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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

NOTICES—General Matters—

2018 WAIRC 00407

Salary Cap for Lodging Claims of Unfair Dismissal or Denial of Contractual Benefits

An employee whose contract of employment provides for a salary greater than $162,990.00 cannot have the Commission decide whether they have been unfairly dismissed or have been denied a benefit to which they are entitled under their contract of employment.

Section 29AA(3) and (4) of the *Industrial Relations Act 1979* provides that the Commission must not determine a claim for harsh, oppressive or unfair dismissal or a claim for a denied contractual benefit if an industrial instrument does not apply to the employment and the contract of employment provides for a salary which exceeds the prescribed amount.

What is meant by an industrial instrument is defined in section 29AA(5) of the Industrial Relations Act 1979 and was discussed by the Full Bench in *Thomas Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd* [2006] WAIRC 05220; (2006) 86 WAIG 2725.

The prescribed amount of the salary is determined by Regulations 5 and 6 of the *Industrial Relations (General) Regulations 1997*. The amount is adjusted each July 1.

The figure that will apply from 1 July 2018 has been calculated by the Registrar as being $162,990.00. The amount is a matter for the Commission to determine so this figure must be seen as a guide, until such time as the Commission may determine a different amount.

GENERAL ORDERS—

2018 WAIRC 00353

RESCIND GENERAL ORDER NO. 20 OF 2017 AND ISSUE A NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 7 JUNE 2018
FILE NO/S	APPL 20 OF 2018
CITATION NO.	2018 WAIRC 00353

Result General Order issued

Representation

Mr B Entrekin on behalf of the Hon. Minister for Commerce and Industrial Relations

Mr K Black on behalf of the Chamber of Commerce and Industry of WA (Inc)

Dr T Dymond on behalf of UnionsWA

General Order

HAVING heard Mr B Entrekin on behalf of the Honourable Minister for Commerce and Industrial Relations; Mr K Black on behalf of the Chamber of Commerce and Industry of Western Australia (Inc); and Dr T Dymond on behalf of UnionsWA, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders –

(1) THAT each award cited in Schedule A of this General Order be varied by substituting for the location allowances provisions contained in each such award the location allowance provisions in Schedule B of this General Order.

(2) THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2018.

(3) THAT this General Order replace the General Order in Matter No 20 of 2017 which thereby shall be rescinded.

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

SCHEDULE A

LOCATION ALLOWANCES

Title of Award or Order	**Clause No.**
Aerated Water and Cordial Manufacturing Industry Award 1975	31
Aged and Disabled Persons Hostels Award, 1987	28
Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979	20
Animal Welfare Industry Award	14
Artworkers Award	20
The Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002	5.14
Bakers' (Country) Award No. 18 of 1977	20
Breadcarters (Country) Award 1976	27
Building Trades Award 1968	24
Building Trades (Construction) Award 1987	Appendix A
Child Care (Out of School Care - Playleaders) Award	10
Children's Services (Private) Award 2006	12
Cleaners and Caretakers Award, 1969	3.6
Cleaners and Caretakers (Car and Caravan Parks) Award 1975	22
Clerks' (Accountants' Employees) Award 1984	23
Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972	27
Clerks' (Customs and/or Shipping and/or Forwarding Agents) Award	30
Clerks' (Hotels, Motels and Clubs) Award 1979	22
Clerks (Timber) Award	31
Clerks (Unions and Labor Movement) Award 2004	37
Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947	28
Clothing Trades Award 1973	22
Contract Cleaners Award, 1986	24
Contract Cleaners' (Ministry of Education) Award 1990	21
Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011	17.6

Title of Award or Order—*continued*	**Clause No.**
Dental Technicians' and Attendant/Receptionists' Award, 1982	27
The Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979	32
Dry Cleaning and Laundry Award 1979	22
Earth Moving and Construction Award	25
Electrical Contracting Industry Award R 22 of 1978	22
Electrical Trades (Security Alarms Industry) Award 1980	19
Electronics Industry Award No. A 22 of 1985	24
Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973	25
Engine Drivers' (General) Award	20
Enrolled Nurses and Nursing Assistants (Private) Award No. 8 of 1978	23
Fast Food Outlets Award 1990	35
Foremen (Building Trades) Award 1991	15
Funeral Directors' Assistants' Award No. 18 of 1962	33
Furniture Trades Industry Award	46
Gate, Fence and Frames Manufacturing Award	21
Golf Link and Bowling Green Employees' Award, 1993	28
Hairdressers Award 1989	31
The Horticultural (Nursery) Industry Award, No. 30 of 1980	6
Industrial Spraypainting and Sandblasting Award 1991	19
Independent Schools Administrative and Technical Officers Award 1993	22
Independent Schools (Boarding House) Supervisory Staff Award	22
Independent Schools Psychologists and Social Workers Award	21
Independent Schools' Teachers' Award 1976	18
Landscape Gardening Industry Award	18
Licensed Establishments (Retail and Wholesale) Award 1979	31
Local Government Officers' (Western Australia) Interim Award 2011	17.2
Meat Industry (State) Award, 2003	21(1)
Metal Trades (General) Award	5.6
Motel, Hostel, Service Flats and Boarding House Workers' Award, 1976	42
Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980	17
Municipal Employees (Western Australia) Interim Award 2011	19.6
Nurses' (Day Care Centres) Award	22
Nurses (Dentists Surgeries) Award 1977	23
Nurses (Doctors Surgeries) Award 1977	22
Nurses' (Independent Schools) Award	20
Nurses' (Private Hospitals) Award	30
Pastrycooks' Award No. 24 of 1981	11
Pest Control Industry Award	14
Photographic Industry Award, 1980	29
Private Hospital Employees' Award, 1972	40
Quarry Workers' Award, 1969	19
Radio and Television Employees' Award	23
Restaurant, Tearoom and Catering Workers' Award	41
Retail Pharmacists' Award 2004	5.2
The Rock Lobster and Prawn Processing Award 1978	26

Title of Award or Order—*continued*	**Clause No.**
School Employees (Independent Day & Boarding Schools) Award, 1980	31
Security Officers' Award	20(3)
Sheet Metal Workers' Award No. 10 of 1973	26
The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977	39
Social and Community Services (Western Australia) Interim Award 2011	18.10
Teachers' Aides' (Independent Schools) Award 1988	17
Timber Yard Workers Award No. 11 of 1951	28
Transport Workers (General) Award No. 10 of 1961	5.13
Transport Workers (Mobile Food Vendors) Award 1987	18
Transport Workers' (North West Passenger Vehicles) Award, 1988	28
Transport Workers' (Passenger Vehicles) Award No. R 47 of 1978	24
Western Australian Surveying (Private Practice) Industry Award, 2003	8.4

SCHEDULE B

Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, an employee shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

TOWN	PER WEEK
Agnew	$21.60
Argyle	$57.80
Balladonia	$22.30
Barrow Island	$37.60
Boulder	$9.20
Broome	$34.80
Bullfinch	$10.10
Carnarvon	$17.80
Cockatoo Island	$38.10
Coolgardie	$9.20
Cue	$22.20
Dampier	$30.30
Denham	$17.80
Derby	$36.10
Esperance	$6.30
Eucla	$24.20
Exmouth	$31.70
Fitzroy Crossing	$43.90
Halls Creek	$50.60
Kalbarri	$7.70
Kalgoorlie	$9.20
Kambalda	$9.20
Karratha	$36.30
Koolan Island	$38.10
Koolyanobbing	$10.10
Kununurra	$57.80
Laverton	$22.10
Learmonth	$31.70
Leinster	$21.60
Leonora	$22.10
Madura	$23.30
Marble Bar	$56.00
Meekatharra	$19.10
Mount Magnet	$24.00
Mundrabilla	$23.80
Newman	$20.70
Norseman	$19.10
Nullagine	$55.90
Onslow	$37.60
Pannawonica	$28.20

TOWN—*continued*	PER WEEK
Paraburdoo	$28.00
Port Hedland	$30.10
Ravensthorpe	$11.40
Roebourne	$41.80
Sandstone	$21.60
Shark Bay	$17.80
Southern Cross	$10.10
Telfer	$51.50
Teutonic Bore	$21.60
Tom Price	$28.00
Whim Creek	$36.00
Wickham	$34.80
Wiluna	$21.90
Wyndham	$54.10

(2) Except as provided in subclause (3) of this clause, an employee who has:

(a) a dependant shall be paid double the allowance prescribed in subclause (1) of this clause;

(b) a partial dependant shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependant is receiving by way of a district or location allowance.

(3) Where an employee:

(a) is provided with board and lodging by his/her employer, free of charge; or

(b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act;

such employee shall be paid $66^{2}/_{3}$ per cent of the allowances prescribed in subclause (1) of this clause.

The provisions of paragraph (b) of this subclause shall have effect on and from the 24th day of July, 1990.

(4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.

(5) Where an employee is on annual leave or receives payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

(6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.

(7) For the purposes of this clause:

(a) "Dependant" shall mean -

(i) a spouse or defacto partner; or

(ii) a child where there is no spouse or defacto partner;

who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.

(b) "Partial Dependant" shall mean a "dependant" as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.

(8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and UnionsWA or, failing such agreement, as may be determined by the Commission.

(9) Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2018] WASCA 5

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	KINNEEN -v- WHELANS AUSTRALIA PTY LTD [2018] WASCA 5
CORAM	**:**	BUSS J
		MURPHY J
		LE MIERE J
HEARD	**:**	1 DECEMBER 2017
DELIVERED	**:**	10 JANUARY 2018
FILE NO/S	**:**	IAC 2 of 2017
BETWEEN	**:**	ROBERT KINNEEN
		Appellant
		AND
		WHELANS AUSTRALIA PTY LTD
		Respondent
ON APPEAL FROM:		
Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	J H SMITH ACTING PRESIDENT
		P E SCOTT CHIEF COMMISSIONER
		S J KENNER ACTING SENIOR COMMISSIONER
Citation	**:**	KINNEEN v WHELANS [2017] WAIRC 00302

Catchwords:

Industrial Appeal Court - Whether court has jurisdiction to hear appeal

Legislation:

Industrial Relations Act 1979 (WA), s 90(1)

Licensed Surveyors (Licensing and Registration) Regulations 1990 (WA), reg 4(1)

Licensed Surveyors Act 1909 (WA)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	In person
Respondent	:	Mr W E Edwardes

Solicitors:

Appellant	:	In person
Respondent	:	Chamber of Commerce & Industry WA

Case(s) referred to in judgment(s):

Underdown v Dowford Investments Pty Ltd (2005) 85 WAIG 1437

1 **BUSS J**: I agree with Le Miere J.

2 **MURPHY J**: I agree with Le Miere J.

LE MIERE J:

Summary

3 The appellant referred to the Western Australian Industrial Relations Commission (the Commission) a claim that he had not been allowed by the respondent a benefit to which he was entitled under his contract of employment with the respondent. The appellant claimed that the respondent had breached a term of his contract of employment that the

respondent would provide him with training to become a licensed surveyor under the *Licensed Surveyors Act 1909* (WA). The Commissioner who heard the appellant's claim found that the contract of employment did not contain the term alleged by the appellant and, if it did, it was not breached by the respondent and dismissed the appellant's claim. The appellant appealed to the Full Bench of the Commission. The Full Bench unanimously dismissed the appeal. The plurality found that it was a term of the contract of employment that the respondent would provide the appellant with training to become a licensed surveyor but the term had not been breached by the respondent. The appellant has appealed to this Court from the decision of the Full Bench on a number of grounds. For the reasons which follow none of the grounds of appeal are grounds on which an appeal lies to this court and the appeal must be dismissed.

