITATION NO.	2018 WAIRC 00286

Result Application dismissed

Order

1. This matter is a claim of unfair dismissal referred to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* on 6 April 2018.

2. The applicant advised that he had reached settlement with his former employer and filed a Form 14 – Notice of withdrawal or discontinuance on 2 May 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.

2017 WAIRC 00957

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM CHUA
	APPLICANT
	-v-
	THE CITY OF NEDLANDS
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 22 NOVEMBER 2017
FILE NO/S	U 31 OF 2017
CITATION NO.	2017 WAIRC 00957

Result	Orders made
Representation	
Applicant	In person
Respondent	Mr B Taylor of counsel

Orders

HAVING heard the applicant on his own behalf and Mr B Taylor of counsel for the respondent on the papers and by consent;

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

(1) THAT by 5.00pm on 22 December 2017, the respondent provide to the applicant by USB storage device couriered to him at the address on his application (or other address nominated by the applicant) documents in the respondent's possession, custody and control as follows:

(a) All emails between the applicant and Ms Shelley Mettam relevant to management action carried out by Ms Mettam towards the applicant for the six month period leading up to the date of his dismissal; and

(b) All emails between the applicant and Ms Loraine Driscoll relevant to management action carried out by Ms Driscoll towards the applicant for the six month period leading up to the date of his dismissal; and

(c) An application for sick leave dated on or about January 10 2017, which the applicant says was placed in Ms Driscoll's in tray.

with the exception of such documents considered by the respondent to be commercially sensitive or subject to legal professional privilege with such documents being identified to the applicant and the basis of the claim stated.

(2) THAT on or before 5.00pm on 25 January 2018 the applicant email to the respondent and the Commission:

- a list of the applicant's witnesses for attendance at the hearing;
- written submissions;
- any documents; and
- cases and authorities;

on which he intends to rely.

(3) THAT on or before 5.00pm on 23 February 2018 the respondent email to the applicant and the Commission:

- a list of the respondent's witnesses for attendance at the hearing;
- written submissions;
- any documents; and
- cases and authorities;

on which it intends to rely.

(4) THAT the matter be listed for a hearing of two day's duration on dates to be fixed by the Commission.

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

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

2018 WAIRC 00260

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00260
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 26 MARCH 2018, TUESDAY, 27 MARCH 2018
DELIVERED	**:**	WEDNESDAY, 18 APRIL 2018
FILE NO.	**:**	U 31 OF 2017
BETWEEN	**:**	KIM CHUA
		Applicant
		AND
		THE CITY OF NEDLANDS
		Respondent

CatchWords	**:**	Respondent's application for dismissal of application pursuant to sections 27(1)(a)(ii) and (iv) *Industrial Relations Act 1979* - Application upheld - Respondent's application for cost and expenses pursuant to section 27(1)(c) *Industrial Relations Act 1979* - No "expenses" evidenced - Application for costs and expenses dismissed
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application for dismissal upheld - Unfair dismissal claim dismissed - Application for costs dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr B Taylor of counsel and with him Ms N Berkeley-Hill of counsel
Solicitors:		
Respondent	**:**	Robertson Hayles Lawyers

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings and taken from the transcript as edited by the Commission)

1 The respondent has made an oral application that this matter be dismissed under section 27(1)(a) (ii) and (iv) *Industrial Relations Act 1979*.

2 Section 27(1)(a)(ii) says that:

> "The Commission may, at any stage of the proceedings, dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied that further proceedings are not necessary or desirable in the public interest."

3 Section 27(1)(a)(iv) says that:

> "The Commission may, at any stage of the proceedings, dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied that for any other reason, the matter or part should be dismissed or the hearing thereof discontinued, as the case may be."

4 By claim dated 24 February 2017 the applicant claims that he was unfairly dismissed by the respondent.

5 By its Notice of Answer, dated 17 March 2017, the respondent denies that it unfairly dismissed the applicant.

6 Not having settled at conference, the matter was set down for hearing, on 26 and 27 March 2018 and the applicant was informed that the matter was set down for hearing on those dates in an appropriate way.

7 At the commencement of the hearing on 26 March 2018 there was no attendance by the applicant and at that time the respondent made its application under sections 27(1)(a)(ii) and (iv) *Industrial Relations Act 1979.*

8 The application was adjourned for further hearing on 27 March 2018.

9 My Associate communicated to the applicant on 26 March 2018 that the application for dismissal under section 27(1)(a)(ii) and (iv) *Industrial Relations Act 1979* had been made and that it was going to be decided on 27 March 2018 and that he needed to show cause on that date why the section 27 *Industrial Relations Act 1979* application ought fail, given his nonattendance and non-communication, and that he would also need to show cause why the matter ought now proceed to hearing.

10 The applicant communicated with my Associate and appeared at the show cause hearing on 27 March 2018 by telephone from Singapore.

11 At the show cause hearing the applicant informed that he was presently resident in Singapore and that he had made no preparation for the matter to proceed by way of hearing on either of the listed hearing dates.

12 In fact, the applicant informed that, if the section 27 *Industrial Relations Act 1979* application were to be unsuccessful, he would immediately seek an adjournment of proceedings so that he could apply to amend his application and to prepare himself for the further hearing.

13 The Commission clearly has power to dismiss proceedings when they are not in the public interest or for any other reason.

14 In this case, the applicant has demonstrated a completely cavalier attitude toward the Commission and its processes and, equally as important or more important, a cavalier attitude toward the position of the respondent.

15 The respondent, in good faith, prepared for a hearing which involved the proofing of witnesses and getting up by counsel and junior counsel, which would have resulted in significant costs and inconvenience for the respondent.

16 The respondent came to the Commission on 26 March 2018 ready for a hearing, although it received an email in relation to a potential offer of settlement from the applicant at about 10:00AM on the 26 March 2018, which may have given an indication that the applicant would not be proceeding or prosecuting his claim at the hearing. In any event, the respondent had incurred significant expense and inconvenience preparing for a hearing which, by the time the respondent arrived at the Commission, it seemed likely was not going to proceed on that date. The settlement offer I note was not accepted.

17 The applicant now proposes that the respondent's section 27 *Industrial Relations Act 1979* application be dismissed, that the matter be relisted for hearing and that the respondent again run the significant risk of preparing for a matter to proceed which does not proceed, simply because of the applicant's cavalier attitude to the proceedings.

18 The applicant also seeks that the Commission relist this matter over other matters, that is, to list this matter on a day or days when other matters could be listed. Again, if this occurred the very real risk would be run that, because of his cavalier attitude, this matter would not proceed on that date and matters which could have proceeded on that date will proceed at a later time.

19 Given the cavalier attitude demonstrated by the applicant, that is not a risk that the Commission is prepared to run in relation to its own processes and it is not a risk which it is fair for the Commission to ask the respondent to run.

20 The applicant's attitude, being that he was aware of the matter being listed for hearing and not being in any way prepared to proceed with that hearing, not attending on the first day of the hearing, and placing the Commission in the situation where it had to pursue him for any contact in relation to the hearing leads me to the conclusion that it is not in the public interest for this matter to proceed and accordingly, the application made by the respondent will succeed and the claim lodged by the applicant on 24 February 2017 will be dismissed.

21 An order will issue to that effect.

22 The balance of my reasons deal with the respondent's application for costs and expenses foreshadowed on 27 March 2017 but made later.

23 The respondent seeks that the applicant pay the "expenses of witnesses."

24 The approach the respondent takes is that it paid wages to employees who, instead of doing other duties, spent time preparing to be witnesses at the hearing of this matter.

25 In other words the respondent says the preparation of the witnesses came at their "expense."

26 The number of hours spent preparing by those employees, multiplied by the employees' hourly rate of pay, the respondent says, gives the quantum of the expense incurred.

27 The amounts claimed are clearly not "expenses of witnesses" as contemplated by section 27(1)(c) *Industrial Relations Act 1979.*

28 The employees were paid their normal rate of pay as part of their normal salary or wage. Nothing additional was incurred by the respondent. These employees were paid for preparing to be witnesses because the respondent wanted them to do so as part of, or incidental to, their employment. It is totally normal for an employer to allow its employees to prepare for a hearing in which it is involved, and in which the employees are to give evidence, as a normal incident of their work. It is not in any way the incurral of an "expense" related to the proceedings.

29 The claim for costs and expenses is dismissed.

2018 WAIRC 00257

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM CHUA
	APPLICANT
	-v-
	THE CITY OF NEDLANDS
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 18 APRIL 2018
FILE NO/S	U 31 OF 2017
CITATION NO.	2018 WAIRC 00257

Result	Application for dismissal upheld; unfair dismissal claim dismissed - Application for costs dismissed
Representation	
Applicant	In person
Respondent	Mr B Taylor of counsel and with him Ms N Berkeley-Hill of counsel

Orders

HAVING heard the applicant on his own behalf and Mr B Taylor of counsel and with him Ms N Berkeley-Hill of counsel for the respondent and by written submissions; and

HAVING given Reasons for Decision in which I upheld the respondent's application to dismiss the applicant's claim of unfair dismissal and dismissed the respondent's application for costs;

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

1. The claim be dismissed;
2. The respondent's application for costs be dismissed.

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

2018 WAIRC 00263

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER GROOT
	APPLICANT
	-v-
	BYATT FAMILY TRUST TRADING AS BURKELLY HOLDINGS PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 23 APRIL 2018
FILE NO/S	B 30 OF 2018
CITATION NO.	2018 WAIRC 00263

Result	Application dismissed

Order

1. This is a claim for contractual benefits referred to the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* on 27 March 2018.
2. On 12 April 2018, the applicant advised the Commission that it was likely that the matter was resolved, and he would file a *Form 14 – Notice of withdrawal or discontinuance.*
3. On 13 April 2018, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance.*

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

THAT this matter be and is hereby dismissed.

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

2018 WAIRC 00261

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PATRICIA ANN LAPPIN
	APPLICANT
	-v-
	K AND G C BARRETT T/AS GATEWAY MOTEL CARNARVON WA
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 19 APRIL 2018
FILE NO/S	U 12 OF 2018
CITATION NO.	2018 WAIRC 00261

Result	Application dismissed
Representation	
Applicant	In person and with her Mr G Cartner
Respondent	Mr K Barret and Mrs G Barrett

Order

WHEREAS the applicant filed a notice of claim of harsh, oppressive or unfair dismissal on 30 January 2018;

WHEREAS conferences occurred on 3 April 2018 and 12 April 2018;

WHEREAS immediately following the conclusion of the conference on 12 April 2018 the respondent informed the Western Australian Industrial Relations Commission it wished to settle on the terms offered by the applicant during the conference;

WHEREAS the Western Australian Industrial Relations Commission informed the parties on 12 April 2018 that the respondent had accepted the applicant's offer to settle and that payment of the settlement sum should be made forthwith and evidence of the payment provided to the Western Australian Industrial Relations Commission at which time the Western Australian Industrial Relations Commission would issue an order dismissing the application;

WHEREAS the respondent has provided evidence of payment of the settlement sum to the applicant to the Western Australian Industrial Relations Commission on 19 April 2018;

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

THE application be dismissed.

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

2018 WAIRC 00291

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS EMMA ROSIER
	APPLICANT
	-v-
	MRS GILLIAN ROBB, CEO TRAINING FOR ME PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 8 MAY 2018
FILE NO/S	B 88 OF 2017
CITATION NO.	2018 WAIRC 00291

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

Order

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

AND WHEREAS on 4 April 2018 Mrs Emma Rosier wrote to the Commission to inform it that this matter had been dealt with according to the 'Fair Entitlements Guarantee Scheme' and that she wished to discontinue the application;

AND WHEREAS the Commission requested that Mrs Rosier file a *Form 14 – Notice of discontinuance* (**Form 14**);

AND WHEREAS 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 by leave.

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

2018 WAIRC 00284

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR ROB SHARLAND
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER
	WIRRKA MAYA HEALTH SERVICES
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 4 MAY 2018
FILE NO/S	B 6 OF 2018
CITATION NO.	2018 WAIRC 00284

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

Order

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

AND WHEREAS on 3 April 2018, Mr Rob Sharland wrote to the Commission to inform it that this matter was no longer in dispute and asked if he was required to do anything further;

AND WHEREAS on 4 April 2018 Commissioner Emmanuel's Associate wrote to Mr Sharland, confirming he wished to discontinue his application and requesting that Mr Sharland file and serve a *Form 14 – Notice of discontinuance* (**Form 14**);

AND WHEREAS Mr Sharland has not filed a Form 14 or contacted the Commission since 3 April 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, discontinued.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Glenn Crew	Switch Family Trust Trading As Claremont Cellars	B 136/2017	Commissioner T Emmanuel	Discontinued
Jillian Catherine Shepherd	Autism Association of Western Australia Incorporated	U 123/2017	Commissioner D J Matthews	Discontinued
Mr Glenn Grayson	Eastern Goldfields Ltd	B 13/2018	Commissioner T Emmanuel	Discontinued
Ms Jignaben Langalia	Southern Cross Care (WA) Inc.	B 156/2017	Commissioner T Emmanuel	Discontinued
Ms Joanne Saunders	Ms Sharyn O'Neill Director General, Department of Education	U 128/2017	Commissioner D J Matthews	Discontinued
Rowena Puertollano	Marnja Jarndu Women's Refugee	U 8/2018	Commissioner T Emmanuel	Discontinued
Sharon Gillies	Mindarie Regional Council	U 28/2018	Commissioner T Emmanuel	Discontinued
Teow EE Gaik	Zhong Wei Qiu & Ai Qun Qiu t/as Foo Lok Midland	U 5/2018	Commissioner T Emmanuel	Discontinued

CONFERENCES—Matters arising out of—

2018 WAIRC 00266

DISPUTE RE UNION MEMBER'S EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00266
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 19 APRIL 2018 AND WRITTEN SUBMISSIONS ON MONDAY, 23 APRIL 2018
DELIVERED	**:**	THURSDAY, 26 APRIL 2018
FILE NO.	**:**	C 13 OF 2018
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Applicant AND THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

CatchWords	**:**	Applicant's member to be dismissed due to inability to complete rail car driver training - Inability to complete training a result of injury - Whether injury work-related or not disputed - Consideration of order for respondent to continue employing applicant's member - Principles applied - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* *Workers Compensation and Injury Management Act 1981*
Result	**:**	Application for order dismissed
Representation:		
Applicant	**:**	Mr T Kucera of counsel and with him Mr P Baker, Mr P Robinson and Mr G Johnston
Respondent	**:**	Ms J Allen-Rana and with her Mr D Anderson, of counsel, Mr G Raithel, of counsel, and Mr E Gearon
Solicitors:		
Applicant	**:**	Turner Freeman Lawyers
Respondent	**:**	State Solicitor's Office

Case referred to in reasons:

The State School Teachers' Union of W.A. (Incorporated) v The Director General, Department of Education (2017) 97 WAIG 564

Cases also cited:

Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618

Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 2) [2013] WASC 375

Reasons for Decision

1 The applicant makes, on behalf of its member, what is on the face of it a reasonable request. It seeks to have its member's employment preserved, without pay, until it is decided whether or not an injury he has suffered was work-related. That determination, the applicant says, will have a bearing on whether or not his employment continues.

2 However, despite on its face being reasonable, it is a request which ought not, in all of the circumstances, be met.

3 The respondent has written to the applicant's member telling him that because he is physically unable to complete the training as a railcar driver he was engaged to do that he is to be dismissed.

4 The applicant says that its member has been unable to complete the training due to a work-related injury. Whether or not the injury was work-related is a matter of dispute. As things currently stand, the assertion that the injury was work-related has been rejected by the relevant authority and the applicant's member is challenging that rejection.

5 The applicant essentially asks that I stay the decision to dismiss its member until the question of whether the injury was work-related is finally determined.

6 In terms of my power to make such an order it is clear that section 44(6)(ba) *Industrial Relations Act 1979* does not assist. Orders under section 44(6)(ba)(i) and (ii) *Industrial Relations Act 1979* clearly contemplate that there is a matter on foot, at the time an order is made under one of the subparagraphs, that may ultimately be resolved by conciliation or arbitration. There is no such matter on foot here.

7 I am not being asked to do something "until conciliation or arbitration has resolved that matter" or to "enable conciliation or arbitration to resolve the matter in question." If I make the order sought there will be no need for arbitration (or indeed further conciliation). The applicant's member will not be dismissed. In the future something more will happen (either the injury will be determined to be work-related or it will not). That will give rise to new decision making on the part of the respondent but that will be a process that has moved on from the present dispute.

8 The current dispute will require no conciliation or arbitration. That is the "matter" or "matter in question" will never be resolved by conciliation or arbitration if the order is made.

9 Section 44(6)(ba)(iii) *Industrial Relations Act 1979* is not relevant.

10 Accordingly, there is no power under section 44(6)(ba) *Industrial Relations Act 1979* to do what is asked of me.

11 The applicant actually cites section 44(6)(bb)(ii) *Industrial Relations Act 1979* as the source of power but that subparagraph is clearly inapplicable given its member has not yet been dismissed and there is on foot no claim of harsh, oppressive or unfair dismissal.

12 That leaves section 44(6)(bb)(i) *Industrial Relations Act 1979* as a possible source of power for the order the applicant seeks.

13 I discussed section 44(6)(bb)(i) Industrial Relations Act 1979 in *The State School Teachers' Union of W.A. (Incorporated) v The Director General, Department of Education* (2017) 97 WAIG 564.

14 The question is whether the *Industrial Relations Act 1979* "otherwise authorises" me to preserve a person's employment, where the employer wishes to dismiss a person, to "see how things turn out." As in the case cited I have not had, and not through any fault of the parties who are dealing with this matter quickly, the benefit of argument on the point. I am therefore not prepared to decide that there is no such power in the *Industrial Relations Act 1979* to make such an order.

15 However, I am prepared to say that where an employer has a lawful right to dismiss, and that is not challenged here, consideration of the thing that is said will, or may, make a difference will loom large in the question of the balance of convenience.

16 That is, the time within which the thing will, or might, occur and the likelihood of the thing happening will be important considerations in deciding where the balance of convenience lies. If the thing will in all likelihood happen, and that thing will occur soon, the more it will favour the making of an order.

17 Here it is not known when the question of whether the injury was work-related will be finally determined and it is certainly not known whether it will be finally determined in favour of the applicant's member.

18 In my view, so much uncertainty surrounds that matter that it is, ultimately, not a good one to rely upon in seeking the order sought by the applicant.

19 It is hard to see why I should preserve the employment by order when the matter the applicant says will make all the difference may or may not occur and it is not even known when the matter will be decided.

20 I am bolstered in my view that the order sought not be made by other considerations going to the balance of convenience as follows:

(1) The applicant's member is currently on leave without pay. This means that there will be no cost to the respondent associated with the payment of wages to the applicant's member if the order is made but it is the loss of wages, and not the payment of them, which normally sounds most loudly in balance of convenience considerations and that factor is not present here;

(2) The respondent expresses the view that if it is ultimately decided that the injury of the applicant's member was work-related section 84AA *Workers Compensation and Injury Management Act 1981* will have a beneficial effect on his employment;

(3) The matters raised in the affidavit of Mr Elwyn Gearon made 23 April 2018 going to the question of prejudice to the respondent if the order is made; and

(4) That if the applicant's member's employment is terminated the unfair dismissal process will be open to him. In fact, the matters raised fit most conformably within a question of whether the dismissal that will now occur is fair rather than whether it should occur.

21 The application is dismissed.

2018 WAIRC 00267

DISPUTE RE UNION MEMBER'S EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 26 APRIL 2018
FILE NO/S	C 13 OF 2018
CITATION NO.	2018 WAIRC 00267

Result	Application for order dismissed
Representation	
Applicant	Mr T Kucera of counsel and with him Mr P Baker, Mr P Robinson and Mr G Johnston
Respondent	Ms J Allen-Rana and with her Mr D Anderson, of counsel, Mr G Raithel, of counsel, and Mr E Gearon

Order

HAVING heard Mr T Kucera of counsel and with him Mr P Baker, Mr P Robinson and Mr G Johnston for the applicant and Ms J Allen-Rana and with her Mr D Anderson, of counsel, Mr G Raithel, of counsel, and Mr E Gearon for the respondent on Thursday, 19 April 2018 and by written submissions on Monday, 23 April 2018; and

HAVING given Reasons for Decision in which I determined to dismiss the application for an order;

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

THAT the application for an order is dismissed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Medical Association (WA) Incorporated	Department of Health Industrial Relations Division North Metropolitan Health Service	Emmanuel C	PSAC 11/2017	04/07/2017 13/09/2017 23/10/2017	Dispute re alleged unfair treatment of union member	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Director General, Department of Health	Emmanuel C	PSAC 20/2017	15/09/2017	Dispute re proposed transfer of union member	Discontinued
The East Metropolitan Health Service established as a Health Service Provider pursuant to section 32(I)(b) of the Health Services Act 2016	Ms Carolyn Smith Secretary United Voice WA	Emmanuel C	C 26/2016	17/01/2017 27/07/2017	Dispute re proposed major change to rostering	Discontinued
The West Australian Prison Officers' Union of Workers	The Minister for Corrective Services; The Department of Justice	Matthews C	C 36/2017	29/12/2017	Dispute re employment restrictions	Discontinued

PRACTICE NOTES—

2018 WAIRC 00275

The Western Australian Industrial Relations Commission

111 St Georges Terrace, Perth WA 6000

PUBLIC SERVICE ARBITRATOR

PRACTICE NOTE No. 1 of 2018

RECLASSIFICATION APPLICATIONS

General Approach

The Public Service Arbitrator encourages discussion between the parties and the disclosure of relevant information and documentation at all stages of the reclassification application process.

Before an applicant requests that an application be listed for hearing, the employer should have made the applicant fully aware of the reasons of the employer (including of the classification review committee) for rejecting the application for reclassification. This should include a copy of any report presented to and relied on by the employer for its consideration, however, it should be recognised that such reports are not always accepted by employers and accordingly may be of little use to the applicant in considering his/her situation. The applicant should have had the opportunity to consider his/her position in light of the employer's reasons before deciding to proceed with his/her application.

It should be borne in mind that, in determining reclassification applications, the Arbitrator is performing a review of the decision made by the employer, including the conclusions of the committee. It is not appropriate for parties to adopt an adversarial approach to the proceedings. There will be an opportunity for each party to ask questions of witnesses for the purposes of clarification and elaboration. However, this is not cross-examination in the sense usually undertaken in hearings before the Commission generally.

The application should be based on the material that was before the employer and not on new material not previously considered. Where an applicant seeks to pursue an application based in part or in whole on new material not considered by the employer, or the employer seeks to introduce new material or reasons for rejecting the application, the Arbitrator is likely to not proceed with the application until that new material has been considered.

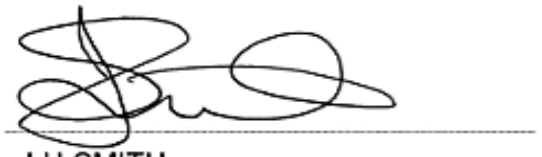
Procedure

1. At least seven (7) clear working days before the hearing of the application, the applicant is to provide the Arbitrator with a written statement of the facts upon which the applicant relies to support the application and any witness statements, and serve a copy of the statement on the employer or its representative.
2. At least three (3) clear working days before the hearing, the employer is to provide the Arbitrator with a written statement of the basis upon which it relies to resist or otherwise question the application and any witness statements, and serve a copy of that statement on the applicant or the applicant's representative.

3. The material included in the parties' statements is the primary evidence to be considered. Where there is a need for oral evidence, witnesses may be asked questions by the other party with a view to clarifying or eliciting information. However, this is not an opportunity for cross-examination in the traditional sense.
4. The evidence presented to the Arbitrator should be confined to that information provided to the employer for consideration of the application for reclassification and the employer's reasons for refusing the application.
5. The hearing of the application will proceed on the following basis:
   (a) The applicant or agent may, if desired, make a brief opening statement to outline the basis of the application.
   (b) The applicant may give evidence to support the application which, in the normal course of events, will be confined to those matters raised in the written statements submitted by the applicant and employer.
   (c) The employer may then question the applicant.
   (d) The applicant may then be re-questioned in light of the employer's questioning.
   (e) The applicant may call any other witnesses.
   (f) The case for the applicant then closes.
   (g) The employer through its agent then opens its case and in doing so may make a brief opening statement.
   (h) The employer may give evidence to support its position which, in the normal course of events, will be confined to those matters raised in the written statements submitted by the applicant and employer.
   (i) The applicant may then question the employer.
   (j) The employer may then be re-questioned in light of the applicant's questioning.
   (k) The employer may call any other witnesses.
   (l) The case for the employer then closes.
   (m) The parties may make brief closing statements.
6. 1.5 hours is normally set aside for each application.

Operative Date

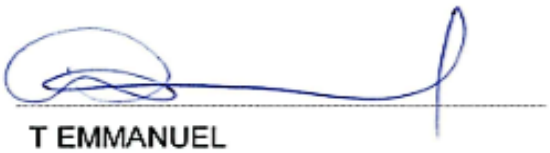
The normal practice is that reclassifications are effective from the date on which the employee formally notified the employer that a reclassification is sought and provided sufficient information to enable a proper consideration of the claim.



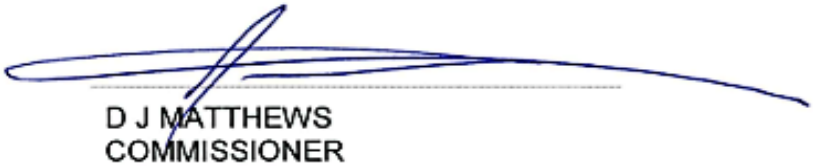
J H SMITH
ACTING PRESIDENT

P E SCOTT
CHIEF COMMISSIONER

S J KENNER
ACTING SENIOR COMMISSIONER



T EMMANUEL
COMMISSIONER



D J MATTHEWS
COMMISSIONER

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00280

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH, PHARMACY GUILD OF WESTERN AUSTRALIA ORGANISATION OF EMPLOYERS
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 4 MAY 2018
FILE NO.	APPL 86 OF 2017
CITATION NO.	2018 WAIRC 00280

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

Direction

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

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 18 May 2018;
2. THAT the applicant file and serve outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 1 June 2018;
3. THAT the respondent and intervenor each file and serve outlines of evidence and documents, other than the agreed documents, on which they intend to rely by 29 June 2018;
4. THAT the applicant file and serve written submissions by 27 July 2018;
5. THAT the respondent and intervenor file written submissions by 24 August 2018;
6. THAT this matter be listed for hearing after 7 September 2018.

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

2018 WAIRC 00060

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JODY LEE LATHAM
	APPLICANT
	-v-
	MICHAEL KING CEO CENTACARE KIMBERLEY
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 31 JANUARY 2018
FILE NO	U 140 OF 2017
CITATION NO.	2018 WAIRC 00060

Result Order made

Representation (by correspondence)

Applicant Ms K Grove of counsel

Respondent Ms L Hillbrick of counsel

Order

HAVING heard Ms K Grove of counsel for the applicant and Ms L Hillbrick of counsel for the respondent;

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

THAT the name of the respondent in U 140 of 2017 be changed to "Centacare Kimberley Association Inc".

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Justice (Jury Officers) CSA Agreement 2017 PSAAG 6/2017	12/22/2017	Department of Justice	(Not applicable)	Commissioner D J Matthews	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2017 WAIRC 00752

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 4 MAY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KIMBERLY-LOUISE JONES

APPELLANT

-v-

DARA DAHLITZ DENTAL THERAPIST, SAM CARRELLO
GM DENTAL HEALTH SERVICES, SIMON MARTIN
HR MANAGER, ARIF OURESHI
A/SENIOR HR CONSULTANT

RESPONDENTS

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER D J MATTHEWS - CHAIRMAN
MR G LEE - BOARD MEMBER
MS J VAN DEN HERIK- BOARD MEMBER

DATE THURSDAY, 24 AUGUST 2017

FILE NO PSAB 9 OF 2017

CITATION NO. 2017 WAIRC 00752

Result Orders made

Representation

Appellant In person

Respondents Ms J Symons, and with her Ms R Richardson

Orders

HAVING heard the appellant and Ms J Symons, and with her, Ms R Richardson for the respondents, the Public Service Appeal Board pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders:

1. The respondents file and serve written submissions by close of business 7 September 2017 relating to their:
   i. Application to amend the name of the respondents; and
   ii. Application that the appeal be dismissed for want of jurisdiction.
2. The appellant file and serve written submissions in response by close of business 21 September 2017.
3. The matter be relisted for hearing to hear and determine the respondents applications on a date to be fixed.