Appellant's employment

4 The appellant was employed by the respondent. The appellant claims that it was a term of his contract of employment that the respondent would provide him with all the necessary training to become a licensed surveyor under the *Licensed Surveyors Act*. The appellant entered into a professional training agreement with Mr Jonath, a licensed surveyor employed by the respondent, which was registered with the Land Surveyors Licensing Board. The training agreement included training for the appellant to complete the Board's final examination at Boya. In March 2011 the appellant attempted the Boya examination which he failed. Shortly after finding out he had failed the examination he resigned from his employment with the respondent.

Appellant claims he was denied a contractual benefit

5 The appellant referred to the Commission a claim that he had not been allowed by the respondent a benefit to which he is entitled under his contract of employment. The appellant said that the respondent had not provided him with the necessary training to become a licensed surveyor as a result of which he failed the Boya examination and resigned his employment.

Claim dismissed by Commissioner

6 The Commissioner dismissed the appellant's claim. The Commissioner found that it was not a term of his contract of employment that the respondent would provide him with all the necessary training to become a licensed surveyor. The Commissioner further found that if there was such a term in the contract of employment, for the appellant to succeed he would have to establish that the term was that he would be provided with the training prior to March 2011 because the appellant resigned his employment in March 2011 and it was only if the term was that the training be completed by this time that the respondent could be in breach of it. The Commissioner found that the respondent had not promised to complete the appellant's training by March 2011.

Appeal dismissed by Full Bench

7 The appellant appealed to the Full Bench of the Commission. The Full Bench unanimously dismissed the appeal. The plurality, Smith AP and Scott CC, upheld grounds 1 and 2 of the appeal to the effect that the Commissioner erred in finding that it was not a term of the appellant's contract of employment that the respondent was obliged to train the appellant to become a licensed surveyor. That finding was based in part on the finding that the professional training agreement was part of the contract of employment. The plurality upheld ground 3 of the appeal in so far as it asserted that the Commissioner erred in finding that the appellant did not need to become a licensed surveyor for his employment as a surveyor party leader to continue. The plurality dismissed ground 4 which was to the effect that the Commissioner erred in finding that the respondent had not promised to complete the appellant's training by March 2011. The plurality held that that finding was fatal to the appeal because, as the Commissioner had found, it is only if the term was that the training had to be completed by March 2011, when the appellant resigned, that the respondent could be in breach of the term. The plurality held that the Commissioner did not err, as alleged by the appellant in ground 5, by failing to explore the reasons the appellant resigned, or as alleged by the appellant in ground 6, that the Commissioner erred by failing to make any finding about the adequacy of the training provided by the respondent. Kenner ASC found that the training agreement was not part of the contract of employment, it was not a term of the contract of employment that the respondent would provide the appellant with all the necessary training to become a licensed surveyor and, if there was such a term, there was no term that the respondent would do so by March 2011 and therefore the respondent had not breached the contract of employment.

Appeal to this court

8 The appellant now appeals to this court from the decision of the Full Bench. There are eight grounds of appeal. The respondent has moved that judgement be entered summarily for the respondent on the basis that the Court does not have jurisdiction to hear this appeal and if the Court determines that some of the grounds of appeal purport to be within jurisdiction, such grounds have no reasonable prospects of success and ought to be dismissed.

9 An appeal lies to this court from a decision of the Full Bench on the grounds set out in paragraphs (a), (b) and (c) of s 90(1) of the *Industrial Relations Act 1979* (WA) but upon no other ground. Ground (a), that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter, has no application to this appeal. If any of the grounds of appeal enliven the jurisdiction of the Court it can only be because they fall within grounds (b) or (c) of s 90(1) of the *Industrial Relations Act*. Ground (b) is that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against. Ground (c) is that the appellant has been denied the right to be heard.

10 At the outset of the hearing of the appeal the presiding judge explained to the appellant the very limited jurisdiction of this court to hear appeals from the Full Bench. The appellant submitted that his appeal comes under s 90(1)(b) of the *Industrial Relations Act* because he claims that the Full Bench's decision is erroneous in law. The appellant did not submit that the Full Bench had made any error in the construction or interpretation of any Act, award, industrial agreement or order in the course of making its decision. In relation to some of the grounds of appeal the appellant referred to the *Licensed Surveyors (Licensing and Registration) Regulations 1990* (WA) and in particular to reg 4(1). However, the appellant did not submit that the Full Bench had made any error in construing or interpreting

reg 4. The appellant's complaint is that the Land Surveyors Licensing Board and the respondent did not act in accordance with the regulation and the Full Bench's findings of fact and reasoning process were wrong when regard is had to reg 4. Those arguments do not bring any of the grounds of appeal within s 90(1)(b) of the *Industrial Relations Act* and do not enliven the jurisdiction of this court.

11 At the hearing of the appeal the appellant said 'I'm not so sure whether I was given a proper opportunity to present something that comes under ground 1'. That is a reference to ground 1 of the appeal that the Full Bench erred by not receiving into evidence a document that was not in evidence before the Commissioner. That is not a ground of appeal that the appellant has been denied the right to be heard and does not enliven the jurisdiction of this court. I will now refer to each of the grounds of appeal separately.

Ground 1

12 Ground 1 of the appeal is that the Full Bench erred in their decision not to allow the submission of Appendix C - Employee Management Plan. This document refers to a goal of the appellant to obtain a licence through ongoing training in February/March 2010. The appellant did not tender it in evidence or refer to it before the Commissioner. The Full Bench held that it had a discretion to receive additional evidence but would not receive the document in evidence because it did not meet the test set out in ***Underdown v Dowford Investments Pty Ltd*** (2005) 85 WAIG 1437 that the new evidence would only be admitted if it were not available to the appellant at the time of the trial and could not by reasonable diligence have been made available, that the evidence is credible and it is almost certain that, if the evidence had been available and adduced, an opposite result would have been reached.

13 The appellant says that the document is relevant to his claim that it was a term of his contract of employment that the respondent provide the training before March 2011. In his written submissions the appellant says that the Commissioner should have directed him to have a good look through his file for anything that had a time limit to it. In his oral submissions the appellant said that the Commissioner asked him if he had any documents showing there was a time limit to the training he was to receive from the respondent. In his oral submissions the appellant said that the Commissioner asked him if he had a time limiting document and the only thing he could think of was the time schedule under Appendix B of the professional training agreement. In his written submissions the appellant says he did not mention the document at trial because he had forgotten it.

14 There is no reason why the appellant could not and should not have put the document before the Commissioner. The Commissioner gave the appellant an opportunity to do so.

15 There is no reason why the Full Bench should have allowed the appellant to place before it, in support of his appeal, a document that could and should have been placed before the Commissioner. The Full Bench made no error in not receiving the document in evidence. This ground of appeal does not disclose that the appellant has been denied the right to be heard. An appeal does not lie on ground 1.

Ground 2

16 Ground 2 is that the Full Bench erred in law by denying that the respondent was obliged to complete the appellant's training by March 2011, or, to put it another way, that the professional training agreement was not time-limited. In advancing this ground the appellant refers to reg 4(1) of the *Licensed Surveyors (Licensing and Registration) Regulations*. The appellant says the Full Bench should have found that the professional training agreement was 'time limited' because reg 4(1)(b) provides that the period of field service shall be a period of 24 months.

17 The appellant has not identified any error in the construction or interpretation of the regulation in the course of the Full Bench decision. Indeed, in his oral submissions the appellant said that the Board made an error of law in registering the professional training agreement but that 'that wasn't an error of law by the Full Bench'. In so far as the ground of appeal alleges any error by the Full Bench the appellant's complaint is not that the Full Bench made an error in the construction or interpretation of the regulation in the course of its decision. His complaint is that the Full Bench made an error in finding the relevant term of the contract of employment was not 'time limited' because the regulation provides that the period of field service shall be a period of 24 months. This ground asks the Court to review the merits of the decision of the Full Bench. That is not within the jurisdiction of this Court.

Ground 3

18 Ground 3 is that the Full Bench erred in their decision that because the appellant conceded in the first instance that he could not prove that he would have passed the Boya exam had he received the necessary training, and that he could have delayed undertaking the Boya exam for another six months, there was no need to investigate the adequacy of the training.

19 The appellant's complaint is that the Full Bench made an error in its findings of fact or in the reasoning process by which it arrived at its decision. The ground does not assert that the appellant has been denied the right to be heard nor that the Full Bench made an error in the construction or interpretation of reg 4 or any Act, regulation or other relevant instrument in the course of its decision. An appeal does not lie on ground 3.

Ground 4

20 Ground 4 is that the Full Bench erred in their decision that the appellant expected to be trained until he became licensed. The appellant says he never made such a claim. Again the appellant's complaint is that the Full Bench erred in its finding of fact or in its reasoning process. The ground does not assert that the appellant has been denied the right to be heard nor that the Full Bench made an error in the construction or interpretation of any Act, regulation or other relevant instrument in the course of its decision. An appeal does not lie on ground 4.

Ground 5

21 Ground 5 is that the Full Bench erred in their decision that the professional training agreement did not require the respondent to train the appellant to successfully become a licensed surveyor. This ground does not assert that the

appellant has been denied the right to be heard nor that the Full Bench made any error in the construction or interpretation of any Act, regulation or other relevant instrument in the course of its decision. An appeal does not lie on ground 5.

Ground 6

22 Ground 6 is that the Full Bench erred in law in their statement that there was no requirement for Mr Jonath to exclusively and personally instruct the appellant.

23 In the course of his submissions the appellant referred to reg 4 and asserted that having regard to that regulation and other things the Full Bench should have found that Mr Jonath was required to train the appellant exclusively and personally. However, the appellant does not identify any error in the construction or interpretation of the regulation in the course of the Full Bench decision. The appellant's complaint is that the Full Bench erred in its fact finding and reasoning. This ground does not assert that the appellant has been denied the right to be heard nor that the Full Bench made any error in the construction or interpretation of any Act, regulation or other relevant instrument in the course of its decision. An appeal does not lie on ground 6.

Ground 7

24 Ground 7 is that the Full Bench erred in the assumption that training leave of the employment contract related to the performance of the appellant's substantive role, not to the professional training agreement whereby he was being assisted to become a licensed surveyor. The appellant's complaint is that the Full Bench erred in its fact finding and reasoning. This ground does not assert that the appellant has been denied the right to be heard nor that the Full Bench made any error in the construction or interpretation of any Act, regulation or other relevant instrument in the course of its decision. An appeal does not lie on ground 7.

Ground 8

25 Ground 8 is that the Full Bench decision contains errors such as wrong dates, and other typographical errors and phrases that are misleading to the reader. The appellant subsequently provided a schedule of the alleged errors. The transcription errors alleged by the appellant are not significant; they could not have led the Full Bench into error. None of these alleged errors amounts to an assertion that the appellant has been denied the right to be heard nor that the Full Bench made any error in the construction or interpretation of any Act, regulation or other relevant instrument in the course of its decision. An appeal does not lie on ground 8.

Conclusion

26 The appellant's grounds of appeal raise arguments about factual findings or the reasoning process of the Full Bench or, in the case of ground 8, typographical or other transcription errors. None of these grounds raise any ground that the Full Bench erred in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making its decision or that the appellant has been denied the right to be heard. These grounds in effect ask the Court to review the merits of the Full Bench decision. That is not within the jurisdiction of the Court. The Court does not have power to review the Full Bench decision on the grounds set out in the appellant's notice of appeal.