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

2018 WAIRC 00283

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 4 MAY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00283
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER D J MATTHEWS - CHAIRMAN MR G LEE - BOARD MEMBER MS J VAN DEN HERIK - BOARD MEMBER
HEARD	**:**	THURSDAY, 24 AUGUST 2017, MONDAY, 2 OCTOBER 2017, MONDAY, 11 DECEMBER 2017, WEDNESDAY, 28 MARCH 2018
DELIVERED	**:**	FRIDAY, 4 MAY 2018
FILE NO.	**:**	PSAB 9 OF 2017
BETWEEN	**:**	KIMBERLY-LOUISE JONES Appellant AND MR WAYNE SALVAGE, CHIEF EXECUTIVE, NORTH METROPOLITAN HEALTH SERVICE Respondent

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CatchWords	**:**	Appeal against decisions of respondent - Whether decisions taken by respondent properly characterised as improvement action or disciplinary action - Jurisdiction of the Public Service Appeal Board - Held employer took no disciplinary action - Various other complaints not within jurisdiction of Public Service Appeal Board
Legislation	**:**	*Crimes Act 1914* (Cth) *Criminal Code Act 1995* (Cth) *Health Services Act 2016* (WA) *Industrial Relations Act 1979* (WA) *Public Sector Management Act 1984* (WA) *Racial Discrimination Act 1975* (Cth)
Result	**:**	Appeal dismissed for want of jurisdiction
Representation:		
Appellant	**:**	In person and with her Agent Copeland and Minister Tonkin as agents
Respondent	**:**	Ms J Symons, as agent, and with her Ms R Richardson

Reasons for Decision

1 These are the unanimous Reasons for Decision of the Public Service Appeal Board.

2 The relationship between the parties to this matter, as far as the paperwork filed reveals, became fractious in early 2017 after problems developed between the appellant and a co-worker, Dara Dahlitz.

3 The appellant has many complaints about how she has been treated by her employer since that time.

4 To be exact, the appellant has complained not only about her employer but also many others.

5 The Notice of Appeal filed 31 May 2017 listed the following persons (all employed at that time by the respondent) as respondents:

- Dara Dahlitz;
- Sam Carrello;
- Simon Martin; and
- Arif Qureshi.

6 The appellant later made an oral application to join as respondents:

- Dr Russell-Weisz;
- Roger Cook; and
- Department of Dental Health Services.

7 The respondent's agent made an application for the named four respondents listed above to be struck out and substituted with "Mr Wayne Salvage, Chief Executive, North Metropolitan Health Service" on the basis that person was the appellant's employer. The respondent's agent opposed the application to join the three above named entities on the basis that none of them was the appellant's employer.

8 During the course of the hearing on 28 March 2018, the application made by the respondent's agent was upheld and the appellant's application to join parties was dismissed.

9 The reason this was done was because it is only the actions of the employer (or more accurately expressed the "employing authority") that may be reviewed by the Public Service Appeal Board pursuant to its powers under section 172 of the *Health Services Act 2016* (putting to one side findings made under section 165(5)(a)(ii) of the *Health Services Act 2016* which are not relevant here).

10 As Mr Wayne Salvage, Chief Executive, North Metropolitan Health Service was the appellant's employer (or employing authority) he is the proper respondent.

11 The appellant may be concerned that this has the effect that action taken by persons other than Mr Wayne Salvage himself cannot be reviewed. That is not the case because decisions and actions of the respondent's employees may be taken as having been done for and on behalf of an employer, unless the employer argues that person was not acting on the employer's behalf and there was no such argument put here by the respondent.

12 Section 172 *Health Services Act 2016*, relevantly gives the Public Service Appeal Board the power to hear and determine appeals from "disciplinary decisions or findings".

13 In this matter the respondent argued that the things about which the appellant complains are not "disciplinary decisions or findings" and that, accordingly, there is no jurisdiction for the Public Service Appeal Board to enquire into and deal with them.

14 The appellant maintained that disciplinary decisions or findings have been made against her.

15 The preliminary matter of whether the Public Service Appeal Board had jurisdiction in this matter in light of the above contentions was listed for a hearing which took place on 28 March 2018.

16 To ensure the efficient consideration of the matter the appellant was invited to put up everything and anything during the course of her employment up to the date of the hearing that she contended amounted to disciplinary action. This included the matters she had raised in her Notice of Appeal and anything additional she wished the Public Service Appeal Board to consider.

17 At the hearing, it became clear that the appellant's main arguments were that the following matters constitute disciplinary action against her:

1. Being subjected to a "Performance Improvement Plan" in early 2017;
2. Being subjected to a "warning" and a direction to attend some courses following a determination in May 2017 that she had committed a breach of discipline;
3. Being told to remain away from work and being sent to see an Occupational Physician in August 2017; and
4. Being directed to report for work at Piara Waters Dental Therapy Centre in November 2017.

18 At the hearing, the appellant gave evidence and the respondent called Salvatore (Sam) Carrello, General Manager of Dental Health Services, the author of many of the letters which the appellant claims contain objectionable content.

19 The Public Service Appeal Board is of the view that none of the above matters amount to disciplinary action. The Public Service Appeal Board is of the view that no other matters raised by the appellant in her paperwork are disciplinary actions. There has been nothing raised by the appellant which the Public Service Appeal Board considers is within its jurisdiction to hear and determine.

20 Accordingly, for the reasons that follow, the Public Service Appeal Board is of the view that it does not have jurisdiction to hear and determine the appeal and it will be dismissed.

Performance Improvement Plan

21 Placing an employee on a Performance Improvement Plan was, within the respondent's organisation, a step which indicated concern with the appellant's performance.

22 A failure to successfully complete the Performance Improvement Plan can lead to action being taken against the employee under Part 11 Division 2 *Health Services Act 2016*. Such action can lead to a decision being made under sections 159(1)(b) or (c) *Health Services Act 2016*.

23 Decisions under sections 159(1)(b) and (c) *Health Services Act 2016* are, pursuant to section 172(1) *Health Services Act 2016*, appealable to the Public Service Appeal Board.

24 In the appellant's case, however, the respondent's concerns about her performance did not lead to a decision being made under section 159(1)(b) or (c) *Health Services Act 2016*.

25 By letter date 25 October 2017 the appellant was informed by the respondent as follows:

> "I confirm that you have successfully met the PIP Outcomes for satisfactory performance and the process will now conclude."

26 Obviously being subject to a Performance Improvement Plan, or even a more formal process under Part 11 Division 2 *Health Services Act 2016* cannot, in itself and without more, amount to disciplinary action. In this case it neither amounted to, nor led to, disciplinary action. The appellant was informed she had "successfully met the PIP Outcomes".

The warning and courses

27 By letter dated 3 April 2017 the respondent informed the appellant that it was suspected she had committed a breach of discipline.

28 By letter dated 11 May 2017 the respondent informed the appellant that a finding had been made against her that she had committed a breach of discipline.

29 The letter also informed as follows:

> "Consequently, I confirm Improvement Action to be:
>
> - In the form of training and development. In order to ensure that you are properly trained in Interpersonal and Communication Skills and Emotional Intelligence, Dental Health Services will arrange for training on 15 June 2017 and 17 July 2018 (tentative). These training sessions are not Disciplinary Action and will not be recorded as such. Arif Qureshi, A/Senior HR Consultant will be in contact with you in relation to the details of the training.
>
> And
>
> - In the form of a warning that the conduct you have displayed by writing inappropriate and derogatory comments inferring to a religious group/faith is unacceptable. This waring is not Disciplinary Actions and will not be recorded as such."

30 While the above arose out of an allegation of a breach of discipline, and followed a disciplinary process, it was not "disciplinary action" as defined by section 6 *Health Services Act 2016*. It was, on the face of the letter dated 11 May 2017, "improvement action" under section 6 *Health Services Act 2016*.

31 We find that it was improvement action both on its face and in substance. That is, we find that the action was taken not to punish the appellant but, as the definition of improvement action provides, "for the purpose of improving the performance or conduct of the employee" (in this case it was both performance and conduct). So much was made clear by the evidence of Sam Carrello, which was not undermined.

32 The appellant took offence at being directed to attend the courses because the nature of the courses suggested deficiencies which she maintains she does not have. She also complains that there was an impost in terms of expense and inconvenience that raised attendance at the course to the level of punishment.

33 Without needing to decide whether the appellant had deficiencies that could be addressed by the courses or whether needing to travel a distance and buy lunch might in some circumstances be a penalty the Public Service Appeal Board simply notes that improvement action is not disciplinary action, and cannot become so simply because an employee does not want to go on or does not see the need, or incurs some minor inconvenience or expense, in attending a course or courses.

34 The Public Service Appeal Board only has jurisdiction to hear and decide appeals in relation to matters set out a section 172(1)(a) to (e) *Health Services Act 2016* and the taking of "improvement action" by an employer is not captured by the subsection.

35 Specifically, section 172(1)(d) *Health Services Act 2016* provides that the Public Service Appeal Board can hear and decide appeals from "decisions to take disciplinary action made under section 150(1), 163(3)(b) or 166(b)".

36 The only paragraph of any potential relevance here is section 163(3)(b) which provides:

> "(b) if the employing authority finds that the employee has committed a breach of discipline that is not a section 173(2) breach of discipline, the employing authority must decide —
>
> (i) to take disciplinary action, or both disciplinary action and improvement action, with respect to the employee; or
>
> (ii) to take improvement action with respect to the employee; or
>
> (iii) that no further action is to be taken."

37 In this case the respondent decided to take "improvement action" (both in form and substance) and not "disciplinary action". Therefore, there can be no appeal to the Public Service Appeal Board under section 172 *Health Services Act 2016* in relation to the action taken.

Being told to remain away from work and being sent to the Occupational Physician

38 By letter dated 31 August 2017 Sam Carrello wrote to the appellant telling her that she was "to remain absent from the workplace pending an assessment from an Occupational Physician regarding your fitness for work."

39 The second paragraph of the letter was as follows:

> "The decision has been made as a result of your continual threats to colleagues to enact legal and/or "criminal" action against them with regards to the actioning of your Performance Improvement Plan and other reasonable directions. This, and other threatening and aggressive conduct displayed by you towards some of your colleagues has given the employer reason to believe that you may be a danger to yourself, fellow employees or the public, and the requirement for you to attend an assessment with an Occupational Physician is in accordance with Personal Leave subclause 21.33 of the *Public Service and Government Officers General Agreement 2014* which states (quote omitted)"

40 The applicant says the directions (to remain absent from work and to attend the Occupational Physician) were given to her as a form of punishment.

41 Certainly on the face of the letter the directions are associated with concerns about the appellant's conduct or, given its phrasing, unfavourable conclusions about her conduct.

42 On the other hand simply because an action is motivated by concerns or conclusions about conduct does not, as a matter of course, make the action disciplinary.

43 Mr Carrello came along as a witness and explained the letters and the directions contained therein. (ts 115 – 119)

44 Mr Carrello satisfied the Public Service Appeal Board that the directions were not given to punish the appellant. The appellant asked some pointed questions, when cross-examining Mr Carrello, to the effect that the directions seemed to be based on findings against her of a disciplinary nature and, what is more, findings in relation to matters she had not yet had the opportunity to formally respond to. (ts 116)

45 Mr Carrello denied this. He admitted that there were concerns about the appellant's conduct and that the directions were given to "risk mitigate the situations" (ts 116) but did enough to explain that the directions were in the interests of an attempt to effectively manage an ongoing and difficult situation and were not penalties imposed at the end of a process.

46 In any event, being directed to remain away from a workplace (or even "stood down") is not, and cannot be, a disciplinary decision or finding under section 172(1) *Health Services Act 2016* if the employee remains on full pay, as the appellant did. Only a decision to suspend on partial or no pay are within section 172(1) *Health Services Act 2016*. Also a direction to attend upon a medical practitioner is not within section 172(1) *Health Services Act 2016*.

Being directed to report to work at Piara Waters Dental Therapy Clinic in November 2017.

47 By letter dated 2 November 2017 Mr Carrello wrote to the appellant "regarding workplace issues."

48 The letter set out a history going back to March 2017 covering the placement of the appellant on a Performance Improvement Plan, the disciplinary process resulting in the improvement action, and the matters which led to the letter of 31 August 2017 referred to under the previous heading herein.

49 The letter went on to cover that the Occupational Physician had cleared the appellant for work and the reasons for the Performance Improvement Plan coming to an end in October 2017.

50 On page three of the letter this summary of the then recent history appeared:

> "As outlined above, OHS considers you to have displayed repeated inappropriate workplace behaviour over an extended period of time, to a significant number of fellow employees and members of the public and in a variety of work environments. OHS has received confirmation that there is no medical condition(s) impacting your conduct and considers your instances of inappropriate behaviour to be a conscious and deliberate decision and not related to a lack of understanding or knowledge on the expected standards of behaviour. To date, OHS has endeavoured to support you in addressing this behaviour through a variety of process including workplace counselling, training, a change in work location and performance management without success. OHS remains committed to supporting you in the workplace but I can advise that any alleged breaches of the Code may result in a disciplinary process being initiated against you, the outcome of which may include the termination of your contract of employment."

51 The next paragraph contains the directions about which the appellant complains and was as follows.

> "With effect from Monday 6 November 2017 you are to attend work at the Piara Waters Dental Therapy Centre (OTC). You will be directly supervised by Ms Janet Lynn, Area Dental Therapist, and the area has been staffed with two operators to provide the appropriate support. Your roster for this period will be 8:00 to 4:00pm, Monday to Wednesday at the Piara Waters DTC and Thursday and Friday at the DTC outlined in the attached roster."

52 On its face, and without knowing more, the reproduced passage above might indicate that as a result of misconduct the appellant was being transferred or that the scope of her practice or duties was being altered.

53 However, it became clear at the hearing that Piara Waters Dental Therapy Centre was one of the places at which the appellant worked in the ordinary course of her duties. The appellant worked substantively as a Dental Clinic Assistant within "Area South 2", an organisational and geographical division of the North Metropolitan Health Service. Piara Waters Dental Therapy Centre was within Area South 2 and the appellant had worked there before the direction in the letter dated 2 November 2017.

54 In fact, attached to the letter was a roster for Term 4 (rosters being associated with the school year) that set out the appellant was to work variously at Piara Waters, Orelia, Success, Harmony and South Coogee, all of which are sites within Area South 2. Properly understood no transfer was involved in the direction.

55 There was also no alteration to the scope of the appellant's practice or duties. The appellant had a greater level of supervision (or support depending on who is assessing it) upon her return to work but she remained a Dental Clinic Assistant.