27 None of the grounds of appeal fall within the grounds set out in paragraphs (a), (b) or (c) of s 90(1) of the *Industrial Relations Act*. Therefore, the appeal is not within the jurisdiction of this Court and must be dismissed.

2018 WAIRC 00431

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 10 OF 2016

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	ROBERT KINNEEN
	APPELLANT
	-v-
	WHELANS AUSTRALIA PTY LTD
	RESPONDENT
CORAM	THE HONOURABLE JUSTICE BUSS, PRESIDING JUDGE
DATE	WEDNESDAY, 18 JULY 2018
FILE NO/S	IAC 2 OF 2017
CITATION NO.	2018 WAIRC 00431

Result	Final Orders issued
Representation	
Appellant	Mr R Kinneen
Respondent	Ms L B Hillbrick (of counsel), Chamber of Commerce & Industry WA

Order

1. The appeal is dismissed; and
2. The respondent's application for costs is dismissed.

(Sgd.) S BASTIAN,
[L.S.] Clerk of Court.

PRESIDENT—Unions—Matters dealt with under Section 66—

2018 WAIRC 00376

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEORGE TILBURY
	APPLICANT
	-and-
	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	MONDAY, 18 JUNE 2018
FILE NO/S	PRES 1 OF 2018
CITATION NO.	2018 WAIRC 00376

Result	Order varied
Appearances	
Applicant	Mr P Hunt, as agent
Respondent	Mr P Hunt

Order

WHEREAS I issued orders in relation to this matter on 9 February 2018 ([2018] WAIRC 00089; (2018) 98 WAIG 76) (the Orders) constituting an Interim Board of Directors and granting the applicant liberty to apply to vary the Order; and

WHEREAS Order 9 of the Orders states that the Orders cease to have effect if a certificate is issued pursuant to s 71(5) of the *Industrial Relations Act 1979* or on 8 July 2018, whichever is sooner; and

WHEREAS no certificate has been issued pursuant to s 71(5); and

WHEREAS on 14 June 2018, the applicant filed an application requesting that Order 9 be varied so that the Orders have effect until 15 October 2018.

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

THAT Order 9 of the Orders that issued on 9 February 2018 ([2018] WAIRC 00089; (2018) 98 WAIG 76) be varied by deleting the words '8 July 2018' and the words '15 October 2018' be inserted in lieu thereof.

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

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2018 WAIRC 00382

TEACHERS (PUBLIC SECTOR PRIMARY AND SECONDARY EDUCATION) AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PRINCIPALS' FEDERATION OF WESTERN AUSTRALIA
	FIRST APPLICANT
	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	SECOND APPLICANT
	-v-
	DIRECTOR GENERAL THE DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 25 JUNE 2018
FILE NO/S	APPL 80 OF 2017
CITATION NO.	2018 WAIRC 00382

Result	Award varied
Representation	
First Applicant	Mr S Kemp, of counsel
Second Applicant	Mr J Theodorsen, as agent
Respondent	Ms E McAdam, as agent

Order

HAVING heard Mr S Kemp, of counsel, on behalf of the first applicant and Mr J Theodorsen, as agent, for the second applicant and Ms E McAdam, as agent, for the respondent on Friday, 8 June 2018 and by consent;

NOW THEREFORE I, the undersigned, pursuant to section 40(3)(iii) *Industrial Relations Act 1979* hereby order:

THAT the *Teachers (Public Sector Primary and Secondary Education) Award 1993* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the date of this order.

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

SCHEDULE

1. Clause 2 – Arrangement:

A. Delete "14. – Teachers – Duties Other Than Teaching (Dott) Time" and insert the following in lieu thereof:

14. – Teachers – Duties Other Than Teaching (DOTT) Time

2. Clause 3.2 – Area of Operation and Scope: Delete this subclause and insert the following in lieu thereof:

(2) This Award shall apply to employees who are employed pursuant to section 235 of the School Education Act 1999 (WA) by the Director General for the Department of Education of Western Australia in the classifications outlined in section 237 of the School Education Act 1999 (WA) and Regulations 127 and 127A of the School Education Regulations 2000 who are members or are eligible to be members of the State School Teachers' Union of WA Inc and/or the Principals' Federation of Western Australia.

3. Clause 5 – Definitions – Delete this clause and insert the following in lieu thereof:

In this Award unless otherwise specified:

"Act" means the *School Education Act 1999* as amended and any regulations made under the Act or successor legislation;

"Approved" means approved by the Employer;

"Award" means the Teachers (Public Sector Primary and Secondary Education) Award 1993;

"Base Salary" or "Base Rate" means an employee's annual salary excluding allowances and any other additional payments;

"Casual Employee" means an employee engaged by the hour for a period not exceeding four weeks in any period of engagement, as determined by the Employer;

"De Facto Relationship" means a relationship (other than a legal marriage) between two persons who live together in a marriage-like relationship and includes same sex partners;

"De Facto Partner" means a person who lives in a de facto relationship with the first person;

"Department" means the Department of Education and Training;

"Dependant" means:

(a) for the purposes of Clause 53. – Locality Allowance of this Award, in relation to an employee:

(i) a partner who is resident within the State and is not in receipt of an income exceeding the separate net income (SNI), as set by the Australian Taxation Office for the purposes of the dependent spouse tax offset; and/or

(ii) a student child under the age of eighteen (18) years who is not in receipt of income exceeding the separate net income (SNI), as set by the Australian Taxation Office for the purposes of the dependent spouse tax offset.

(b) for the purpose of the remainder of the Award in relation to an employee:

(i) a partner;

(ii) child/children; and/or

(iii) other dependent family

who reside with the employee and who rely on the employee for support.

"District" means:

District 1:	That area within a line commencing on the coast; thence east along latitude 28 to a point north of Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of latitude 32 and longitude 119 to the coast.
District 2:	That area within a line commencing on the south coast at longitude 119 thence east along the coast to longitude 123; thence north along longitude 123 to a point on latitude 30; thence west along latitude 30 to the boundary of No. 1 District.
District 3:	That area within a line commencing on the coast at latitude 26; thence along latitude 26 to longitude 123; thence south along longitude 123 to the boundary of No. 2 District.
District 4:	That area within a line commencing on the coast at latitude 24; thence east to the South Australian border; thence south to the coast; thence along the coast to longitude 123; thence north to the intersection of latitude 26; thence west along latitude 26 to the coast.
District 5:	That area of the State situated between the latitude 24 and a line running east from Carnot Bay to the Northern Territory.
District 6:	That area of the State north of a line running east from Carnot Bay to the Northern Territory border.

“District Office or District Education Office” means a metropolitan or regional (non metropolitan) office of the Department that has responsibilities including: the provision of support, advice, consultancy and specialist services to schools and their communities within the specified district;

“Employee” means any person employed in a classification contained within this Award and includes full-time, part-time, casual, permanent and fixed-term contract employees;

“Employer” means the Director General of the Department of Education;

“Family” means the definition contained in the *Equal Opportunity Act 1984* for “relative”. That is a person who is related to the employee by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the employee;

“Four-Year-Trained Teacher” means a Teacher who has successfully completed an academic qualification requiring a sequence of the equivalent of four (4) years of full time, post-matriculation tertiary education which incorporates an approved course of initial teacher training, or obtained other qualifications approved as of equivalent standard;

“Five-Year-Trained Teacher” means a Teacher who has successfully completed an academic qualification requiring a sequence of the equivalent of five (5) years of full time, post-matriculation tertiary education which incorporates an approved course of initial teacher training, or obtained other qualifications approved as of equivalent standard;

“Internal Relief” means the taking of a relief class by a Teacher employed as part of the normal staffing establishment of a school;

“Industrial Relations Commission” means the Western Australian Industrial Relations Commission (WAIRC);

“Locality” means:

(a) for the purpose of Clause 53. – Locality Allowance, a locality specified in Schedule E – Locality Allowance of this Award;

(b) for the purpose of Clause 47. – Allowances Payable on Appointment, Promotion or Transfer and Clause 55. – Property Allowance of this Award, in relation to an employee:

  (i) the Metropolitan Schools District; or

  (ii) outside the Metropolitan Schools District, that area within a radius of fifty (50) kilometres from an employee’s headquarters.

"Metropolitan Schools Boundary" means the line joining and including the following schools and locations: Becher Point, Byford, Carinyah, Sawyers Valley, Mt Helena, Warbrook and a line due west to the Coast;

"Metropolitan Schools District" means the area bounded by the Metropolitan Schools Boundary and the coast together with Rottnest Island;

“Normal School Day or Normal Operating Hours” means the normal duration of the school day based on the start and finish times as determined by the Principal (as the delegate of the Employer) – the minimum daily attendance requirement for a full-time employee is five hours and thirty-five minutes unless otherwise agreed by the Principal;

“Partner” means a person who is a spouse or de facto partner;

"Pre-School Centre" has the same meaning as it has in the Act;

“Primary Care Giver” is the employee who will assume the principal role for the care and attention of newborn/newborns and/or adopted child/children. The Employer may require confirmation of primary care giver status;

“Primary” when used in conjunction with a “school” or a “Principal” in this Award relates to, but is not limited by, the delivery of the “primary educational programme” as defined in the Act;

"Replacement Employee" is an employee specifically engaged to replace an employee proceeding on parental leave;

"Residence" includes any accommodation of a kind commonly known as a flat or home unit that is, or is intended to be, a separate tenement;

"Secondary" when used in conjunction with a "school" or a "Principal" in this Award relates to, but is not limited by, the delivery of the "secondary educational programme" as defined in the Act;

"School Administrator" means a person holding a position of School Administrator, as prescribed in the Act;

"School Psychologist" means a person holding a position of School Psychologist, as prescribed in the Act;

"Spouse" means a person's partner in marriage;

"Teacher" means a person as defined in the Act, and unless otherwise specified in this Award, the term is used to include the classifications identified in Clause 15 – Teacher Career/Classification Structure of this Award;

"Tertiary Education" means undertaking a course at an approved education institution for which the pre-requisite is a successful Year 12 of schooling or its approved equivalent;

"Three-Year-Trained Teacher" means a Teacher who successfully completed an academic qualification requiring a sequence of the equivalent of three (3) years of full time, post-matriculation tertiary education which incorporates an approved course of initial teaching training, or obtained other qualifications approved as of equivalent standard;

"Union" means The State School Teachers' Union of W. A. (Incorporated) (SSTUWA) and/or the Principals' Federation of Western Australia (PFWA); and

"Untrained Teacher" means a Teacher who does not have teacher training.

4. Clause 7 – Permanency and Tenure – Delete this clause and insert the following in lieu thereof:

(1) The Department is committed to the engagement of Teachers and School Administrators on a permanent basis. Fixed term and casual contracts will only be used to the extent that the position is unable to be filled on an ongoing basis due to it being:

(a) For a defined and limited program of work; or

(b) A vacancy due to leave of absence.

(2) Fixed term contracts, subject to the above, will be for the maximum possible duration.

(3) (a) The Department will continue to engage Teachers on a permanent basis where a suitable vacancy occurs in accordance with the Department's policy on permanency for all teaching staff.

(b) Changes to the policy on permanency and tenure are to be negotiated between the Parties.

(4) An employee engaged on a fixed term contract will be notified, in writing, upon commencement of employment of:

(a) The details of the work;

(b) The reason for the contract being fixed term;

(c) The applicable conditions of employment; and

(d) The starting and finishing dates of the contract.

(5) This clause applies to all positions including locally selected positions.

5. Clause 27 – Annualisation of summer vacation loading – Delete this clause and insert the following in lieu thereof:

The salaries of permanent and fixed-term employees include the annualisation of summer vacation leave loading over a period of four (4) weeks – equivalent to "annual leave".

6. Clause 31(1) – Carer's Leave – Delete this subclause and insert the following in lieu thereof:

(1) Carer's Leave

(a) Employees are entitled to access in any one year up to a maximum of 12.5 days paid leave to care for a sick family member, provided the days used are accrued sick leave entitlements. Carer's leave is not cumulative from year to year.

(b) In exceptional circumstances employees can apply to the Employer to access additional carer's leave beyond the maximum of the 12.5 days entitlement at clause 31(a) from their accrued sick leave in accordance with clause 41 – Sick Leave.

7. Clause 38 – Long Service Leave – Delete this clause and insert the following in lieu thereof:

(1) Subject to this clause, a permanent or fixed-term contract employee is entitled to long service leave of 13 weeks on completion of:

(a) 10 years' continuous service; and

(b) any subsequent period of seven (7) years' continuous service.

(2) A part-time employee accrues an entitlement to long service leave at the same rate as a full-time employee but is paid on a pro rata basis.

(3) For the purposes of this clause the term "continuous service" is defined in accordance with clause 38(4).

(4) (a) An interruption in the service of an employee normally does not count as service and will break continuity of service.

(b) Notwithstanding clause 38(4)(a), the following periods count as continuous service and do not break service:

(i) sick leave with pay; or

(ii) all absences on workers' compensation leave; or

(iii) approved sick leave without pay not exceeding 13 weeks.

(c) Notwithstanding 38(4)(a) the following periods do not break service but do not count for the purpose of calculating entitlements:

(i) long service leave and any period of student vacation within that period; or

(ii) student vacation for which the employee is not entitled to payment; or

(iii) up to six (6) months during which the services of a fixed-term contract employee are not required.

(5) An application for long service leave, using an authorised application form, must be made no later than:

(a) the date specified by the Employer by notice published in School Matters; and

(b) two (2) years after the date on which an entitlement to 13 weeks' long service leave has accrued.

(6) The Employer may, on application by the employee made within two (2) years of the date on which the employee becomes entitled to long service leave for 13 weeks, approve of the employee postponing the taking of that entitlement until the employee becomes entitled to take long service leave over one (1) semester.

(7) Subject to organisational needs the Employer may approve the clearing of any accrued entitlement to long service leave in any form provided that no absence is less than one (1) working day.

(8) The Director General may direct an employee to take accrued long service leave and may determine the date on which such leave commences.

(9) Where an employee takes long service leave over more than one (1) term, any student vacation period that occurs between the terms is not regarded as long service leave.

(10) Any public holiday occurring during an employee's absence on long service leave is deemed to be a portion of the long service leave and extra days in lieu thereof can not be granted.

(11) Payment of Long Service Leave

(a) Full or Half Pay

Subject to the Employer's convenience, the Director General may approve an employee's application to take a complete entitlement of accrued long service leave on full pay or half pay.

(b) Long Service Leave on Double Pay

Employees may by agreement with their Employer, access any portion of an accrued entitlement to long service leave on double pay for half the period accrued. In these circumstances the leave actually taken is 50 percent of the accrued entitlement accessed.

Where employees proceed on long service leave on double pay, the entitlement accessed is excised pursuant to clause 38(4) for the purpose of continuous service.

(12) Early Access to Pro Rata Long Service Leave

(a) Subject to clause 38(12) (c), employees within seven years of their preservation age under Western Australian Government superannuation arrangements may, by agreement with their Employer, choose early access to their long service leave at the rate of:

(i) 6.5 days per completed twelve month periods of continuous service for full time employees in their first period of long service leave accrual; or

(ii) 9.28 days per completed twelve month periods of continuous service for full time employees in subsequent periods of long service leave accrual.

(b) Part time employees have the same entitlement as full time employees, with their entitlement calculated on a pro rata basis according to any variations to their ordinary working hours during the accrual period.

(c) Early access to pro rata long service leave does not include access to long service leave to which the employee has become entitled, or accumulated prior to being within seven years of their preservation age.

(d) Under this clause, long service leave can only be taken as paid leave and there is no capacity for payment in lieu of leave.

(e) Employees may, by agreement with their employer, clear long service leave in minimum periods of one day.

(f) Where employees access pro rata long service leave early, any period of leave taken will be excised for the purpose of continuous service in accordance with Clause 38(4).

(13) Cash out of Accrued Long Service Leave

(a) An employee may by agreement with their Employer, cash out any portion of an accrued entitlement to long service leave.

(b) Where an employee cashes out any portion of an accrued entitlement to long service leave in accordance with this clause, the entitlement accessed is excised for the purpose of continuous service.

(c) Employees should seek financial advice at their own cost with regard to the effects on taxable income and/or superannuation arrangements prior to making a request for cashing out of accrued long service leave.

(14) Lump Sum Payment

(a) A lump sum payment for the money equivalent of any accrued long service leave entitlement of an employee under the provisions of this clause and/or any pro rata long service leave credit of an employee under the provisions of this clause is due:

(i) as of the date of retirement, to an employee who is retired because of incapacity, provided that at least 12 months continuous service has been completed prior to the date of the retirement;

(ii) as of the date of retirement, to an employee who retires at or over the age of 55 years provided that at least three (3) years of continuous service has been completed prior to the date of retirement;

(iii) as of the date of their death in respect of an employee who dies provided that the employee has completed not less than 12 months of continuous service prior to the date of their death.

(b) A lump sum payment for the money equivalent of any accrued long service leave entitlement of an employee under the provisions of this clause must be made as soon as practicable after the date of the employee's resignation or dismissal.

(15) Pro-rata long service leave is the proportion of long service leave credit that an employee has accumulated towards a long service leave entitlement.

(16) Except as provided in this clause an employee is not entitled to a lump sum payment in respect of any pro rata long service leave credit.

(17) Portability of Long Service Leave Credits (State and Commonwealth Employment)

For the purpose of this clause:

"Commonwealth Employee" means a person who is employed in a classification contained within this Award and whose appointment is continuous with employment with a Commonwealth instrumentality;

"Commonwealth Instrumentality" means:

(a) any Department of the Australian Public Service; or

(b) any body constituted under an Act of the Parliament of the Commonwealth; or

(c) any body subject to the administration of a Minister of the Crown in the right of the Commonwealth;

as the Minister for Education and Training declares by notice in the Government Gazette to be a Commonwealth instrumentality for the purposes of this clause;

"Period of Accrued Long Service Leave" means a period of long service:

(a) to which an employee in a State instrumentality is entitled as of the date the employee ceases to be employed by that instrumentality; and

(b) for which the employee has received no benefit in lieu of such entitlement;

"State Employee" means a person who is employed in a classification contained within this Award and whose employment is continuous with employment in a State instrumentality;

"State Instrumentality" means any body, which is, or is capable of being declared to be, a Department for the purposes of the *Superannuation and Family Benefits Act 1938*.

(18) Where an employee was immediately prior to being employed in the Department, employed in the service of:

(a) the Commonwealth of Australia; or

(b) any Western Australian State body or Western Australian statutory authority,

and the period between the date when the employee ceased previous employment and the date commencing employment in the Department does not exceed four (4) weeks, that employee is entitled to long service leave determined in the following manner:

(i) the pro rata portion of long service leave to which the employee would have been entitled up to the date the employee ceases employment with their previous Employer, is calculated in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment is deducted from any long service leave to which the employee may become entitled under this clause; and

(ii) the balance of the long service leave entitlement of the employee is calculated upon appointment to the Department in accordance with the provisions of this clause.

(19) A previous Commonwealth employee can not proceed on long service leave until they have completed a period of over three (3) years of continuous service in a classification contained within this Award.

8. Clause 41– Sick Leave:

A. Delete subclause 41(2)(b) of this clause and insert the following in lieu thereof:

(b) any day taken immediately preceding or immediately following a student vacation, provided it is accompanied by evidence even where the absence does not exceed two (2) consecutive working days; or

B. Delete subclause 41(4)(iv)(aa) of this clause and insert the following in lieu thereof:

(aa) in circumstances where the concerns are such that to leave the employee in the environment may be harmful or injurious to themselves or others the employee can be immediately directed to vacate the premises;

9. Clause 60 – Notification of Change – Delete this clause and insert the following in lieu thereof:

60. – NOTIFICATION OF CHANGE

(1) Where the Employer has made a definite decision to introduce major changes that are likely to have a significant effect on employees' conditions of employment, the Employer must notify the employees who may be affected by the proposed changes and the relevant Union/s.

(2) Where the employee is eligible to be a member of the SSTUWA and the PFWA, both Unions must be notified.

(3) For the purpose of this clause, "Significant Effects" includes: termination of employment, major changes in the composition; operation or size of the Employer's work force or in the skills required; elimination or diminution of the job opportunities; promotion opportunities or job tenure; the need for retraining or transfer of employees to other work or locations and restructuring of jobs.

(4) The Employer must discuss with the employees affected and the relevant Union/s, inter alia, the introduction of the changes referred to in clause 60(1) of this clause; the effects the changes are likely to have on employees; measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or the relevant Union/s in relation to the changes.

(5) The discussion must commence as early as practicable after a firm decision has been made by the Employer to make the changes referred to in clause 60(1), unless by prior arrangement, the relevant Union/s is/are represented in formulating recommendations for change to be considered by the Employer.

(6) For the purposes of such discussion the Employer is to provide to the employees concerned and the relevant Union/s all relevant information about the changes; including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees; provided the Employer is not required to disclose confidential information, the disclosure of which would be inimical to the Employer's interests.

10. Clause 61 – Union Facilities for Union Representatives – Delete this clause and insert the following in lieu thereof:

61. – UNION FACILITIES FOR UNION REPRESENTATIVES

(1) The Employer recognises the rights of the SSTUWA and PFWA to organise and represent its members.

(2) The Employer will recognise SSTUWA representatives and the members of the PFWA Council as the representatives of the PFWA and will allow them to carry out their roles and functions.

(3) SSTUWA representatives in the Department have a legitimate role and function in assisting the SSTUWA in the tasks of recruitment, organising, communication and representing members' interests in the workplace, Department and SSTUWA branch.

(4) The Employer recognises that, under the SSTUWA's rules, SSTUWA representatives are members of a branch representing members within a SSTUWA electorate. A SSTUWA branch may cover more than one workplace.

(5) The SSTUWA will advise the Employer in writing of the names of the SSTUWA representatives in the Department.

(6) The Employer must recognise the authorisation of each the STTUWA and PFWA representatives in the Department and must provide them with the following.

(a) Paid time off from normal duties to perform their functions as a Union representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the branch and to attend Union business in accordance with this clause and the Department's Industrial Relations Advice 6 of 2009. The Department will consult with the Unions regarding any proposed changes to this Industrial Relations Advice.

(b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities must not unreasonably affect the operation of the organisation and is in accordance with normal Departmental protocols.

(c) A noticeboard for the display of Union materials including broadcast email facilities.

(d) Paid access to periods of leave for the purpose of attending Union training courses in accordance with Clause 62. – Leave to Attend Union Business of the Award. Country representatives will be provided with appropriate travel time.

(e) Notification of the commencement of new employees, and as part of their induction, time to discuss the benefits of Union membership with them.

(f) Access to awards, agreements, policies and procedures.

(g) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.

(7) The Employer recognises that it is paramount that Union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a Union representative.

11. Clause 62 – Leave to Attend Union Business:

A. Delete subclause 62(1)(c) and insert the following in lieu thereof:

(c) when prior arrangement has been made between the relevant Union and the Employer, for the employee to attend official Union meetings preliminary to negotiations and/or Industrial Tribunal proceedings; and

B. Delete subclause 62(5) and insert the following in lieu thereof:

(5) An employee is not entitled to paid leave to attend to Union business other than as prescribed by this clause.