56 As we now know the appellant's return to work was not as success but the issues that arose had not, as at the date of the hearing, led to outcomes and will have to await another day.

Other matters raised by the appellant's paperwork

57 The appellant, in paperwork filed with, and in submissions made and evidence given before, the Public Service Appeal Board complained about what she sees as the respondent's fundamental failure to deal properly with a grievance she lodged in early 2017. In the first paragraph of this decision problems between the appellant and Ms Dara Dahlitz are referred to. The appellant complained to the respondent about Ms Dahlitz and remains aggrieved that her complaints have not been dealt with in the way she says they should have been. She complains that she, and her conduct, have become the respondent's focus instead of Ms Dahlitz and her conduct. The Public Service Appeal Board does not have jurisdiction to look into that complaint because it is not referred to in section 172 *Health Services Act 2016.*

58 The appellant also complains about things such as breaches of the *Racial Discrimination Act 1975* (Cth) and makes allegations of torts and crimes against employees of the respondent and assertions of protection under the *Crimes Act 1914* (Cth) and *Criminal Code Act 1995* (Cth) that are clearly not within the jurisdiction of the Public Service Appeal Board to consider.

59 The appeal will be, by order of the Public Service Appeal Board, dismissed.

2018 WAIRC 00281

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 4 MAY 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIMBERLY-LOUISE JONES
	APPELLANT
	-v-
	MR WAYNE SALVAGE, CHIEF EXECUTIVE, NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS - CHAIRMAN
	MR G LEE - BOARD MEMBER
	MS J VAN DEN HERIK - BOARD MEMBER
DATE	FRIDAY, 4 MAY 2018
FILE NO	PSAB 9 OF 2017
CITATION NO.	2018 WAIRC 00281

Result		Order made; Appeal dismissed for want of jurisdiction
Representation		
Appellant	**:**	In person and with her Agent Copeland and Minister Tonkin as agents
Respondent	**:**	Ms J Symons, as agent, and with her Ms R Richardson

Orders

HAVING heard the appellant on her own behalf and with her Agent Copeland and Minister Tonkin, as agents, and Ms J Symons, as agent, and with her Ms R Richardson for the respondent on 28 March 2018;

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

1. That the name of the respondent in PSAB 9 of 2017 be changed to "Mr Wayne Salvage, Chief Executive, North Metropolitan Health Service".
2. The appeal be dismissed for want of jurisdiction.

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

PUBLIC SERVICE APPEAL BOARD—Notation of—

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

Application Number	Parties		Commissioner	Matter	Dates	Result
PSAB 17/2017	Mr Kurt John Mayerhofer	Director General, Department of Justice	Matthews C	Appeal against the decision to take disciplinary action on 3 August 2017	31/10/2017 14/12/2017 28/02/2018 01/03/2018	Discontinued
PSAB 1/2017	Michael Jacobson	Emma White Director General The Department for Child Protection and Family Support	Matthews C	Appeal against the decision to terminate employment on 23 February 2017	12/06/2017	Discontinued

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2018 WAIRC 00255

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00255
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 12 MARCH 2018
DELIVERED	**:**	WEDNESDAY, 18 APRIL 2018
FILE NO.	**:**	APPL 5 OF 2018
BETWEEN	**:**	SHANE JAMIESON Applicant AND THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Challenge to finding against and penalties imposed on applicant - Challenge based on evidence before respondent supplemented by additional evidence - Held not fair, reasonable or safe for respondent to have found applicant punched a student - Held that applicant's conduct in the form of certain words prior to physical altercation with student amounted to misconduct - Penalty discussed and imposed - Reprimand and fine of one days' pay imposed
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application upheld in part; penalty of reprimand and fine of one days' pay imposed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr W Fitt of counsel
Solicitors:		
Respondent	**:**	State Solicitor’s Office

Case referred to in reasons:

Barry Landwehr v Sharyn O'Neill Director General, Department of Education (2017) 97 WAIG 1671

Case also cited:

Briginshaw v Briginshaw (1938) 60 CLR 336

Reasons for Decision

1 The breach of discipline found by the respondent to have been committed by the applicant had as central elements that the applicant had said certain words to a student, (T), and had subsequently punched that student in the head.

2 The applicant's challenge asked that I consider the respondent's treatment of the matter on such record of proceedings as was before the respondent supplemented by three additional documents. The applicant's challenge did not require me to hear the matter afresh.

3 The applicant sought to persuade me that:

(1) it was not fair or reasonable to find on the evidence that he had punched the student;

(2) it was not fair or reasonable to find, once all of the circumstances were properly understood, that what he said to the student amounted to punishable wrongdoing; and

(3) he had not committed a breach of discipline and should not have been punished.

4 The facts, apart from whether the applicant punched the student, were largely uncontroversial as between the parties to the proceedings.

5 The applicant decided to keep back his Year 8 class for a few minutes at lunch due to misbehaviour. T became agitated and after some ranting and raving took his bag and went to leave the classroom. The applicant did not try to prevent this and told T that he should produce a "red card" (meant to indicate T was aware he was losing his temper) and sit outside and wait for the applicant to deal with him. This did not happen so the applicant told T to go to "Student Services" and the matter would be dealt with later and he would probably be suspended from school as a result of his behaviour. T left the classroom.

6 T had misbehaved in the past and the "red card" or "report to Student Services" strategies had worked to bring an end to the behaviour. Accordingly, when T left the classroom the applicant "thought things had gone as they normally would and wasn't too concerned". (ts 10)

7 However, on this occasion, T came back into the classroom and continued to behave in a completely uninhibited way. T approached the applicant, who was seated at his desk, and kicked the applicant's desk and an adjacent metal cabinet and "stood over" (ts 11) the applicant swearing at him and threatening to punch him.

8 The applicant employed verbal strategies in an attempt to calm T, reminding him of a commitment he had made to the applicant in the presence of T's father about his classroom conduct, telling him that he needed to go to Student Services and firmly but calmly telling T that T would not hit him and the matter would have to be resolved in a normal way.

9 None of these strategies worked and T continued his uninhibited behaviour.

10 The applicant had not seen T behave in this way before and to deal with the behaviour ultimately said words to the effect "If you are going to hit me make it your best shot because you won't get a second chance."

11 I have deliberately used the phrase "words to the effect" because the finding made against the applicant by the respondent were that the words "If you're the man hit me" were said and there are slight differences between the versions given by the applicant. The effect of the words however, are, in my view, uncontroversially captured by what I have set out above.

12 It is clear that in response to the applicant's statement, and by this I mean a causal link is apparent, T took the applicant's glasses from his face. The applicant demanded that the glasses be returned but T made to leave the classroom. At this point the applicant grabbed T's bag, which was on his back, and pulled him back.

13 T turned and headbutted the applicant. The applicant then restrained T on the ground. The respondent found that during the restraint of T the applicant punched T in the head. The applicant denies this although he says that to effect the restraint he found it necessary to "put my fist onto the side of [T's] head and push his head back down". (ts 12)

Consideration

14 That a teacher punched a student is a serious allegation. In this matter the allegation is that the teacher punched the student as a form of punishment, it being inherent in the allegation that the punch was not necessary for the restraint of the student. It is basically an allegation that the applicant delivered, albeit in the heat of the moment, a form of "vigilante justice" to T.

15 The standard of proof is, and remains at all times, the balance of probabilities but the seriousness of the allegation is relevant to the task of deciding whether the standard has been met.

16 In my assessment of the evidence issues of consistency and contemporaneity loom large.

17 Unless there is a credible explanation for why such elements do not appear, or should not affect the assessment of the evidence, the evidence of the punch, if it is to be safely relied upon, should in my view be clear, contemporaneous and consistent.

18 The evidence of the punch falls into two categories, being accounts on the day (and in one case a few days after) and the accounts given in interviews with witnesses which commenced about seven weeks after the day of the incident.

19 Five students gave accounts on the day of the incident. The most thorough of those was apparently an interview with T conducted by police on the day. Transcript of that interview was not available to the respondent but the respondent concluded that T had complained during that interview that the applicant had punched him when he was on the ground.

20 That conclusion relied upon an email from one of the police officers who conducted the interview. I set it out in full:

> Hi Karina,
>
> I did review the footage and yes T did mention that he was held on the ground and struck by Mr JAMIESON. This according to T was after he head butted Mr JAMIESON.
>
> According to the interview T did want to leave and go to the toilet but was refused, T has got up to walk away and when confronted by Mr JAMIESON, T has challenged him to stop from walking out.
>
> T has then walked out after kicking a piece of furniture with Mr JAMIESON grabbing his back pack, T has turned and head butted Mr JAMIESON then I believe that is when the altercation has taken place on the ground with T being struck.

T did state he was quite angry and did not recall the incident clearly.

Hope this helps.

Any further information feel free to contact.

Regards

(Exhibit 1 77)

21 This is a police officer reporting that T made a contemporaneous complaint of having been "struck" by the applicant. However, in terms of the reliability of the evidence, the report lacks essential clarity. In the opening paragraph the email says T said the applicant struck him while "he was held on the ground." The third paragraph suggests that the strike occurred during an "altercation" on the ground. It is relevant to know, if a proper finding of fact was to be made, whether the strike occurred during an attempt to restrain T or after he had been restrained.

22 It is also relevant to know where T said he had been struck, an element not made clear by the email even reading it in the context of the email request that it responded to. The head or face is simply not mentioned.

23 It is also relevant to know exactly what is meant by the use of the word "struck". Was this T's word or the description of the police officer of the words T used? If the latter, what exactly did T say? Did T describe the punch to the head the applicant was found to have delivered or did he describe something that could be consistent with what the applicant said occurred, the application of pressure with his fist?

24 It is also noteworthy that the email concludes with a report that T had told police he "did not recall the incident clearly." So much is clear from the second and third paragraphs of the email which, if they accurately record what T told police, reveal poor recollection of events.

25 The report, such as it was, may have been contemporaneous but what exactly was reported is very unclear.

26 Better clarity is provided by the report filled out on 8 June 2016, which has written as marginalia that it was "written by a staff member, T provided the information". (Ex 1 25 - 27) It was written five days after the incident.

27 In this report T says that when he was restrained on the ground and not "fighting back" the applicant "hit me with a closed fist on the left side of my face." The report is not quite contemporaneous and the proper use to be made of its contents will be dealt with later in my reasons.

28 The other four contemporaneous reports from students on the day, written incident reports completed by another teacher immediately after the incident, describe the applicant's restraint of T on the ground but make no mention of a punch or strike or similar.

29 The incident reports are not long or detailed but are of sufficient length and detail that, had something occurred as dramatic as that of which the applicant was found guilty, the absence of its mention, without credible explanation, must affect the fact-finding mission.

30 Each report was detailed enough to include that the applicant had restrained T on the ground but no mention is made of what I find would have been a significant incident, being a teacher punching a child in the head.

31 The failure of all four children to mention the punch on the day must lead to doubt as to whether the punch happened.

32 That assessment might be affected by other evidence to the effect that the children did describe a punch but for some good reason it was not recorded or evidence to the effect that the children were too traumatised on the day to mention the punch or some other evidence explaining the absence of this important detail from the incident reports.

33 However, there was no such evidence. The teacher who wrote up the incident reports later said that one of the four boys had told her "it was rough on the floor" and answered "He did" to the question asked of her "Did he say anything I guess specifically about [the applicant] punching [T] on the floor?" (Ex 1 225) However, this teacher did not give, nor was she asked to give, a good reason for omitting this from the report and the second-hand account lacks essential clarity.

34 Of the four children (other than T) who gave reports on the day, three were later interviewed and two said they had witnessed a punch but, and here I am dealing only with the issue of contemporaneity, the one of them was not asked why he had not mentioned it on the day and the other was not asked whether he had mentioned it on the day.

35 In this case, unlike in some cases, there were contemporaneous reports. The lack of clarity about the punch in the version of T that was obtained by the respondent and the lack of reference to a punch in the other four contemporaneous reports are, in my view, telling matters in the fact-finding exercise.

36 To be clear, if the respondent had before her contemporaneous reports of the incident and the evidence of a punch is very unclear in the one case and completely absent in the other four cases these are factors that should weigh heavily in the balance, especially when the allegation was as serious as that made here.

37 The second category of evidence considered by the respondent, and ultimately that which was, in combination with the evidence of earlier reports by T, relied upon to find the applicant had punched T in the head, were the interviews conducted with the students in the class commencing seven weeks after the incident.

38 In his interview, T said the applicant hit him in the "left temple", "left forehead" with a "closed fist" once he had been restrained on the floor and that the force of the punch was a seven out of ten. (Ex 1 94 – 5)

39 One student, the student who had apparently mentioned on the day that the applicant had punched T, said the applicant "kind of knocked T on the head, not hard at all." (Ex 1 115)

40 That student said he didn't know if the punch was deliberate or not. (Ex 1 123)

41 Another student, one who had given an account on the day but had not reported a punch, said that the applicant "punched [T] in the jaw." (Ex 1 126)

42 Other students interviewed, including one who had given an account on the day, did not report, or denied, that the applicant had punched T.

43 The accounts given contain various inconsistencies with each other in terms of the sequence of events and other details. This is to be expected when Year 8 children are asked to recount a volatile and stressful situation some time after its occurrence. A certain lack of clarity and consistency is understandable in those circumstances and does not necessarily render the evidence unreliable in relation to material matters.

44 Even a certain lack of clarity and consistency in relation to what might be considered material matters is understandable and does not necessarily render evidence unreliable if a robust theme emerges in relation to crucial elements. I do not consider it would have been unsafe for the respondent to have overlooked different evidence about the force of the strike or the exact area of the contact if clear and consistent evidence emerged that the applicant had punched T in the face or head.

45 It is, for instance, understandable that T may have perceived the contact to be of greater force than an observer.

46 Similarly, not much can be made of child witnesses variously describing the contact being to the "temple" or "cheeks" or "jaw". These are not material inconsistencies given the volatile and stressful nature of the incident.

47 Further, it would not necessarily be unsafe to find something as a fact even if every witness does not describe having seen it. If there are good reasons to accept evidence of something having happened as credible and compelling to the necessary standard, it does not necessarily matter that there is competing evidence. In this case, all things being equal, it is just as, if not more likely, that those who did not report seeing a punch did not see it or did not, when asked, recall it or had some other reason for not mentioning it than that the punch did not occur and those who said it did are mistaken or independently lying or have colluded to do so.

48 In other words, looking simply at the accounts given in the interviews done on behalf of the respondent, it could not be said it was unfair, unreasonable or unsafe to have concluded that the applicant punched T in the way alleged.