(a) An employee who successfully gains employment with either Union will be granted leave without pay for the duration of any such appointment up to a period of four (4) years. Further leave without pay beyond this period is at the discretion of the Employer.

(b) An employee who is elected to the role of President, Senior Vice President or General Secretary of either Union will be granted leave without pay for the duration of that term.

(c) Arrangements prescribed in clause 62(5)(a) and (b) are subject to written notification of the relevant Union.

12. Clause 63 – Trade Union Training Leave:

A. Delete subclause 63(1)(a) and insert the following in lieu thereof:

(a) The Employer is to grant paid leave of absence to employees who are nominated by the relevant Union to attend short courses relevant to the public sector or the role of Union workplace representative, conducted or approved by the SSTUWA or the PFWA.

13. Clause 66 – Dispute Settlement Procedures – Add the following new subclauses (8) and (9):

(8) Subject to clause 66 (9), where the dispute affects only a member of one of the Unions, the other Union will not be involved in the procedure.

(9) Where a dispute has the potential to affect members, or persons eligible to be members of both Unions, both Unions will be involved in the procedure.

14. Schedule A – Parties – Delete this Schedule and insert the following in lieu thereof:

SCHEDULE A – PARTIES

Name	Address
Employer Respondent	
Department of Education	151 Royal Street EAST PERTH WA 6004
Union Respondents	
State School Teachers Union of W.A. (Incorporated)	1 West Street WEST PERTH WA 6005
Principals' Federation of Western Australia	PO Box 3496 SUCCESS WA 6964

2018 WAIRC 00385

TEACHERS (PUBLIC SECTOR PRIMARY AND SECONDARY EDUCATION) AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PRINCIPALS' FEDERATION OF WESTERN AUSTRALIA

FIRST APPLICANT

THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

SECOND APPLICANT

-v-

THE DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS

DATE WEDNESDAY, 27 JUNE 2018

FILE NO. APPL 80 OF 2017

CITATION NO. 2018 WAIRC 00385

Corrigendum

HAVING issued order 2018 WAIRC 00382 varying the *Teachers (Public Sector Primary and Secondary Education) Award 1993* on Monday, 25 June 2018 and having been notified that the Schedule attached to the order contained an error;

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

THAT 2018 WAIRC 00382 be corrected so that where "Department of Education and Training" appeared "Department of Education" now appears.

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

INDUSTRIAL MAGISTRATE—Claims before—

2018 WAIRC 00400

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2018 WAIRC 00400
CORAM	:	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	:	THURSDAY, 17 MAY 2018
DELIVERED	:	WEDNESDAY, 4 JULY 2018
FILE NO.	:	M 159 OF 2017
BETWEEN	:	SHIVA KANDEL
		CLAIMANT
		AND
		RUL'S PTY LTD T/AS RAJ MAHAL
		FIRST RESPONDENT
		RAJ KUMAR LAD
		SECOND RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Penalties – Contraventions of *Fair Work Act 2009* (Cth) and *Restaurant Industry Award 2010* [MA000119]
Legislation	:	*Fair Work Act 2009* (Cth) *Fair Work Regulations* *Crimes Act 1914* (Cth) *Evidence Act 1906* (WA)
Instrument	:	*Restaurant Industry Award 2010* [MA000119]
Case(s) referred to in reasons	:	***Fair Work Ombudsman v Siner Enterprises Pty Ltd (No. 2)*** [2018] FCCA 589 ***Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*** [2012] 287 ALR 249 ***Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union*** [2015] FCAFC 59 ***Briginshaw v Briginshaw*** [1938] HCA 34 ***Tomvald v Toll Transport Pty Ltd*** [2017] FCA 1208 ***Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd*** [2016] FCAFC 181 ***Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd*** [2008] WAIRComm 350 ***Cuzzin Pty Ltd v Grnja*** [2014] SAIRC 36
Result	:	Penalty issued
Representation:		
Claimant	:	Mr W Keane (of counsel) instructed by Hall & Wilcox
First Respondent	:	Mr R. Lad (director) for the first respondent
Second Respondent	:	In person

REASONS FOR DECISION

Introduction

1 Mr Kandel (the claimant) was employed by Rul's Pty Ltd (the Company) to work in the kitchen of an Indian restaurant operated by the Company at East Victoria Park during two distinct time periods: 1 February 2015 - 30 September 2015 (the 2015 claim period); and 10 October 2015 - 8 August 2016 (the 2016 claim period). On 5 April 2018 I delivered oral reasons (the Liability Reasons) for my findings that the Company had contravened several civil remedy provisions of the *Fair Work Act 2009* (Cth) (FW Act) and that the second respondent (Mr Lad), the sole director of the Company, was involved in those contraventions. The civil remedy provisions contravened by the Company, have also been contravened by Mr Lad: s 550(1), FW Act. Subsequently, the parties made submissions on orders (including penalties) to be made as a result of the Liability Reasons. The contraventions included instances where there was a contravention by failing to pay the amount that the Company, an employer, was required to pay to Mr Kandel under a modern award, namely the *Restaurant Industry Award 2010* [MA000119] (the Award). On 17 May 2018, I made an order pursuant to s 545(3) of the FW Act that the Company pay to Mr Kandel the sum of $50,697.86 (together with pre-judgment interest) being the outstanding amount owed to Mr Kandel by the Company under the Award. Upon the finding of the contravention of a civil remedy provision, the Court may also, on application, order an employer *and* any person involved in a contravention to pay a pecuniary penalty that the court considers appropriate: s 546(1) FW Act. Mr Kandel made such an application and these are my reasons for orders to be made as set out below for the payment of pecuniary penalties by the Company and by Mr Lad.

2 It is appropriate to identify the material relied upon for the purpose of these reasons, namely: evidence admitted at trial on 22 March 2018 and 4 April 2018 (subject to comments below under the heading, 'Rules of Evidence'); the Liability Reasons delivered on 5 April 2018; the claimant's 'Underpayment Calculation for 2015 Claim Period and 2016 Claim Period' schedule filed 26 April 2018; 'Claimant's Submissions on Penalty' filed 26 April 2018; 'Respondents' Response to the Claimant's Submission' filed 14 May 2018; and matters referred to by the parties in submissions during a hearing on the issue of penalty on 17 May 2018.

3 It is also appropriate to record that, as a result of s 551 of the FW Act, the rules of evidence and procedure for civil matters will be applied in these reasons. The onus of proving an allegation is upon the claimant and an allegation is not proved unless it has been proved on the balance of probabilities. An allegation of a contravention of a civil remedy provision is an allegation of 'quasi-criminal' conduct and regard must be had to the nature of the allegation when considering whether it has been proved on the balance of probabilities: ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336 at 362 (Dixon J); ***Tomvald v Toll Transport Pty Ltd*** [2017] FCA 1208 per Flick J at [14]. In the context of a penalty decision, it is for the claimant to prove 'aggravating factors' relevant to the penalty and, if put in issue by the claimant or not accepted by the court, for the respondent to prove 'mitigating factors': ***Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd*** [2016] FCAFC 181 [131].

The Contraventions

4 In the paragraphs below I summarise the findings made (or that follow) from the Liability Reasons.

5 The 2015 Claim Period. In the 2015 claim period, Mr Kandel was paid $350 per week for his work. The Company claimed that this payment, being $25 per hour for 14 hours work per week as a casual employee ($350 per week), discharged any legal obligations to Mr Kandel. My finding was that the Award covered and applied to Mr Kandel and that he worked 20 hours per week. Specifically, I found that he worked four hours per day on each of the Thursday, Friday, Saturday, Sunday, Monday (20 hours) between the hours of 6.00 pm and 10.00 pm. I also found that, under the Award, he was a part-time employee and working as a 'cook grade 1'. For the reasons given by me on 17 May 2018, I accepted the accuracy of the written submission of Mr Kandel's solicitor calculating the total underpayment during the 2015 Claim Period to be $5,087.88. The civil remedy provision contraventions during the period are set out below:

1. Failing to pay the minimum rate prescribed by cl 20.1 of the Award (s 45 of the FW Act). The minimum rate during the 2015 claim period was $18.02 per hour until 30 June 2015 and $18.47 per hour after that date.
2. Failing to pay penalty rates on Saturdays prescribed by cl 34 of the Award (s 45 of the FW Act). The Award provided for a penalty rate of 125% of the Monday to Friday rate to be paid on Saturdays.
3. Failing to pay penalty rates on Sundays prescribed by cl 34 of the Award (s 45 of the FW Act). The Award provided for a penalty rate of 150% of the Monday to Friday rate to be paid on Sundays.
4. Failing to pay penalty rates on public holidays prescribed by cl 34 of the Award (s 45 of the FW Act). The Award provided for a penalty rate of 225% of the Monday to Friday rate to be paid on public holidays.
5. Failing to pay annual leave prescribed by cl 35 of the Award (s 45 of the FW Act) and s 90(2) of the FW Act (read with s 44(1)) by failing to pay annual leave loading and untaken annual leave.
6. Failing to give Mr Kandel a payslip within one working day of paying an amount to him in relation to the performance of work as required by s 536(1) of the FW Act.

6 The 2016 claim period. Mr Kandel alleged that, pursuant to an oral contract of employment, he was employed by the Company for the period between 10 October 2015 and 8 August 2016 (the 2016 claim period) and was not paid at all. The Company disputed the existence of the contract and denied that Mr Kandel did any work for it during this period. My finding was that Mr Kandel was employed by the Company and that he worked throughout the 2016 claim period. Specifically, I found that: the Award covered and applied to Mr Kandel; he worked six and a half hours per day on each of the Wednesday, Thursday, Friday, Saturday, Sunday and Monday between the hours of 11.30 am and 2.00 pm and 5.30 pm and 9.30 pm (a total of 39 hours per week). I also found that, under the Award, he was a full-time employee and working as a 'cook grade 1'. For the reasons given by me on 17 May 2018, I accepted the accuracy of the written submission of Mr Kandel's solicitor calculating

the total underpayment during the 2016 claim period to be $45,609.98. The civil remedy provision contraventions during the period are set out below:

1. Failing to pay the minimum rate prescribed by cl 20.1 of the Award (s 45 of the FW Act). The minimum rate during the 2015 claim period was $18.02 per hour until 30 June 2015 and $18.47 per hour after that date.
2. Failing to pay penalty rates on Saturdays prescribed by cl 34 of the Award (s 45 of the FW Act). The Award provided for a penalty rate of 125% of the Monday to Friday rate to be paid on Saturdays.
3. Failing to pay penalty rates on Sundays prescribed by cl 34 of the Award (s 45 of the FW Act). The Award provided for a penalty rate of 150% of the Monday to Friday rate to be paid on Sundays.
4. Failing to pay penalty rates on public holidays prescribed by cl 34 of the Award (s 45 of the FW Act). The Award provided for a penalty rate of 225% of the Monday to Friday rate to be paid on public holidays.

   The underpayment arising from the above four contraventions (minimum rate of pay and penalty rates) was $42,754.82.
5. Failing to pay annual leave prescribed by cl 35 of the Award (s 45 of the FW Act) and s 90(2) of the FW Act (read with s 44(1)) by failing to pay annual leave loading and untaken annual leave.
6. Failing to give Mr Kandel a payslip within one working day of paying an amount to him in relation to the performance of work as required by s 536(1) of the FW Act.
7. Failing to pay the 'split shift allowance' required by cl 24.4 of the Award (s 45 of the FW Act). The underpayment arising from this contravention was $1,994.81.
8. Failing to give Mr Kandel a minimum of eight full days off per four week period as required by cl 31.2(e) of the Award (s 45 of the FW Act).
9. Failing to pay Mr Kandel overtime for work done outside the ordinary spread of hours as required by clauses 31 and 33 of the Award (s 45 of the FW Act). The underpayment arising from this contravention was $2,855.17.
10. Failing to pay superannuation as required by cl 30 of the Award (s 45 of the FW Act).