49 But all of the evidence must be looked at. That includes the evidence of the reports on the day and the evidence of the applicant himself.

50 Turning to the applicant's evidence he admitted to the respondent in his most comprehensive account that he had pushed the side of T's head as part of the restraint. (Ex 1 234) Indeed, the applicant had first put this forward in his letter dated 15 August 2016, being his first formal response to the allegations. (Ex 1 49)

51 Neither account said whether the push had been with an open hand or a closed fist. The respondent does not appear to have investigated that issue with the applicant or others further. As she proceeded to her conclusions it is clear that both possibilities were open.

52 The applicant said at the hearing before me that he had pushed T's head with a "fist" (t 12).

53 The possibility that the applicant had "pushed" T's head with a fist rather than punched him in the head was a live one for the respondent on the basis of the evidence before her.

54 If there had been such contact as the applicant contends, the evidence of the students given in the interviews might take on a different context, one worthy of further consideration.

55 For instance, T may have interpreted what he felt as a punch when it might not have been. It is to be remembered that he was extremely agitated at the time and was involved in a confronting and stressful physical altercation. This puts T's report of 8 June 2016 in a different possible light. What he felt as a "hit" may have been the application of pressure with a fist as described by the applicant.

56 Further, the evidence of the student who said the applicant "knocked" T on the head "not hard at all" and that the applicant "punched him a little bit" (Ex 1 115, 120) also possibly takes on a different context in light of the applicant's version.

57 Also, the applicant's version might give pause for thought in relation to those students who say they witnessed the incident but did not see a punch. Might it not be possible that they saw everything but would not describe, or think to describe, the application of pressure with a fist as a "punch"?

58 In other words, once the account of the applicant is considered, or at least the possibilities opened up by that account, significant doubt, in my view, is introduced in relation to the reliability of the accounts of a "punch" or "knock" or "hit" given by some students.

59 The four incident reports made on the day can also be considered differently in this context. It seems to me entirely possible that there was no punch of the type the respondent found, and accordingly there was no mention of a punch in the incident reports, but that the contact as described by the applicant had occurred and the students when later interviewed described that contact with words such as "punch" or "knock" either because this was the best they could do, they were led into such descriptions or because such words had started to be bandied about in the inevitable schoolyard discussions that would have taken place in the weeks between the incident and the interviews.

60 In my view, in all of the circumstances, and looking at all of the evidence, I do not consider, for the reasons given above, that it was fair or reasonable or safe for the respondent to have found, as she did, that the applicant punched T in the head.

61 There is too much doubt attending the evidence for it to be fair or reasonable or safe to say it is more likely than not that this occurred.

62 In particular a reasonable alternative, that the applicant exerted pressure to T's head with a closed fist but did not punch him, was clearly open on the evidence before the respondent given the contents of the incident reports, the lack of clarity about that possibility in the later interviews and the applicant's account.

63 With such an obvious explanation consistent with innocence being open on what was before the respondent it was not fair or reasonable or safe for the respondent to make the serious finding she did without further and better enquires. To be as clear as possible I find that on the state of the evidence before the respondent the finding that the applicant had punched T in the head was not safe. Further and better investigations may have changed this but they did not occur.

64 In relation to the words spoken by the applicant, the applicant admits to saying words to the effect which the respondent found objectionable but says, in all of the circumstances, they were not a breach of discipline nor could they amount to a particular of a breach of discipline.

65 The circumstances the applicant argues were given no or insufficient weight by the respondent, and which were emphasised before me, are that when he made the comment he was concerned that T was acting in an unprecedented manner in terms of his physical conduct and language, that he was so concerned for his safety that he was "shaking" (ts 11) "scared" and "in shock" (ts 13), "not rationally thinking" (ts 24) and simply "reacted" (ts 12, 24) and "made [a] decision in a split second under duress, immense duress" (ts 25, 49, 50).

66 The applicant said that it would be unreasonable and unfair to have expected him to act with composure and to think rationally given "the level of violence and the extended period of that violence and the escalation". (ts 27)

67 The applicant says that if all of the circumstances had been considered his comment ought not have been, in any way, the subject of disciplinary action and that training or other improvement action would have been more appropriate. (ts 32 – 33)

68 The applicant's position on this aspect of the matter is completely untenable and does him no credit.

69 The applicant asks me to now accept that the respondent failed to take into account the full circumstances of the matter and erred in her findings in relation to the comment by her failure to do so.

70 The truth of what happened is as follows.

71 The applicant made no reference to the comment in his report of the incident produced the day after the incident (and before any disciplinary process had commenced). (Ex 1 45) That report contains this passage: "Once again [T] leaned over me threatening to hit me and then took my glasses off of my face." (Ex 1 46) It omits that a comment from the applicant in the terms later found to have been made immediately preceded the event that the applicant is criticising T for (and which explains subsequent events), namely the removal of his glasses.

72 The truth is that the applicant's subsequent explanation for the omission, given to the respondent and to me, that the comment was not included because it was not relevant to the headbutt which the applicant considered the significant event in the incident, is not believable and is not believed by me. I have no hesitation in finding that the applicant omitted the comment because it reflected badly on him and he did not want anything to detract from his version that T was the unremitting aggressor in the exchange and he the completely innocent victim.

73 The truth is also that in his first formal response to the respondent, (Ex 1 48), the applicant denied, rather than simply omitted, using the words to the effect he later admitted he had said.

74 It is also true that the applicant, in light of what we now know, admits in that letter to denying, falsely as it turns out, to T's father that he said words to that effect and worse still in the letter the applicant, in light of what we now know, admits that he tried to convince T's father that he had not said those words by reference to the evidence that had been gathered at that time. This occurred while all the time the applicant knew that, despite what was in the evidence, he had said such words.

75 Again, I have no hesitation in finding that the applicant denied using the words, and tried to positively convince persons that he had not said the words, to prosecute a version of events that removed any doubt about his own conduct in the incident and made T look as bad as possible.

76 Accordingly, it does not sit well for the applicant to now be criticising the respondent for failing to take in account "all of the circumstances" in her decision making.

77 As it turned out the applicant's omission and initial denial (and attempt to prosecute a different version on this point) were doomed to fail because he had told other teachers on the day, while "in extremis" as he dealt with the consequences of being headbutted by T, that he had used such words. (Ex 1 81) Those statements have an obvious ring of truth given the applicant now admits having said the words to T.

78 By the time the applicant gave his most thorough account to the respondent, dated 6 September 2017 when he signed a formal statement comprising 26 paragraphs on the matter (Ex 1 231 – 235), the applicant accepted he used words to the effect alleged against him and attempted an explanation for them.

79 This is the explanation given:

> "T again stood directly over me in an extremely threatening manner screaming that he was going to punch my head in. I was now scared for my safety realising that T was completely out of control, not responding to normal classroom management strategies and beyond responding to his personal behaviour plan. It was at this poit I chose to use a paradoxical strategy, in hope that it might make him stop and think for a moment, as my previous strategies had not been successful and I was now in real fear for my safety. I said to T "If You are going to hit me, make it good. I will not let you hit me again. " I was scared, shaking and believed that T had made the decision to hit me. After I had made the paradoxical statement, he appeared to hesitate. He then forcibly grabbed my reading glasses from my face."
>
> (Exhibit 1 233-4)

80 Let us assume, in a way of most benefit to the applicant, that I could take seriously anything said by him about the comment given his earlier approach of omission, denial and prosecution of a version most damaging to T.

81 If I were to do this, I would note that the elements of fear for safety and "shaking" in the face of unprecedented bad behaviour are present but I would also note that the applicant "chose to use a paradoxical strategy" having the purpose, formulated in the applicant's mind at the time, of "making T stop and think for a moment." (Ex 1 233)

82 Accepting this I must immediately rule out that the applicant "lost control" or was so scared or unprepared that he lost the capacity for rational thought and simply reacted or acted instinctively.

83 It is open to me to find, on the applicant's own version, that he made a deliberate decision to pursue a "paradoxical strategy" to try and shock T back into his senses. I might then, as the applicant invites me to do, assess that decision in the light of the circumstances but I would not need to consider the possibility that T's behaviour had caused the applicant to lose his self-control and self-awareness such that he was merely reacting instinctively.

84 On the applicant's case I do not need to consider the matters discussed by the Full Bench as being potentially pertinent in *Barry Landwehr v Sharyn O'Neill Director General, Department of Education* (2017) 97 WAIG 1671. That was a case where the Full Bench said the Commission at first instance ought to have investigated further the seriousness of an assault upon a teacher and the relevance of the seriousness of the assault to the loss of control that followed it.

85 The applicant here did not lose control of himself before making the relevant comment, in fact he says he adopted a strategy, and in any event the circumstances here are nothing like those in *Landwehr* where the teacher was assaulted with an air hose and potentially seriously so prior to the relevant conduct.

86 However, I will go on to consider whether the comment was, in all of the circumstances, excusable, on the favourable assumption to the applicant that his earlier attempts to airbrush his comment from the history of the matter were not because he knew the comment to be inexcusable.

87 T was acting very badly. Established methods that had previously worked to regulate his behaviour had failed on this occasion. The applicant clearly had to do something in the face of T's uninhibited demonstration of defiance and aggression. There was nothing to suggest the behaviour was going to peter out or simply end.

88 The applicant's strategy was to say words to the effect found, and now accepted by him.

89 What may be said immediately about the words, and the strategy behind them, is that they were risky. There was really no telling what reaction the words might produce. It is possible that it could have taken the air out of T's tyres and resulted in him leaving the room, deflated but no longer behaving aggressively. It is also possible that T could have, in his heightened emotional state, jumped to a conclusion that he could not back down in front of his classmates and taken up the challenge and hit or attempted to hit the applicant.

90 There was a range of possibilities in between these two open.

91 As it happened the words caused T to do something, that is to take the applicant's glasses from the applicant's face and attempt to leave the room with them. This was an escalation of matters and in turn led to the attempt to restrain T, the headbutt and the wrestle on the ground.

92 The applicant prays in aid that his words had the effect that T did not, in fact, hit or attempt to hit him. If true this would be a good outcome but it assists the applicant little given what did in fact happen as a result of his words.

93 In short, the situation in which the applicant found himself did not call for risk-taking conduct by him. It was not the time or circumstance to attempt what he called a "paradoxical strategy" or "reverse psychology". (ts 11 – 12) It was a bad decision.

94 The question is whether, in all of the circumstances, the decision amounted to misconduct. An argument that the decision was a bad one but should not be considered misconduct given the circumstances is open, even if the applicant has left it very late in the day to fully ventilate such an argument.

95 My view is that the decision was such a bad one that the circumstances do not excuse it. The circumstances were no doubt concerning and stressful but in my view were not such as to reasonably cause an experienced teacher to adopt a risky "off script" strategy and forget about more appropriate strategies.

96 When the applicant was restraining T on the ground he had the presence of mind to send students to get help. That strategy should have occurred to the applicant at the point he used the words he did. Sending a student to fetch someone in higher authority would have been less risky and more likely to defuse the situation and really should have occurred to the applicant. I am prepared to accept that he did not think of and dismiss the possibility but I do find that he should have considered this strategy given his experience and ability.

97 I find that in all of the circumstances the applicant misconducted himself by saying to an agitated student words to the effect he did.

98 Accordingly, I find that the applicant breached discipline and that it is open to impose a penalty upon him.

99 In considering penalty I have regard to the seriousness with which the respondent considered the whole matter but I also note that the penalty was based on the applicant having punched T, something which I have found it is not fair, reasonable or safe to conclude.

100 Accordingly, I consider that I may act effectively "at large" in relation to the question of penalty.

101 In deciding the appropriate penalty I take into account all of the circumstances which include not only the circumstances leading to the use of inappropriate words but also what followed them.

102 The applicant wishes to portray himself as the victim of the whole affair and it is true that he was the victim of a headbutt delivered by T. The applicant however must accept that he was largely the author of his own misfortune and that his words and omissions led to a scene that should not have occurred and which should not have been witnessed by his class. It is tolerably clear, once unhelpful speculation about what may or may not have occurred otherwise, that the applicant's risky words to T led

to T taking his glasses, that led to the applicant grabbing T's backpack, that led to the headbutt and that led to the tussle and restraint.

103 The applicant ceded his authority as a teacher when he resorted to "street talk". The applicant lost control of a situation without exhausting appropriate ways of maintaining it.

104 The applicant should be reprimanded for the misconduct.

105 However, in my view, a reprimand alone does not adequately address the wrongdoing in all of the circumstances, especially given the spectacle to which the comment directly led.

106 I consider that imposing a fine rather than a more severe penalty adequately takes into account the mitigating circumstances pointed to by the applicant as well as his good record, while also making the severity of the breach clear. That is, I do not consider a more serious penalty is necessary to properly bring home to the applicant the seriousness of his actions.

107 In terms of the size of that fine, I note that a fine of up to five days' pay is available but in my view it is the fact that a fine has been imposed rather than its size that really matters.

108 I suppose the size of the fine might be seen to reflect the seriousness of the misconduct and if that be right I note, without in any way being bound by it, that the respondent considered a five day fine was warranted where the misconduct included a punch, something I have found it was not safe for her to find occurred.

109 I am also of the view that the size of fines should be determined with regard to a person's financial circumstances. It must not only mark the seriousness of the misconduct it must also be, in all the circumstances, proportionate, with one of those circumstances being the effect it will have on the teacher.

110 Against that background, not having heard anything to the contrary, I am prepared to take a view most favourable to the applicant being that a fine of any size will have an effect upon him. I have no reason to think that the applicant is any different from most workers for who a big bill, that is one in the hundreds of dollars, hurts.

111 Taking into account all of the circumstances as set out above I impose a penalty of a fine of one days' pay.

112 The application has been upheld in part and the penalty imposed by my order will be a reprimand and a fine of one days' pay.