Rules of Evidence

7 In the Liability Reasons I stated that the Industrial Magistrates Court was not bound by the rules of evidence in determining this claim. [1] On reflection, that statement is incorrect. It overlooks s 551 of the FW Act which provides that 'a court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention': ***Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd*** [2008] WAIRComm 350; ***Cuzzin Pty Ltd v Grnja*** [2014] SAIRC 36 [14]. I consider it necessary to reconsider my findings in the Liability Reasons in light of the evidence relied upon for those findings, as set out in the Liability Reasons. This reconsideration revealed three matters of significance.

8 First, no question arises as to the admissibility of evidence relied upon to resolve the critical issue at trial, namely, the creditability of Mr Kandel and Mr Lad. Mr Lad was not accepted as a credible witness because of the implausibility of his explanation for the inconsistency between his evidence and the contents of certain exhibits: No 2 and No 3. [2] Exhibit 2 comprised copies of text messages said to have been sent by mobile phone from Mr Kandel to Mr Lad. Those copies were admissible under s 79C(1) of the *Evidence Act 1906* (WA) as tending to establish the oral evidence of Mr Kandel as to the content of text messages that he sent. Exhibit 3 was a copy of a delivery docket said to have been signed by Mr Kandel. It was admissible under s 79C(2a) of the *Evidence Act* 1906 (WA) as a business record. Other exhibits referred to in the Liability Reasons were exhibits 5, 12 and 13. Exhibit 5 was admissible as business records of the Company. Exhibit 13 was a document created by Mr Kandel and admissible. Upon objection, exhibit 12 would have been ruled inadmissible because the author of the document was not available for cross-examination. However, for that same reason, it is expressly stated in the Liability Reasons that no weight was placed on exhibit 12.[3]

9 Secondly, few (if any) objections were taken by either side as to the admissibility of evidence. It may safely be assumed that the absence of objections reflected a pragmatic approach by counsel for the claimant and reflected a state of ignorance by the respondents. In the result, each party made submissions on the weight that should be attributed to the different items of evidence in the case, including submissions that I should wholly discount evidence where, for example, it contained hearsay statements. The Liability Reasons reflect those submissions. For example, it is expressly stated in the Liability Reasons that no weight is accorded to the evidence of Ms Eswaraiah to the extent that she was repeating matters told to her by a third party and not stating her own observations.[4]

10 Thirdly, measures were taken to ensure that, so far as possible, the respondents were not disadvantaged in having to defend the claim without being legally represented. For example, at the commencement of the trial the relevant issues (as revealed by the documents on the court file) were identified.[5] It may also be noted that the respondent's accountant was expressly permitted to sit at the bar table and assist Mr Lad.[6].

11 For the above three reasons, and subject to giving the parties an opportunity to put a contrary view, I do not propose to revisit the findings in the Liability Reasons. On the publication of these reasons, I will invite the parties to address me on the issue.

Relevant Legal Principles

12 In a schedule to these reasons, I have detailed the relevant legal principles to be applied in determining an application that a person pay a pecuniary penalty.

Application of Legal Principles to the Facts of the Claim

13 A penalty will be imposed for *each* of the six contraventions in the 2015 claim period as grouped in paragraph 5 above and for *each* of the ten contraventions in the 2016 claim period as grouped in paragraph 6 above. This grouping follows from the

application of the law concerning s 557 of the FW Act as set out in paragraphs [D.1]; [D.2](a) - (b) of the schedule. A distinct and separate 'course of conduct' of the Company is observable with respect to each of the 2015 claim period and the 2016 claim period. The conduct during the 2015 claim period was characterised by underpayment arising primarily from the Company paying Mr Kandel a 'flat' hourly rate hourly ($25) for 14 hours per week when, in fact, Mr Kandel worked for 20 hours per week and was entitled to penalty rates. The conduct during the 2016 claim period was characterised by a failure to make *any* payment when Mr Kandel worked for 39 hours per week, including at times and days when penalty rates were applicable.

14 The maximum penalties for *each* contravention by the Company during the 2015 claim period was $51,000 - $54,000, a maximum total of $306,000 - $324,000 for six contraventions. The maximum penalties for *each* contravention by Mr Lad during the 2015 claim period was $10,200 - $10,800, a maximum total of $61,200 - $64,800 for six contraventions. The maximum penalties for *each* contravention by the Company during the 2016 claim period was $54,000, a maximum total of $540,000 for ten contraventions. The maximum penalties for *each* contravention by Mr Lad during the 2016 claim period was $10,800, a maximum total of $108,000 for ten contraventions.

15 The following factors are of significance to fixing a penalty in the circumstances of this claim (see C.1 of the schedule).

1. The Company acquired the restaurant business at the commencement of the 2015 claim period and 'took over' the employment of Mr Kandel. There is no evidence of the terms and conditions of Mr Kandel's employment by his previous employer. During the trial, Mr Lad testified to his experience as a cook. There is no evidence of him having any experience as the operator of a restaurant business. His most recent work experience was *not* in hospitality; he had worked as a taxi driver. Mr Lad engaged accountants ('Know Books Know Tax') to assist him with his new business venture. The accountants provided payroll administrative support to the Company i.e. processed timesheets, arranged transfers to employee bank and superannuation accounts, generated payslips as requested etc.

2. The restaurant business was a small enterprise when assessed by total sales and total salary payments over the period July 2015 to March 2016 as recorded in 'Activity statements' submitted to the Australian Taxation Office (exhibit 5- I). Monthly sales (including GST) were reported to be between $20,000 - $33,000 and monthly salary payments were reported to be between $5,000 - $7,000. The evidence suggests that the 'maximum' complement of staff comprised a cook or chef, a kitchen hand and one-two persons at 'front of house'.

3. There is significant overlap in all of the contraventions during the 2015 claim period in the sense that (with the exception of the payslip contravention), the contraventions all stemmed from paying Mr Kandel at an incorrect hourly rate for an inadequate number of hours. The 'flat' rate of $25 per hour was paid on an assumption of 14 hours work per week. This rate of pay was in excess of the minimum Award rate of between $18.02 - $18.47 per hour. However, the Company failure to adjust Mr Kandel's pay to reflect the actual hours of work of 20 hours per week and to pay penalty rates resulted in the underpayment of $5,087.88. This equates to an underpayment of approximately $150 per week over a period of 34 weeks. Given the extent of this underpayment, I would characterise the contraventions during the 2015 claim period as being of moderate seriousness. There is no evidence of the Company having actual knowledge of relevant obligations under the Award and deliberately ignoring those obligations. However, it is a notorious fact that 'penalty rates' are common place in the hospitality industry and this ought to have prompted the Company to seek advice on its obligations to employees under the Award.

4. There is also an overlap in all of contraventions during the 2016 claim period in the sense that the contraventions all stemmed from not paying Mr Kandel at all for working 39 hours per week resulting in the underpayment of $45,609.98. This equates to an underpayment of approximately $1,060 per week over a period of 43 weeks. Given the extent of this underpayment, the contraventions during the 2016 claim period can only be characterised as egregious. The contraventions were deliberate. In the Liability Reasons, I summarised the evidence of Mr Kandel as to the circumstances of him working without pay during the 2016 claim period. For the same reasons that I am satisfied as to Mr Kandel working throughout the 2016 claim period (stated in the Liability Reasons), I am satisfied as to the veracity of the following evidence[7]:

> *Mr Kandel gave evidence of an oral agreement made in July or August 2016 between himself and Mr Lad in the presence of his wife, Ms Kandel. He would be offered fulltime employment as a Chef in the restaurant which was operated by the Company. He would be paid $55,000 per annum., However, he would not be paid any money until March, 2016 when (he would be paid) and Mr Lad would assist Mr Kandel with a permanent residency sponsorship. Part of the oral agreement involved Mr Lad agreeing that Company that the Company would employ his wife, Ms Kandel, as a Restaurant Manager and there would be an appropriate visa sponsorship undertaken by the Company for her employment. His evidence is that when he made oral demands for payment commencing in March, 2016 and that Mr Lad rebuffed him.*

5. For the purpose of determining an appropriate penalty, the evidence quoted in the previous paragraph of the oral agreement made in July or August 2016 reveals that the Company, through Mr Lad, took advantage of the vulnerable immigration status of Mr Kandel to secure a significant financial advantage to itself at the expense of Mr Kandel. It is an aggravating factor for the purpose of fixing a penalty for contraventions during the 2016 claim period.

6. Mr Lad does not accept the findings in the Liability Reasons. Consequently, the Company and Mr Lad have not exhibited contrition and not taken corrective action. There is no mitigation to be found in any corrective action. However, Mr Lad's non-acceptance of my findings is not an aggravating factor for the purpose of fixing a penalty.

7. There is no suggestion that the Company or Mr Lad have any relevant record of contraventions. To that extent, the contraventions before me may be regarded as out of character.

8. The evidence of the capacity of the Company to pay any penalty is limited. At the hearing on 17 May 2018, Mr Lad informed the court that: the Company was in a 'healthy position' as at June 2017; after incurring losses in 2018, the Company ceased trading in March 2018; at present, the Company does not own *any* assets; the Company has prospects of resuming trading if it is successful in a claim it proposes to make against a landlord. In the same penalty hearing, Mr Lad informed the court that he had a limited capacity to pay any penalty. He stated: after the closure of the restaurant business in March 2018 that he had not been working and consequently he had no income; he had no assets apart from a small amount of savings of $1,000 and a car; he proposed to resume receiving an income (before his savings ran out) either by re-opening the restaurant business at a new location or by working for an employer as a restaurant manager or a cook. Counsel for Mr Kandel submitted that, having regard to the vagueness of the assertions by Mr Lad, the Company and Mr Lad had failed to discharge the onus of proving 'financial hardship' as a significant mitigating factor in circumstances of this case. I have reached the view that, for the purposes of fixing a penalty, it is appropriate to have regard *only* to the following: when the Company is operating a business, it has the capacity to generate gross monthly sales (including GST) of between $20,000 - $33,000 (as noted above); the Company may or may not be operating a business in the future; Mr Lad has the capacity to earn an income of a level that reflects his role as the manager of a business of a Company with gross monthly sales of between $20,000 - $33,000; and Mr Lad is likely to earn an income in the future. I am unable to be satisfied as to whether Mr Lad has assets available to him to pay any penalty that may be imposed. In the result, save that any penalty I impose ought not be oppressive given the size of the operations of the Company and the capacity of Mr Lad to earn an income, on the material before me, I am not satisfied that 'financial hardship' is a significant mitigating factor.

16 The purposes to be served by a penalty fixed by the court is discussed in the schedule at [B.1] - [B.2].

1. The penalty must be fixed at a level that promotes the public interest by encouraging compliance with obligations upon employers contained in the FW Act. The respondents in this case and all employers must be deterred from 'the cynical calculation involved in weighing up the risk of penalty against the profits to be made against a contravention': ***Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*** [2012] FCFCA 20 [63].

2. The penalty must also be fixed at a level that is proportionate to the gravity of the contravening conduct. I have already made observations in paragraph 15 on the gravity of the contravening conduct.

3. The penalty must also be fixed at a level that is consistent with penalties imposed in comparable cases. In ***Fair Work Ombudsman v Siner Enterprises Pty Ltd (No. 2)*** [2018] FCCA 589, Lucev J fixed a penalty at 45% of the maximum for each of five contraventions of the Award in circumstances where the employer failed to make any payment to an employee who worked as a restaurant cook for a four month period.

17 Reflecting on the factors set out in paragraph 15, the purposes set out in paragraph 16, and the loss occasioned by each contravention, I consider that the following penalties are appropriate.

1. <u>2015 claim period</u>

1. Minimum rate contravention (1): 20% of maximum (i.e. $10,200)

2. - 4. Penalty rate contraventions (3): 20% of maximum ($30,600)

5. Annual leave contravention (1): 20% of maximum ($10,200)

6. Payslip contravention (1): 5% of maximum ($2,550)

<u>Penalty total (*before application of totality principle*):</u>

<u>The Company</u>: $53,550

<u>Mr Lad:</u> $10,710

2. <u>2016 claim period</u>

1. Minimum rate contravention (1): 50% of maximum (i.e. $27,000)

2. - 4. Penalty rate contraventions (3): 50% of maximum ($81,000)

5. Annual leave contravention (1): 20% of maximum ($27,000)

6. Payslip contravention (1): 20% of maximum ($27,000)

7. Split shift contravention (1): 20% of maximum ($27,000)

8. Time off contravention (1): 20% of maximum ($27,000)

9. Overtime contravention (1): 20% of maximum ($10,800)

10. Superannuation contravention (1): 50% of maximum ($27,000)

Penalty total (*before application of totality principle*):

The Company: $253,800

Mr Lad: $50,760

18 Finally, as set out in [D.3] of the schedule it is necessary to apply the 'totality principle' i.e. to have a 'last look' at the resulting penalty and consider whether the aggregate penalties of $307,330 upon the Company and $61,470 upon Mr Lad (being the sum of $53,530 and $10,710 for the six contraventions during the 2015 claim period and $253,800 and $50,760 for the ten contraventions during the 2016 claim period) are out of proportion to the overall contravening conduct such that it is necessary to reduce the penalty for individual contraventions. The lengthy period of time over which the contraventions occurred and the extent of underpayments to Mr Kandel compared to his Award entitlements are factors that weigh in favour of a condign penalty of significance. Nevertheless, I have reached the conclusion that two factors weigh in favour of reduction individual penalties set out in paragraph 17. First, there is a measure of overlapping conduct among the contraventions. Secondly, total penalties of that magnitude would be crushing having regard to the situation of each of the respondents. It is appropriate to reduce the individual penalties set out in paragraph 17 by 20% to result in an overall penalty that is proportionate to the overall contravening conduct, resulting in aggregate penalties of $245,864 upon the Company and $49,176 upon Mr Lad.

19 The result will be orders that:

1. Penalties in the sum of $245,864 are to be paid to the claimant by the first respondent, for the contravention of the civil penalty provisions in paragraphs 5 and 6 of these reasons.
2. Penalties in the sum of $49,176 are to be paid to the claimant by the second respondent, for the contravention of the civil penalty provisions in paragraphs 5 and 6 of these reasons.

M. FLYNN

INDUSTRIAL MAGISTRATE

Schedule A Pecuniary Penalty Orders under the *Fair Work Act 2009* (Cth)

A. Statutory Power to Impose a Penalty

[A.1] Section 546(1), (2) of the FW Act on 'pecuniary penalty orders' relevantly provides:

> *(1) [An] eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.*
>
> *(2) The pecuniary penalty must not be more than:*
>
> *(a) if the person is an individual—the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or*
>
> *(b) if the person is a body corporate—5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).*

[A.2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): FW Act, s 12. The relevant rate is that applicable at the date of the contravening conduct:

Before 28 December 2012	$110
Commencing 28 December 2012	$170
Commencing 31 July 2015	$180
Commencing 1 July 2017	$210

[A.3] Identifying the maximum penalty for a contravention is an important step because it is a penalty reserved for the most serious case and against a 'benchmark' or 'yardstick' against which the Court may assess a penalty that is proportionate to the circumstances the present case: ***Mornington Inn Pty Ltd v Jordan*** [2008] FCAFC 70 [41] - [46] per Stone and Buchanan JJ.

B. Fixing a Penalty: the Purpose

[B.1] The purpose served by penalties was examined by White J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413 where it is stated at [14]-[ ] (omitting some quotations and citations):

> [14] In *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; at [59], the plurality (French CJ, Kiefel, Bell, Nettle and Gordon JJ) said, in relation to civil penalties generally, that they are not retributive but are 'essentially deterrent or compensatory and therefore protective' Earlier, at [24], the plurality had noted that civil penalties are part of the range of enforcement mechanisms available to regulators by which to achieve compensation, prevention and deterrence. The plurality also referred to the central role of deterrence in the fixing of civil penalty … [W]hereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty is primarily if not wholly protective in promoting the public interest in compliance. …
>
> [16] Courts now tend to regard contraventions of industrial laws more seriously than may have been the case generally in the past.
>
> [17] The Court is to determine a penalty which is proportionate to the contravening conduct and the contravenor's circumstances by a process of instinctive synthesis after taking into account all relevant factors.
>
> [18] A number of the authorities in this Court have emphasised that deterrence has both personal and general aspects.

[B.2] In ***Director of the Fair Work Building Industry Inspectorate v Cartledge*** [2014] FCA 1047 (Mansfield J) observed at [51] - [52], omitting citations:

> *Ultimately, the overriding principle is to ensure that the penalty is proportionate to the gravity of the contravening conduct. By a process of 'instinctive synthesis', a court is required to take into account all relevant factors and to arrive at a single result which takes due account of them all. Proportionality and consistency commonly operate as a final check on the penalty.*

C. Fixing a Penalty: Relevant Factors

[C.1] In ***Kelly v Fitzpatrick*** [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following 'non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty' which had been set out by Mowbray FM in ***Mason v Harrington Corporation Pty Ltd*** [2007] FMCA 7:

- The nature and extent of the conduct which led to the breaches.
- The circumstances in which that conduct took place.
- The nature and extent of any loss or damage sustained as a result of the breaches.
- Whether there had been similar previous conduct by the respondent.
- Whether the breaches were properly distinct or arose out of the one course of conduct.
- The size of the business enterprise involved.
- Whether or not the breaches were deliberate.
- Whether senior management was involved in the breaches.
- Whether the party committing the breach had exhibited contrition.
- Whether the party committing the breach had taken corrective action.
- Whether the party committing the breach had cooperated with the enforcement authorities.
- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and
- The need for specific and general deterrence.

[C.2] The significance of the capacity (or incapacity) of a contravener to pay any pecuniary penalty fixed by the Court was examined by Lucev J in ***Fair Work Ombudsman v Siner Enterprises Pty Ltd (No. 2)*** [2018] FCCA 589 at [31] – [34] (omitting citations and quotation marks):

> *Whilst employers, large, medium or small, cannot overcome financial difficulties by underpaying employees or avoiding statutory entitlements, properly evidenced, and for proper reasons, incapacity to pay may afford some relief by way of mitigation of penalty.*
> *[S]ize [is] a factor to be considered in relation to penalty. [However,] regardless of size, corporate employers are obliged to meet minimum employment standards; when corporate employers do not meet minimum employment standards it will be normal to impose an "appropriate" monetary sanction; and the sanction must be at a meaningful level.*
> *Regard [may be had] to the fact that [an] employer respondent [is] a small enterprise upon whom the imposition of a large fine [is] likely to be oppressive.*
> *[The] size and financial resources of a contravener are factors to be considered, and the impact of those factors upon the setting of penalty is in each case a matter for consideration of the particular circumstances of the size and financial resources of the contravener, plus the other factors which are relevant.*

[C.3] The list in [C.1] is not 'a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.' (Buchanan J in ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; 165 FCR 560 at [91]).

D. Fixing a Penalty: Multiple Contraventions

[D.1] Section 557 of the FW Act on 'course of conduct' relevantly provides:

> *(1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:*
>
> *(a) the contraventions are committed by the same person; and*
>
> *(b) the contraventions arose out of a course of conduct by the person.*
>
> *(2) The civil remedy provisions are the following:*
>
> *(a) subsection 44(1) (which deals with contraventions of the National Employment Standards);*
>
> *(b) section 45 (which deals with contraventions of modern awards);*
>
> *(c) section 50 (which deals with contraventions of enterprise agreements);*
>
> *(d) section 280 (which deals with contraventions of workplace determinations);*
>
> *(e) section 293 (which deals with contraventions of national minimum wage orders);*
>
> *(f) section 305 (which deals with contraventions of equal remuneration orders);*
>
> *(g) subsection 323(1) (which deals with methods and frequency of payment);*
>
> *(h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);*

(i) subsection 325(1) (which deals with unreasonable requirements on employees to spend or pay amounts);

(ia) subsection 325(1A) (which deals with unreasonable requirements on prospective employees to spend or pay amounts);

(j) subsection 417(1) (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.);

(k) subsection 421(1) (which deals with contraventions of orders in relation to industrial action);

(l) section 434 (which deals with contraventions of Ministerial directions in relation to industrial action);

(m) subsection 530(4) (which deals with notifying Centrelink of certain proposed dismissals);

(n) subsections 535(1), (2) and (4) (which deal with employer obligations in relation to employee records);

(o) subsections 536(1), (2) and (3) (which deal with employer obligations in relation to pay slips);

(p) subsection 745(1) (which deals with contraventions of the extended parental leave provisions);

(q) section 760 (which deals with contraventions of the extended notice of termination provisions);

(r) subsection 785(4) (which deals with notifying Centrelink of certain proposed terminations);

(s) any other civil remedy provisions prescribed by the regulations.

(3) Subsection (1) does not apply to a contravention of a civil remedy provision that is committed by a person after a court has imposed a pecuniary penalty on the person for an earlier contravention of the provision.

[D.2] For the purpose of applying s 557(1) of the FW Act:

(a) The contravention of two or more *different* terms of the National Employment Standards (NES) do not constitute a (single) contravention a civil remedy provision and the contravention of two or more *different* terms of a modern award do not constitute a (single) contravention a civil remedy provision: ***Rocky Holdings Pty Ltd & Anor v Fair Work Ombudsman*** [2014] FCAFC 62 at [8], [23] and [27] per North, Flick and Jagot JJ;

(b) Each separate obligation found in a modern award is to be regarded as a 'term', for the purposes of s 557(1) and the ascertainment of a 'term' does not depend upon the clause numbering, but on matters of substance i.e. the different obligations which can be identified: ***Fair Work Ombudsman v Lohr*** [2018] FCA 5 [31]. For example, a failure to pay penalty rates for each of Saturday, Sunday and a Public Holiday as required by cl 34.1 of the *Restaurant Industry Award 2010* gives rise to the contravention of three *different* terms of the award and those three contraventions cannot constitute a single contravention for the purposes of section 557(1): ***Fair Work Ombudsman v Siner Enterprises Pty Ltd*** (No.2) [2018] FCCA 589 [17] - [21];

(c) The contravention one *distinct* term of the NES or one distinct term of a modern award in respect of *multiple* employees, may constitute a single contravention of a civil remedy provision: ***Rocky Holdings*** at [14].

[D.3] In a case of multiple contraventions, it will be necessary to apply the 'totality principle'. Having determined an appropriate level of penalty for each contravention (after the application of s 557 of the FW Act), it is then necessary to 'to look at the aggregate of those penalties in the light of the overall conduct of the contravenor, to form a view as to whether that aggregate was out of proportion to that overall conduct'; if the aggregate is 'a total penalty that is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions': ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** (2008) [2008] FCAFC 8; [47] – [52].