2018 WAIRC 00262

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE JAMIESON
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 23 APRIL 2018
FILE NO/S	APPL 5 OF 2018
CITATION NO.	2018 WAIRC 00262

Result	Application upheld in part; penalty of reprimand and fine of one days' pay imposed
Representation	
Applicant	In person
Respondent	Mr W Fitt of counsel

Order

HAVING heard the applicant on his own behalf and Mr W Fitt of counsel for the respondent on Monday, 12 March 2018; and

HAVING given Reasons for Decision in which I determined to uphold the application in part and to impose a penalty of a reprimand and a fine of one days' pay on the applicant;

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

> THE penalty imposed on the applicant by the respondent by way of letter dated 24 May 2017 be altered to a reprimand and a fine of one days' pay to be paid forthwith.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2017 WAIRC 00912

DISPUTE RE ALLEGED BREACH OF THE DELIVER AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DELIVER2U (WA) PTY LTD
	APPLICANT
	-v-
	GD MITCHELL ENTERPRISES PTY LTD T/AS LITE N' EASY PERTH
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 1 NOVEMBER 2017
FILE NO.	RFT 4 OF 2017
CITATION NO.	2017 WAIRC 00912

Result	Direction issued
Representation	
Applicant	Mr W Spyker of counsel
Respondent	Ms S Camilleri of counsel

Direction

HAVING heard Mr W Spyker of counsel on behalf of the applicant and Ms S Camilleri of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby directs –

(1) THAT the issue of the Tribunal's jurisdiction to hear and determine the applicant's claim be heard as a preliminary issue on the papers.

(2) THAT the applicant file and serve its written submissions by 27 November 2017.

(3) THAT the respondent file and service its written submissions by no later than 4 December 2017.

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

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

2018 WAIRC 00217

DISPUTE RE ALLEGED BREACH OF THE DELIVERY AGREEMENT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2018 WAIRC 00217
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 28 NOVEMBER 2017, MONDAY, 4 DECEMBER 2017, FRIDAY, 9 FEBRUARY 2018, FRIDAY, 23 FEBRUARY 2018
DELIVERED	**:**	THURSDAY, 5 APRIL 2018
FILE NO.	**:**	RFT 4 OF 2017
BETWEEN	**:**	DELIVER2U (WA) PTY LTD Applicant AND GD MITCHELL ENTERPRISES PTY LTD T/AS LITE N' EASY PERTH Respondent

Catchwords	:	*Industrial Law (WA) – Preliminary issue – Whether Tribunal has jurisdiction to determine applicant's claim – Whether agreement constitutes an "owner-driver contract" – Principles applied – Application dismissed*
Legislation	:	*Industrial Relations Act 1979* (WA)
		Owner-Drivers (Contracts and Disputes) Act 2007 (WA)
		Road Traffic (Vehicles) Act 2012 (WA)
		Interpretation Act 1984 (WA)
		Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	Mr W Spyker of counsel
Respondent	:	Ms S Camilleri of counsel
Solicitors:		
Applicant	:	Spyker Legal
Respondent	:	Thynne + Macartney

Case(s) referred to in reasons:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27

Ireland v Johnson, CEO Department of Corrective Services (2009) 189 IR 135

Project Blue Sky v ABA (1998) 194 CLR 355

Ram Holdings, Michael Italiano v Kelair Holdings Pty Ltd [2018] WAIRC 00156

Case(s) also cited:

Allen v Carbone (1975) 132 CLR 528

Antonio Paparoni (Peps Transport) v Viking Group Holdings Pty Ltd [2011] WAIRC 00936

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

Brown v Brown (1905) 5 SR (NSW) 146

Dallikavak v Minister for Immigration and Ethnic Affairs (1985) 61 ALR 471

Ecosse Property Holdings Pty Ltd v Gee dee Nominees Pty Ltd [2017] HCA 12

Electricity Generation Corporation v Woodside Energy Limited (2014) 241 CLR 649

Federal Commissioner of Taxation v Coles and Co Ltd [1974] VR 443

Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603

Gordon v Commissioner of Police [2011] WASCA 168; (2011) 91 WAIG 1825

International Finance Trust Company Ltd v NSW Crime Commission (2009) 240 CLR 319

Jeffrey Daniel Matthews v Webb Freight Services Pty Ltd [2010] WAIRC 01107

Kingstyle Investments Pty Ltd v Gene Lawson [2013] WAIRC 00355

McHenry v McHenry and Anor; Motor Accidents Insurance Board v McHenry (unreported, Supreme Court of Tasmania, Underwood J, 14-17, 21-24, 30 August 1995, 4 October 1995)

Meehan v Jones (1982) 149 CLR 571

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451

Streat v Fantastic Holdings Ltd [2001] NSWCR 1097

The Civil Service Association of Western Australia Inc v Director-General, Department for Child Protection [2010] WAIRC 00206

Thompson v Goold & Co [1910] AC 409

Thorby v Goldberg (1964) 112 CLR 597

Transport Workers' Union of Australia, Industrial union of Workers, Western Australian Branch v Sims Metal Management Ltd [2012] WAIR Comm 235

Upper Hunter County District Council v Australian Chilling and Freezing Company Ltd (1968) 118 CLR 429

Wills v Bowley [1983] 1 AC 57

Reasons for Decision

1 The applicant, Deliver2U (WA) Pty Ltd, contracted to the respondent, Lite n' Easy Perth, to deliver packaged meals to its customers under a delivery agreement entered into on or about 2 May 2016. Although the delivery agreement was never signed by the applicant, the parties, through their course of dealings, adopted its terms. By letter dated 21 August 2017, the respondent purported to terminate the delivery agreement with four weeks' notice. By letter dated 22 August 2017, the respondent informed the applicant that it was terminating the delivery agreement effective immediately. The applicant alleges the respondent breached the delivery agreement and by these proceedings, claims damages for the wrongful termination of the contract based on an implied term of two months' notice to terminate. Furthermore, the applicant alleges the respondent, in imposing conditions on the applicant that were not reasonably necessary to protect its legitimate business interests, engaged in unconscionable conduct under s 30 of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA). Accordingly, the applicant seeks damages for the alleged unconscionable conduct.

2 A preliminary issue has arisen between the parties. That issue relates to whether the agreement between the parties constituted an "owner-driver contract" under the OD Act. The respondent contends the Tribunal does not have jurisdiction to determine the applicant's claim, as there was no requirement placed on the applicant under the delivery agreement to use a heavy vehicle, that being a vehicle with a gross vehicle mass of more than 4.5 tonnes and accordingly, the agreement does not constitute an "owner-driver contract" and the provisions of the OD Act do not apply. As this matter has been raised by the respondent, it is incumbent on the Tribunal to determine the issue prior to enquiring into and dealing with the substance of the applicant's claim. The Tribunal agreed it would determine the issue as a preliminary matter, based upon the written submissions of the parties.

Contentions of the parties

3 Clause 8.1 of the Agreement required the applicant to provide, at its expense, a motor vehicle suitable for the delivery of the products which complied with the following conditions:

(a) the vehicle must be of a type and capacity approved by the Company from time to time;

(b) the vehicle must be fully sealed, insulated and capable of being operated at a temperature advised by the Company from time to time;

(c) the vehicle must be kept in a suitable condition for carrying food products and must comply with all relevant legislation relating to the carrying of food products;

(d) the vehicle must be painted white and will bear no logos, brands, markings or product descriptions, unless required by the Company, in which case they will be provided, at no cost to the Contractor, by the Company; and

(e) the vehicle must be kept in a good and proper state of repair and condition to maintain the highest standards of hygiene and cleanliness as may be reasonably practical.

4 It was common ground that the Agreement did not stipulate the size or tonnage of the vehicle required to deliver the respondent's packaged meals. Nor was any express agreement reached between the parties as to the size and tonnage of the applicant's vehicle.

5 The applicant submitted it is an "owner-driver" for the purposes of the OD Act because:

(a) it is a body corporate;

(b) that carries on the business of transporting goods;

(c) in one or more heavy vehicles, being a Hino truck with a GVM of 5.5 tonnes, which is supplied by it and operated by its officer, Anthony Baggs, whose principal occupation is the operation of the vehicle.

6 The applicant maintained that to perform the regional runs and to accommodate the refrigeration style insulation required by the respondent, it required a vehicle with a GVM of 5.5 tonnes.

7 The applicant further submitted that all that is required to invoke the Tribunal's jurisdiction is that, as a matter of fact, the applicant transported the respondent's goods in a heavy vehicle. The applicant contended there is nothing in the OD Act which sets out a requirement for a hirer or an owner-driver contract to specify the size of a vehicle, in terms of its GVM, that a driver must utilise for the provisions of the Act to apply. For a contract to do so would be rare and to construe the OD Act as containing such a requirement would be to contradict the plain meaning of the words of the statute. Further, such a requirement would infringe s 7 of the OD Act by reason that it "purports to exclude, modify or restrict the operation" of the Act.

8 The respondent contended that the ordinary and grammatical sense of the words used in s 5(1) of the OD Act requires that an "owner-driver contract" must have all the following elements:

(a) there must be a contract (whether written or oral or partly written and partly oral); and

(b) the contract must be entered into in the course of business; and

(c) the contract must be between an owner-driver and another person; and

(d) the contract must be:

(i) for the transport of goods;

(ii) in a heavy vehicle;

(iii) by the owner-driver.

9 While the Agreement was for the transport of goods, it was not a term of the Agreement, or a requirement of the hirer, that the applicant was to transport the goods in a heavy vehicle, that being a vehicle with a GVM of more than 4.5 tonnes.

10 As the respondent operates a business to manufacture, sell and deliver packaged meals, it maintained that the vehicles used by its independent contractor drivers, including the applicant, need to be suitable for this purpose. In accordance with clause 8.1(b) of the Agreement, the applicant was required to use a vehicle that is "fully sealed, insulated and capable of being operated at a temperature advised by the Company from time to time". The respondent denied a heavy vehicle was required and submitted that the quantity and weight of the containers (eskies) which the respondent's contractors deliver (up to 220 at peak times), are such that a vehicle with a carrying capacity of approximately two tonnes is sufficient. Further, the respondent said the applicant previously undertook deliveries for the business in a smaller vehicle, while he was engaged as an independent contractor operating under his own ABN.

11 Accordingly, the respondent contended there was no requirement, oral or written, under the Agreement and no business requirement, for the applicant to use a heavy vehicle. The applicant simply decided of its own volition to purchase a vehicle with a GVM of more than 4.5 tonnes.

Consideration

12 The relevant principles in relation to the construction of statutes are well settled. Words in a statute are to be considered in accordance with their ordinary meaning taken in context. As was said by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky v ABA* (1998) 194 CLR 355 at par 78:

> However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction [56] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation*, Mr Francis Bennion points out [57]:
>
> > "The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with." (footnotes omitted)

13 Reliance on the ordinary grammatical meaning of the language used in a statute was also referred to by French CJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 240 CLR 319 at par 31 (see too *Ireland v Johnson, CEO Department of Corrective Services* (2009) 189 IR 135 at 141). Furthermore, the Tribunal is not at liberty to regard words used in the statute as superfluous. All words used must be given some meaning: Pearce D C and Geddes R S *Statutory Interpretation in Australia* (7th ed 2011) 2.26.

14 By its long title the OD Act is an Act:

- **To promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so; and**
- **To establish the Road Freight Transport Industry Tribunal and the Road Freight Transport Industry Council,**

and for related purposes.

15 By its ordinary language, the OD Act extends to regulating the entry into of "contracts for the transport of goods in heavy vehicles". A purpose, from both the long title and indeed the short title of the legislation, is the regulation of persons party to certain contracts. The long title may be referred to as an aid to the construction of an Act of Parliament, not only when there may be ambiguity as to meaning: *Statutory Interpretation in Australia* (7th ed 2011) 4.46.

16 By s 3 of the OD Act, "heavy vehicle" has the meaning as prescribed in s 3(1) of the *Road Traffic (Vehicles) Act 2012*. This means a vehicle with a GVM of greater than 4.5 tonnes. By s 4, the meaning of "owner-driver" is set out in the following terms:

> **4. Meaning of "owner-driver"**
>
> (1) In this section —
>
> ***listed public company*** has the same meaning as it has in the *Income Tax Assessment Act 1997* of the Commonwealth;
>
> ***officer***, of a body corporate, has the same meaning as it has in the *Corporations Act 2001* of the Commonwealth.

(2) For the purposes of this Act an ***owner-driver*** is —

(a) a natural person —

(i) who carries on the business of transporting goods in one or more heavy vehicles supplied by that person; and

(ii) whose principal occupation is the operation of those vehicles (whether solely or with the use of other operators); or

(b) a body corporate (other than a listed public company) that carries on the business of transporting goods in one or more heavy vehicles that are —

(i) supplied by the body corporate or an officer of the body corporate; and

(ii) operated by an officer of the body corporate (whether solely or with the use of other operators) whose principal occupation is the operation of those vehicles; or

(c) a partnership of persons, at least one of whom is a person referred to in paragraph (a).

17 The key provision for present purposes, is the definition of "owner-driver contract" which is found in s 5. It is in the following terms:

5. Meaning of "owner-driver contract"

(1) For the purposes of this Act, an ***owner-driver contract*** is a contract (whether written or oral or partly written and partly oral) entered into in the course of business by an owner-driver with another person for the transport of goods in a heavy vehicle by the owner-driver.

(2) It does not matter that an owner-driver contract provides for an owner-driver to perform services other than transporting goods, as long as the services to be performed under the contract predominantly relate to the transport of goods.

(3) To avoid doubt, an owner-driver contract does not include a contract that is a contract of employment.

18 The Tribunal's jurisdiction is governed by s 38. This provides for the Commission sitting as the Tribunal, to have jurisdiction to hear and determine disputes and to enquire into and deal with matters in relation to owner-driver contracts that may be referred to it. The meaning of "dispute" is set out in s 37(1). Whilst the Tribunal has a broad jurisdiction in relation to various kinds of disputes, one kind of dispute regularly coming before the Tribunal is a dispute arising under or in relation to "an owner-driver contract". The language of the statute, makes it clear that the Tribunal's jurisdiction extends to a range of different kinds of disputes and matters concerning owner-driver contracts including their formation, performance, variation and termination.

19 Based on the affidavit evidence filed by both the applicant and the respondent, it does not appear to be in dispute that for the purposes of s 4 of the OD Act, the applicant was an owner-driver as defined, being a body corporate that carries on the business of transporting goods in one or more heavy vehicles supplied by that body corporate. Mr Baggs, as the officer of the company, operated the vehicle and that was his principal occupation.

20 For the purposes of examining s 5 of the OD Act, it may be helpful to break it down into its component parts. Firstly, there is a requirement for there to be "a contract" (either oral or written or partly so). That requirement would appear to have been satisfied in this case as although there had been several contracts entered into, the latter being unsigned, no issue appears to have been taken by the parties that the terms of the third and final Agreement dated 2016, governed the relationship between them. Secondly, there appears to be no issue with the requirement that the Agreement was entered into by the applicant "in the course of business". I am satisfied that it was. Thirdly, as I have already indicated, the requirement in the definition, that the contract be entered into by an "owner-driver" on the evidence, appears to have been satisfied in that the applicant was, at the material times, so described. The Agreement was also entered into "with another person", that person being the respondent. The subject matter of the contract, that being "for the transport of goods", also appears to have been satisfied, as no issue was taken that the products manufactured by the respondent and delivered to its customers were "goods" as defined in s 3 of the OD Act. Those goods, at least insofar as the applicant was concerned, were transported in a "heavy vehicle" as defined and they were transported by the applicant as the relevant "owner-driver".

21 The question however for the Tribunal to determine, is what meaning should be given to the last part of the definition of "owner-driver contract" in s 5(1), where the words "for the transport of goods in a heavy vehicle by the owner-driver" are used. The issue raised involves a constructional choice. That is, whether for the purposes of the definition in s 5(1), on its proper construction, the meaning of "owner-driver contract" means not just the transport of goods by an owner-driver as defined in s 4 but rather, a contract that must specify in its terms that a heavy vehicle be used, which is one with a GVM of more than 4.5 tonnes.

22 On the other hand, is it sufficient that there simply be a contract between an owner-driver (as defined) and a hirer by which goods (as defined) are to be transported? This is because it is assumed, given the definition in s 4, that the owner-driver, to be so characterised, will be the operator of one or more heavy vehicles supplied by that person. This was the position essentially adopted by the applicant. The respondent placed emphasis on the word "for" in the second last line of s 5. It was contended that this word marks out the scope of the contract and supports the view that specification of the heavy vehicle concerned is a contractual requirement. The failure to do so in a contract means that the contract is not one that attracts the terms of the OD Act.

23 As set out above, in s 5(1), which defines what an owner-driver contract is, specifies that the relevant contract is to be entered into … "*for*" the transport of goods "*in a heavy vehicle*" by the owner-driver. The language of s 5(1) read in its ordinary and natural sense, does not say that the contract between an owner-driver and the other person is for the transport of goods

simpliciter. The final words in the subsection qualify the words "transport of goods", by the inclusion of the further words "in a heavy vehicle by the owner-driver". Such an owner-driver is a person, who, by s 4, is engaged in the business of the transport of goods in heavy vehicles. The word "for" in the context of s 5, in its ordinary and natural sense, must be understood as denoting the relevant purpose or subject matter of the contract. The Shorter Oxford English Dictionary relevantly defines "for" as "1. with the object or purpose of OE. b. for the purpose of being or becoming …". In my view, the word "for" is directly referable to the preceding words in the sub-section and refers to the subject matter of the contract between the parties.

24 The terms of s 5(2) tend to confirm this construction as it further deals with the purpose and subject matter of the contract by providing that it may also enable the owner-driver to perform other services, so long as the contract predominantly relates to the transport of goods. When read with the long title, by s 5, the OD Act concerns itself with contracts of the specified kind. That is, in part at least, the subject matter of the legislation. This is supported by reference to other parts of the legislation. By Part 2, is prescribed matters in relation to the content of owner-driver contracts. These include prohibited provisions and implied provisions. By Part 4, are prescribed terms dealing with the making of a Code of Conduct concerning various matters in relation to owner-driver contracts and the conduct of the parties to such contracts. Parts 5 and 6 cover negotiations for owner-driver contracts and unconscionable conduct in relation to their negotiation, terms and performance.

25 Additionally, s 5(1) is not to be read in isolation. The long title to the OD Act, set out earlier in these reasons, in part provides that in pursuing a safe and sustainable road freight transport industry, this is to be achieved "by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so …".

26 The terms of the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* are also relevant. Whilst it is the general rule that regulations may not be referred to in the interpretation of the statute under which regulations are made, an exception applies where regulations are, in conjunction with the statute, part of a legislative scheme: *Statutory Interpretation in Australia* (7th ed 2011) 3.41. In this case, the Code of Conduct is part of such a scheme. In the negotiation for owner-driver contracts in Division 1 of the Code, certain obligations are imposed on parties. Section 7 deals with entering into contracts. By s 7(2), a prospective hirer is obliged to provide certain information to an owner-driver. This includes a copy of Guideline Rates published by the Road Freight Transport Industry Council, comprising industry representatives and established under Part 3 of the OD Act. Such Guideline Rates are given statutory effect and have the status of subsidiary legislation for the purposes of s 43(7) to (9) of the *Interpretation Act*. They are to be published under s 27 of the OD Act and s 8 of the Code. Guideline Rates consider fixed and variable costs of operating heavy vehicles of specified classes. Under s 7(2) of the Code, they are to be given to an owner-driver, irrespective of whether such rates are applicable to the proposed contract. This would cover the circumstance where, for example, a payment system by piecework is being contemplated. An owner-driver can then, by way of comparison, make some assessment of what might be earned under an hourly or per kilometre rate basis, to help assess whether rates to be paid are safe and sustainable: *Ram Holdings, Michael Italiano v Kelair Holdings Pty Ltd* [2018] WAIRC 00156 at pars 129-130.

27 Guideline Rates are applicable to heavy vehicle types starting from 5 tonnes GVM up to prime movers of 122.5 tonnes GVM. They specify rates, according to size of vehicle, on both an hourly rate and per kilometre rate basis, for metropolitan and regional work. Whilst not minimum or maximum rates, they are published to guide parties in their negotiations for owner-driver contracts. Rates of pay are a fundamental term of any owner-driver contract and the Guideline Rates are fixed by reference to classes of heavy vehicles. The Tribunal may have regard to the Guideline Rates under the OD Act in determining whether rates paid under an owner-driver contract are safe and sustainable. All the above is a strong indication of legislative intention that the use of a heavy vehicle must be part of the bargain between the parties for a contract to be an owner-driver contract as defined in s 5 of the OD Act.

28 The fact that the focus and object of the OD Act is contracts of a specified kind (i.e. owner-driver contracts) and not specified classes of persons, may be illustrated by an example. Take the case of a light courier driver who may have a contract with Australia Post for the delivery of small parcels in the Perth metropolitan area. The courier uses a light van or similar small vehicle for this purpose, of about a maximum GVM of one tonne. If, in a week, the courier attends for work driving a 5-tonne truck, to deliver the same small parcels around the metropolitan area, without the agreement or even perhaps, the knowledge of the other party to the agreement, would this of itself, convert the arrangement between the courier and Australia Post to an owner-driver contract amenable to the Tribunal's jurisdiction? I do not think so. Unless the express terms of the contract itself, whether oral or written, or partly so, provides for the use of a heavy vehicle as defined in s 3 of the OD Act, by the owner-driver, to transport the relevant goods, then the resulting contract is not one amenable to the Tribunal's jurisdiction in my view.

29 Furthermore, if one were to accept the contentions of the applicant, that it is not necessary for the relevant contract to provide that goods are to be transported in a heavy vehicle, and the fact of the use of a heavy vehicle is enough, then it is open for one party to unilaterally alter the character of the arrangement, as I have attempted to illustrate in the example above. If that were so, some odd results may follow. Take the further case where an owner-driver and a hirer agree for the owner-driver to transport certain goods and, as contended by the applicant, the requirement for it to do so in a heavy vehicle forms no part of the bargain between them. Assume also that for three days of the week the owner-driver uses a heavy vehicle of 5 tonnes GVM. Due to operational or other reasons the owner-driver needs to use another vehicle that is only 4 tonnes GVM for the remaining two days of the week, but is still suitable for the transport task at hand. Does this mean that for the first three days of the week the arrangement is subject to the jurisdiction of the Tribunal but not the last two days of services? I do not think that it would have been the intention of the legislature that a party could oscillate in and out of the Tribunal's jurisdiction in this way. It would make the determination of monies owed and damages by the Tribunal under s 47 of the OD Act problematic to say the least.

30 Taking this last point to its logical conclusion, there would be nothing stopping an owner-driver as defined in s 4 of the OD Act, from entering into a contract with another person to transport goods in a light vehicle, if the circumstances required it, resulting from the express request of the other party. On the face of it, that would not be an arrangement amenable to the Tribunal's jurisdiction, even on the applicant's case. However, if on the day appointed for the performance of services the

owner-driver attends and performs the transport task in a heavy vehicle, despite the express wishes of the other party, on the applicant's view of s 5 of the OD Act, an owner-driver contract exists and the other party is exposed to the full rigour of the OD Act. The express position of the other party is taken to be irrelevant on the applicant's case. With respect, I consider such an outcome would be irrational and arbitrary.

31 I do not consider that s 7 of the OD Act assists the applicant in this case. The purpose of this provision is to prevent any contract terms cutting down or avoiding the protections and obligations imposed on parties to an owner-driver contract created by the legislation. Any such purported terms of a contract are to be of no effect and are severable from the remaining terms of the contract.

32 The resolution of construction choices is to be influenced by a consideration of the terms of the statute read in terms of its purpose. This is part of the modern approach to statutory interpretation as also enshrined under s 18 of the *Interpretation Act 198*4 (WA). As an aid in this respect, by s 19 of the *Interpretation Act*, extrinsic materials can be referred to not only to confirm the ordinary and natural meaning of a statutory provision, but also to assist in resolving any ambiguity. However, reference to extrinsic materials should only occur after applying the ordinary rules of statutory construction: *Ram Holdings* at par 31.

33 In the explanatory memorandum to the Bill, which referred to the meaning of "owner-driver contract" it was said as follows:

> An owner-driver contract is defined as a contract for the transport of goods in a heavy vehicle.

34 Further, in the second reading speech for the *Owner-Drivers (Contracts and Disputes) Bill 2006* (WA) the responsible Minister said the following:

> The purpose of the Owner-Drivers (Contracts and Disputes) Bill 2006 is to provide legislation that ensures safe and sustainable rates for owner-drivers in the road transport industry. We expect heavy haulage drivers to operate in a safe manner, with proper fatigue management practices in place. However, unless owner-drivers are paid reasonable rates, the pressure will be on to cut corners to meet the high cost environment in which they operate.
>
> This bill recognises inequity in the bargaining positions of owner-drivers and hirers. Several studies have indicated that excessive competition in the trucking industry has resulted in lower than economic rates, leading to driving hours above safe levels, the use of stimulant drugs to keep drivers awake, reduced maintenance on vehicles, unsafe work schedules and unsafe loads.
>
> Owner-drivers are the most vulnerable and least protected sector in their industry. The sector is often characterised by low-level earnings, high rates of business failure, and working conditions that many members of the community would consider unacceptable. This legislation aims to regulate this industry so that standards are maintained at a high level and that self-employed drivers are guaranteed a reasonable rate of return.
>
> Fuel prices have been trending upwards, raising financial pressure upon already marginal owner-drivers in the trucking industry, particularly long-distance drivers. Although increases in fuel prices are directly related to international fuel price increases, owner-drivers have sought relief and assistance from the state. Fluctuations in fuel prices during 2006 indicate that price volatility is likely to continue. The legislation will provide owner-drivers with some capacity to ensure that they do not bear all the risks associated with these fluctuations. The legislation will cover all operators and hirers of vehicles with a tonnage limit greater than 4.5 tonnes, in circumstances in which those vehicles are used for the carriage of goods for reward. The tonnage limit of 4.5 tonnes has been used as it is in a number of other statutes that apply to the road freight industry, including the Western Australian Commercial Driver Fatigue Management Code of Practice and the federal diesel fuel rebate scheme. Amongst other things, the legislation provides owner-drivers with security of payment; establishes the Road Freight Transport Industry Council; and establishes a mandatory code of conduct.

35 The terms of the second reading speech, read with the long title, confirm that it is a purpose of the legislation to provide a safe and sustainable road freight transport industry. It was intended that obligations be imposed on the parties to owner-driver contracts and prospective contracts, to conduct themselves in various ways; to promote fair dealing; to ensure rates paid under contracts are safe and sustainable; and to provide appropriate protections for owner-drivers in the heavy vehicle transport industry. There is nothing inconsistent with these purposes to require that as a part of the bargain between contracting parties, for the transport of goods, that it be agreed that the vehicle to be used will be a heavy vehicle as defined under the OD Act. From the Tribunal's own experience, many contracts for the transport of goods that come before it in matters within the Tribunal's jurisdiction, are informal and often oral. This does not mean however, that the parties have not turned their minds to and discussed the requirement that the relevant goods need to be transported in a heavy vehicle. As a matter of common sense, that is why a hirer will need to engage an owner-driver in the first place, to undertake the freight task the hirer has in mind.

36 Whilst the applicant referred to other cases that have been before the Tribunal, those matters turned on their own facts and none of them involved the determination of the present point. The Full Bench matter referred to, *Kingstyle Investments Pty Ltd v Mr Gene Lawson* (2013) WAIRC 00355; (2013) 93 WAIG 304, turned on the issue of whether the respondent in the appeal was an "owner-driver" for the purposes of s 4, in terms of the type of vehicle he operated, which was a tow truck. The issue of the meaning of "owner-driver contract" for the purposes of s 5, did not arise for specific consideration.

37 Having reached the view that it is to be specified that a heavy vehicle be used, for a contract to be an owner-driver contract as defined, it is necessary for me to consider whether, in terms of the contract entered into between the parties in this case, there was such an agreement. By cl 8.1(a) of the Agreement, it was provided that "the (applicant's) Vehicle must be of a type and capacity *approved by the Company from time to time*". The issue arising from that being whether, on the facts, the respondent did approve the type and capacity of vehicle purchased by the applicant to continue performing the services and thus, whether it could be contended, that the use by the applicant of its heavy vehicle to perform the services was in accordance with the terms of the Agreement. In a letter dated 25 January 2018 from my Associate to the solicitors for the parties, the Tribunal directed their attention to cl 8.1(a) of the Agreement and invited them to address the issue. This factual issue was the subject of

the affidavit evidence from Mr Baggs and Ms Brokaw of the respondent and supplementary written submissions were filed by the parties. I turn to deal with that question now.

Was the use of a heavy vehicle to perform the services part of the Agreement?

38 As I have noted already, it was not disputed that the unsigned Agreement dated 2016, governed the parties' relationship from about May 2016 onwards. The relevant part of the Agreement for present purposes was cl 8 Vehicle. It was in the following terms:

> **8. Vehicle**
>
> **8.1** The Contractor must provide, at the Contractor's expense, the Vehicle suitable for the delivery of the Products which complies with the following conditions:
>
> (a) the Vehicle must be of a type and capacity approved by the Company from time to time;
>
> (b) the Vehicle must be fully sealed, insulated and capable of being operated at a temperature advised by the Company from time to time;
>
> (c) the Vehicle must be kept in a suitable condition for carrying food products and must comply with all relevant legislation relating to the carrying of food products;
>
> (d) the Vehicle must be painted white and will bear no logos, brands, markings, or product descriptions, other than the Company's logo or brand if required by the Company, in which case they will be provided, at no cost to the Contractor, by the Company; and
>
> (e) the Vehicle must be kept in a good and proper state of repair and condition to maintain the highest standards of hygiene and cleanliness as may be reasonably practical.
>
> **8.2** The Contractor must at all times during the Contract Period keep the Vehicle registered and maintain a comprehensive motor vehicle insurance policy for the Vehicle at its replacement cost.
>
> **8.3** If the Vehicle is damaged or requires repair at any time during the Contract Period, the Contractor must supply a replacement Vehicle at its cost, to ensure that the Contractor can provide the Services. The replacement Vehicle must comply with clause 8.1.
>
> **8.4** The Contractor must supply the Company, upon request, with a copy of the following:
>
> (a) a current driver's license for any Permitted Driver;
>
> (b) a copy of the current registration certificate for the Vehicle; and
>
> (c) a current certificate of motor vehicle insurance for the Vehicle.
>
> **8.5** A failure to comply with the required standards may result in a suspension of the Engagement until the required conditions are met.

39 Mr Baggs in his affidavit, outlined his initial engagement by the respondent between April 2014 and April 2016. Over this period, he performed deliveries of the respondent's prepacked meals in a van hired from a rental company. Mr Baggs said that the vehicle had a GVM of 4.5 tonnes. It was Mr Baggs' observation that that capacity of vehicle provided him with very little extra space when it was filled with eskies of meals to be delivered and empty eskies from returns.

40 In late March 2016 Mr Baggs said that he met with Ms Brokaw. The meeting took place at the respondent's depot in Canning Vale. It was at this meeting that Mr Baggs was informed that the respondent was changing its arrangements for delivery drivers. He would need to incorporate a company and purchase a truck if he was to continue performing deliveries. This latter point was disputed by Ms Brokaw, who said that no mention was made of the need for a truck to be purchased. She testified that what arrangements Mr Baggs made for the provision of a vehicle was up to him. Mr Baggs also said that Ms Brokaw told him during that meeting, that the truck would need to be fitted with refrigerated style insulation and it needed to be white. Again, Ms Brokaw testified that she did not specify refrigerated style insulation, but when it was raised by Mr Baggs, she agreed that would be suitable.

41 From this meeting, Mr Baggs understood that he needed to put these new arrangements in place within a period of two months. However, it seemed that this was later extended to commence on 1 July 2016.

42 The upshot of this meeting was, according to Mr Baggs, that he commenced looking to purchase a suitable truck. His evidence was that by about April 2016, the number of eskies that he was required to deliver had increased to about 120 for each trip and the number of empty eskies to be returned were approximately 160. Using these figures, Mr Baggs estimated that he would need a vehicle with a carrying capacity of about 280 eskies all up to perform the services. As the vehicle would need to also have refrigerated style insulation, Mr Baggs concluded that the vehicle he would need for the services would have to be bigger that the one he was then using. From Mr Baggs' enquiries, he concluded that to satisfy these requirements he would need a truck of about 5 tonnes GVM, which would cost him about $70,000.

43 Given the capital cost required, Mr Baggs testified that he wanted to clarify with Ms Brokaw that there would be sufficient work to justify his purchase. Accordingly, on 2 May 2016, Mr Baggs sent Ms Brokaw a text message informing her of what he was considering doing. A copy of the text message and Ms Brokaw's reply was annexure AB-1 to Mr Baggs' affidavit. The message was quite lengthy. In it Mr Baggs informed Ms Brokaw of his thoughts regarding buying a new truck. He mentioned the cost of about $70,000. Mr Baggs expressed concern about there being no guarantee that his current income would be maintained. He mentioned the purchase cost of a van at about $45,000, as being easier to financially manage. If he chose to purchase the larger truck, he would need to cover his higher expenses. Mr Baggs said that he was happy to proceed to make that commitment if the respondent could commit to ensuring its viability. He set out some weekly expenses which would be incurred and the extra weekly expense from using the larger truck than a van. In the message, Mr Baggs did not specify what

capacity of truck he was considering at that time. Mr Baggs sought clarification from Ms Brokaw whether there would be any major changes to his runs in the foreseeable future and whether the additional expense in a truck purchase would be considered by the respondent when arranging driver runs.

44 In her reply, Ms Brokaw indicated that whilst she could not guarantee the numbers would increase, there was no intention to reduce them. Further, Ms Brokaw made the comment that the respondent was looking to "better match capacity of drivers. So yes, if you had higher capacity you would get higher numbers". Mr Baggs testified that he took this to mean that if he was to continue performing his then existing delivery numbers, in particular in relation to the "bulk delivery runs", the respondent would require him to purchase a truck large enough to accommodate his estimate of about 280 eskies and that it have refrigerated style insulation fitted to it. On this basis, the applicant went ahead and purchased the Hino 4.5 tonne truck. Along with the insulation that was fitted, the manufacturer registered the truck with a GVM of 5.5 tonnes.

45 In accordance with the new arrangements, Mr Baggs said that he commenced deliveries on 1 July 2016 in his new Hino truck. He said that he travelled to and from the depot in Canning Vale where product is loaded and empty eskies are unloaded. Mr Baggs testified that the dock is monitored by cameras and that Ms Brokaw and other staff from time to time visit the depot. Mr Baggs was of the view that the staff of the respondent were aware of the type of vehicle that he had purchased and was using. Indeed, Mr Baggs further said that he thought in about August 2016, he approached Ms Brokaw while he was at the loading dock and requested that she inspect his truck to ensure that it met with the requirements she had specified in their earlier meeting in March 2016. Mr Baggs said that Ms Brokaw did so and she asked questions about the type of insulation and he answered them. According to Mr Baggs, after the inspection and their discussion, Ms Brokaw raised no concerns about the type or size of the truck. At no time subsequently, were any concerns raised by Ms Brokaw or anyone else from the respondent, about the size and type of vehicle that the applicant was using to perform the services.

46 Finally, whilst it was of a hearsay nature, Mr Baggs said that he was aware of at least two other drivers who used vehicles to deliver the respondent's products, both of which have a GVM greater than 4.5 tonnes. Additionally, Mr Baggs said that the respondent's reference to other contractors using vehicles of approximately two tonnes, was inaccurate. He testified this refers to the weight of the vehicle and not the GVM, which is a measure of not only the vehicle's weight, but also its total cargo capacity, fuel load with a driver etc.

47 In response to Mr Baggs' evidence, Ms Brokaw in her affidavit said that when she met with Mr Baggs to discuss the new arrangements, she drew his attention to clause 8.1 of the Agreement, set out above. Ms Brokaw testified that at no time was she, or anyone else from the respondent, aware of the specific type or size of the vehicle that the applicant was using to perform the services. Nor was the respondent requested to provide any form of "approval" for its use. Furthermore, Ms Brokaw, said that Mr Baggs never provided to the respondent, the relevant documents in relation to his truck, such as registration and insurance documents indicating the type and capacity of the applicant's truck. It was not clear on the evidence that this followed a request by the respondent for this information. As to the numbers of eskies of meals that might be required to be delivered, Ms Brokaw took issue with Mr Baggs' assertion that deliveries performed by him were increasing and that he would need a vehicle with a capacity of 280 eskies to perform the services. Ms Brokaw's evidence was that from the respondent's records, the maximum number of eskies at any one time that Mr Baggs had transported was 210 on two occasions in September 2016. Ms Brokaw testified that Mr Baggs' estimate of 280 eskies, including deliveries and returns, was an assumption made by him that was, in her view, incorrect. Her evidence was that she never discussed that number with Mr Baggs and any such discussion would have been based on regular averages of about 180 eskies, including those to be delivered and returns.

48 As to the inspection of the applicant's vehicle, Ms Brokaw agreed that she did speak with Mr Baggs at the respondent's depot, she thought in about July or August 2016. Ms Brokaw inspected his vehicle to ensure that it was insulated, was clean and in good repair, was white in colour as required and did not have any branding or logos on it. Ms Brokaw said she was not aware of the capacity, size or type of vehicle other than it was a Hino vehicle from its badging. Ms Brokaw's evidence was that at no time did the applicant inform her or any other person from the respondent that the truck being used by the applicant was a heavy vehicle, with a GVM of more than 4.5 tonnes. At all times she assumed that a normal C class drivers licence would be required to drive the applicant's vehicle, as had been the case in the past.

49 In its terms, cl 8.1 (a) of the Agreement did not specify the GVM or the weight of the vehicle that was required to be approved by the respondent. The first aspect of the vehicle specified was the "type" of vehicle. This is not a criterion relevant to the definition of a "heavy vehicle" under the OD Act. The second criterion specified was "capacity". In the context of the Agreement and the nature of the work to be performed under it, I consider this should be construed as the carrying capacity of the vehicle. I see no reason to give this word other that its ordinary meaning which, in the Shorter Oxford Dictionary is "1. Ability to take in or hold…2. Hence, Content : area; volume…3. A containing space, area, or volume; *esp.* a hollow space…" Thus, so read and understood, this criterion may be said to be somewhat more ambiguous in the context of the present issue to be determined because, as a matter of common sense, a larger carrying capacity vehicle will be a heavier one, both absolutely and in terms of GVM.

50 In relation to the observation made by Mr Baggs about the capacity of vehicles used by other drivers, it was Ms Brokaw's evidence that the respondent generally informed contractors who might perform services for the respondent, that a vehicle of about 2.5 tonnes is required. Furthermore, she testified that one of the drivers referred to by Mr Baggs has provided relevant registration documents to the respondent, indicating that it is a Class A vehicle and the driver concerned has provided the respondent with a copy of his C class drivers' licence. Ms Brokaw surmised from this that the vehicle concerned could be driven by that class of licence and by inference, it would not be a heavy vehicle. As to the other driver referred to, the respondent was undertaking enquiries.

51 There is some dispute on the affidavit evidence as to what may have been said in relation to the applicant's vehicle. However, it is clear that prior to 2016, Mr Baggs delivered the respondent's products in a vehicle of a GVM of 4.5 tonnes. The vehicle in use by Mr Baggs at that time was regularly filled to almost its capacity, with both full eskies and empty eskies from prior deliveries. From about mid-2016, Mr Baggs was informed that he would need to incorporate a company and provide a vehicle with sufficient insulation to carry the respondent's meal products and that "refrigerated style" insulation would be suitable. Mr Baggs did incorporate the applicant and the applicant purchased a vehicle that Mr Baggs considered to be suitable for the performance of the services. This was based upon the information he had been provided and his own experience in undertaking the services for the respondent up to that time. Furthermore, is it the case that the maximum number of eskies recorded by the respondent as carried by the applicant was 210 in September 2016, although Mr Baggs estimated the capacity required was closer to 280 eskies, comprising both full and empty returns.

52 It is also the case that Mr Baggs did inform Ms Brokaw that he was considering a larger truck and not a van and asked for her expectations about delivery numbers. Mr Baggs informed Ms Brokaw of the financial outlay he was considering of approximately $70,000 and accordingly, the need for viability of the business. Ms Brokaw informed Mr Baggs that the respondent would look to match capacity with drivers. If he had greater capacity, then the respondent would provide greater numbers. No other commitment was or could be made by the respondent on Ms Brokaw's evidence.

53 The evidence also established that in either July or August 2016, Mr Baggs and Ms Brokaw had a conversation about the applicant's vehicle whilst he was at the depot. Ms Brokaw inspected it and confirmed that it met the respondent's requirements. This included clarification that the vehicle had the appropriate insulation fitted to it. Ms Brokaw was aware that the vehicle make was a "Hino". Nothing further was disclosed about the vehicle by Mr Baggs to Ms Brokaw. No mention was made by him as to the vehicle's weight or GVM or that it was a "heavy vehicle". Registration papers for the vehicle, that would be expected to reveal these matters, were not provided to the respondent.

54 Clause 8.1(a) of the Agreement requires the company to "approve" the type and capacity of a contractor's vehicle. It is not a matter only for a contractor to obtain approval. Approval may arise in various ways. It may be inferred from conduct as well as resulting from express concurrence. However, as to the former, there would need to be informed assent by the respondent. Guesswork would not be sufficient. After commencing in July 2016, Mr Baggs specifically spoke to Ms Brokaw and asked her to inspect the vehicle acquired by the applicant to ensure that it met the respondent's requirements. She did so. Ms Brokaw was satisfied with the vehicle that the applicant had provided. However, her satisfaction was as to the express requirements of cl 8.1 (b) to (d) of the Agreement set out above. Whilst it is the case that the respondent would have been aware, from the text messages from Mr Baggs, that he was considering obtaining a larger vehicle to perform the services, this is not the same as constituting an agreement that the applicant's vehicle was a heavy vehicle for the purposes of the OD Act.

Conclusion

55 The applicant was not party to an owner-driver contract at the material times. The Tribunal does not have jurisdiction to deal with the applicant's claims. Accordingly, the application must be dismissed.

2018 WAIRC 00218

DISPUTE RE ALLEGED BREACH OF THE DELIVER AGREEMENT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	DELIVER2U (WA) PTY LTD
	APPLICANT
	-v-
	GD MITCHELL ENTERPRISES PTY LTD T/AS LITE N' EASY PERTH
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 5 APRIL 2018
FILE NO/S	RFT 4 OF 2017
CITATION NO.	2018 WAIRC 00218

Result	Dismissed for want of jurisdiction
Representation	
Applicant	Mr W Spyker of counsel
Respondent	Ms S Camilleri of counsel

Order

HAVING heard Mr W Spyker of counsel on behalf of the applicant and Ms S Camilleri of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

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

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

NOTICES—Union Matters—

2018 WAIRC 00311

NOTICE

FBM No. 2 of 2018 and FBM No. 3 of 2018

NOTICE is given of applications by the Registrar of the Western Australian Industrial Relations Commission to the Full Bench of the Western Australian Industrial Relations Commission to cancel the registration of The Boot Trade of Western Australia Union of Workers, Perth (FBM 2/2018) and the Master Plasterers' Association of Western Australia Union of Employers (FBM 3/2018) on the grounds the organisations are defunct.

The matters are listed for hearing before the Full Bench at 11.30am on Wednesday 30 May 2018 on Level 18, 111 St Georges Terrace, Perth.

Any person who desires to object to the application/s may do so by appearing at the hearing before the Full Bench at the above listed date and time.

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

15 May 2018