Pecuniary Penalty to be paid to the Commonwealth, an organisation or a person

[8] Section 546(3) of the FWA also provides:

(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

(a) the Commonwealth; or

(b) a particular organisation; or

(c) a particular person.

[9] In ***Milardovic v Vemco Services Pty Ltd (Administrators Appointed)*** (No 2) [2016] FCA 244 [40] - [44], Mortimer J summarised the law (omitting citations and quotations) on this provision in light of ***Sayed v Construction, Forestry, Mining and Energy Union*** [2016] FCAFC 4 as follows:

> *The power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. The initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the 'Gibbs exception' (Gibbs v The Mayor, Councillors and Citizens of City of Altona [1992] FCA 553) that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.*

1. Transcript 5/4/18, page 182.
2. Transcript 5/4/18, pages 182 ff.
3. Transcript 5/4/18, page 182.

4. Transcript 5/4/18, page 184
5. Transcript 22/3/18, pages 2 - 4.
6. Transcript 22/3/18, page 2.
7. Transcript 5/4/18, page 183.

2018 WAIRC 00389

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2018 WAIRC 00389
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	WEDNESDAY, 18 APRIL 2018
DELIVERED	**:**	THURSDAY, 28 JUNE 2018
FILE NO.	**:**	M 81 OF 2017
BETWEEN	**:**	MR LESLIE GEORGE MAGYAR
		CLAIMANT
		AND
		DIRECTOR GENERAL OF EDUCATION
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW (WA) - PRACTICE AND PROCEDURE – Application for leave to amend originating claim – Proposed amendments allege contravention of industrial agreement provisions on 'full and proper consultation with staff' and on grievance procedure – Whether amended claim has reasonable prospects of success - Whether leave to amend should be allowed
Legislation	**:**	*Industrial Relations Act 1979* (WA) *School Education Act 1999* (WA)
Instruments	**:**	*School Education Act Employees' (Teachers and Administrators) General Agreement 2014*
Case(s) referred to in reasons	**:**	***May v Thomas*** [2008] WASCA 215 ***Sino Iron Pty Ltd v Mineralogy Pty Ltd*** [2014] WASC 406 ***SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd*** [2011] WASCA 138 ***Boase v Axis International Management Pty Ltd*** (No 2) [2012] WASC 334
Result	**:**	Application for leave to amend the claim is refused.
Representation:		
Claimant	**:**	Mr Magyar (in person)
Respondent	**:**	Mr J. Carroll instructed by the State Solicitor of WA

REASONS FOR DECISION

1 Mr Magyar is a school teacher at Kent Street State High School.[1] On 22 August 2013 he wrote to a regional executive director of the Department of Education, Ms Margaret Collins, invoking the procedure covering 'grievances about worksite matters affecting employees' found in cl 41 (the Clause 41 Procedure) of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2014* (the School Agreement).[2] Mr Magyar's grievance concerned an allegation that school principal, Ms Ward, had failed to allocate time at a staff meeting on 21 August 2013 for discussion of an issue that was of concern to Mr Magyar. This was said to be a contravention of cl 9.3(b) of the School Agreement which provides that the agenda of whole of staff meetings 'be determined in full and proper consultation with staff'.[3] On 4 September 2013, Ms Collins advised Mr Magyar that she would not commence the Clause 41 Procedure because she considered that Ms Ward had in fact complied with cl 9.3(b) of the School Agreement. On 3 May 2017, Mr Magyar commenced this claim alleging a contravention of cl 41 of the School Agreement when Ms Collins failed to convene a Regional Grievance Committee (RGC) as required by the Clause 41 Procedure (the 2013 Contravention Claim). *After* the commencement of his claim, a RGC was convened to determine Mr Magyar's grievance. By a letter dated 4 September 2017, the RGC determined the grievance, setting out written 'findings' and 'resolutions', including that 'full and proper consultation with all teaching staff regarding the structure of meetings for 2018 take place before the end of 2017' (the RGC Resolution).

2 On 11 December 2017, Mr Magyar filed an application to amend the claim, alleging that: (1) in breach of cl 9.3(b) of the School Agreement, Ms Ward had failed to engage in 'full and proper consultation with staff' on the agenda, venue, frequency and timing of 2018 staff meetings; (2) in breach of cl 41.10 of the School Agreement (RGC resolutions are binding on employees), Ms Ward had failed to engage, before the end of 2017, in full and proper consultation with all teaching staff regarding the structure of meetings for 2018. The proposed amendments will together be referred to as 'the 2017 Contravention Claims'. The respondent contends and Mr Magyar disputes that relevant consultation took place in staff meetings held on 9

October 2017 and 15 November 2017. The respondent opposes the proposed amendments. For the reasons set out below, I agree with the respondent that the 2017 Contravention Claims have no reasonable prospects of success. It follows that Mr Magyar's application for amendment must be dismissed.

3 Although the matter is not entirely clear, the text of the Form 6 Application to amend the claim lodged by Mr Magyar on 11 December 2017, suggests that he proposed to *add* the 2017 Contravention Claims to the 2013 Contravention Claim. If that is correct, the 2013 Contravention Claim remains to be determined. I propose to hear from the parties on the most efficient mode of achieving that determination. For example, the respondent *may* consider it expedient to admit a contravention of cl 41 of the School Agreement by failing to convene a Regional Grievance Committee (RGC) in September 2013 and for the Court to hear submissions from the parties on appropriate consequential orders.

Application to Amend a Claim: the Principles

4 Subject to case management considerations, a party will usually be permitted to amend a claim to enable the court to conveniently decide all matters in issue between the parties.[4] However, if it is apparent that a proposed amendment would result in a claim that has no reasonable prospects of success, the application for amendment will be refused. It is for the respondent in this case to persuade the court that there is no issue to be tried in respect of the 2017 Contravention Claims. The amendment will be allowed unless the court is satisfied that this case is 'one of the clearest of cases, when there is a high degree of certainty that the 2017 Contravention Claims would ultimately fail at trial'.[5] If the ultimate outcome of the 2017 Contravention Claims may be affected by unresolved questions of fact or difficult questions of law or any other factor, including the filling of the current evidential vacuum, then the application to amend should be granted.[6] The power to refuse an amendment on the basis that a claim has no reasonable prospects of success is always exercised with great care and more so in the case of an unrepresented litigant where the court must be alert to the possibility of an undisclosed viable cause of action.[7]

The 2017 Contravention Claims

5 The 2017 Contravention Claims raise for consideration the content of the rights, duties and liabilities of teachers and the principal with respect to 'whole of staff meetings outside the normal school day' as proscribed by cl 9.3 of the School Agreement. The meaning of cl 9.3 of the School Agreement must be ascertained by the ordinary meaning of the words read against the context of cl 9, the whole of the School Agreement and the relevant legislative framework, including the *School Education Act 1999* (WA) (the Act).

6 Clause 9.3 of the School Agreement provides that the principal may require teachers to attend up to five hours of 'whole of staff meetings' per term, including in smaller learning area groups (cl 9.3(a)). The 'agenda, venue, frequency and timing of scheduled' meetings is determined by the principal 'in full and proper consultation with staff' (cl 9.3(b),(c)) and will reflect equity considerations including family responsibilities (cl 9.3(b)). The ordinary meaning of cl 9.3 suggests that the principal is required to set a date and time for whole of staff meetings after 'full and proper consultation with staff' and having regard to equity considerations. Similarly, the principal is required to set the meeting agenda after consultation with staff.

7 In addition to making provision for 'whole of staff' meetings in cl 9.3, other provisions of cl 9: identify that the functions of a teacher are found in s 64 of the Act (cl 9.1); notes that a teacher's workload is to be negotiated such that it is not excessive (cl 9.2); provides that teachers may be required to attend two parent teacher interviews with the 'agenda, venue and timing of the interviews determined in full and proper consultation with staff' (cl 9.5); provides for the possibility of payment or time off in lieu for activities outside normal hours such as school camps etc. (cl 9.6; 9.7). The significance of the content of the balance of cl 9 when interpreting cl 9.3 is to suggest that: the parties to the School Agreement are concerned to delimit the outer parameters of the workload of teachers; and that the duties upon the principal are considerable insofar as consultation with staff is required on both staff meetings and parent teacher interviews.

8 The 2017 Contravention Claims also raise for consideration cl 41.10 of the School Agreement which provides that resolutions of the Regional Grievance Committee are binding on all employees to the grievance. The issue is whether 'full and proper consultation with all teaching staff regarding the structure of meetings for 2018' took place before the end of 2017'.

9 The Act provides for the establishment of government schools by the Minister (s 55). The functions of the chief executive officer (CEO) (s 61), principals (s 63) and teachers (s 64) are proscribed by the Act. The CEO determines the standard of educational instruction in government schools. The functions of the principal include responsibility for day to day management and control of the school. The functions of a teacher include the giving of competent instruction to students in accordance with the curriculum. The functions of a teacher are subject to the direction and control of the principal (s 64(2)(c)). The significance of the content of the Act when interpreting cl 9.3 and cl 41.10 is to confirm that the principal is ultimately responsible for the management of the school. One implication is that the manner in which consultation with staff will occur is a matter in which the principal enjoys broad discretion.

10 The following facts, disclosed in Mr Magyar's application to amend the claim filed on 11 December 2017 will, for present purposes, be assumed to be correct:

a. By a letter dated 4 September 2017, the RGC resolved that: 'full and proper consultation with all teaching staff regarding the structure of meetings for 2018 take place before the end of 2017'; 'consultation may occur at an all of staff meeting in term 4 or suitable other time such as a professional learning day'; 'staff are to be given the opportunity for submission, discussion, recording and feedback'.

b. In the same letter, the RGC offered, if requested, more detailed advice on the consultation process. Notwithstanding his request to the RGC, Mr Magyar has not received further advice from the RGC.

c. On 9 October 2017, all staff had the opportunity to attend a 'professional learning day'. The agenda for that day did not contain an item that made reference to 2018 staff meetings. On the morning of 9 October 2017, staff had the opportunity to view a document entitled, 'PL/SD Planner – Using 2017 PL/SD Planner as a guide'. The document contained a proposal for allocation of time in 2018 to the following items (based upon the 2017 allocation for the same items): professional development, ***staff meetings*** (my emphasis), learning area time, peer observation etc. The same document referred to "other ideas presented for discussion". Approximately five

minutes before the time scheduled for a meeting lunch break, the proposal was raised and, without any discussion, the subject of a vote by staff attending the meeting. The proposal was not the subject of discussion before 9 October 2017 in any learning area meeting that involved Mr Magyar.

d. On 9 October 2017 (and after the professional learning day meeting), Mr Magyar attended a learning area meeting where the head of the learning area invited staff to comment upon 'the voting' at the professional learning day meeting earlier that day. Mr Magyar, surprised at the issue being raised, did not offer any comment.

e. On 8 November 2017, in anticipation of a 'professional learning day' for staff scheduled for 15 November 2017, a 'draft PL planner for 2018' said to reflect the outcome of the 9 October 2017 meeting was distributed by email to all staff together with the following comments: (1) '**should anyone wish to present an alternative plan** for how we make best use of the time allocated, this can be placed on the agenda and time will be allocated' (emphasis in original); (2) 'I also urge anyone wishing to offer an alternative plan to forward that to all staff for consideration in advance of the meeting'.

f. On 13 November 2017, in anticipation of the 15 November 2017 'professional learning day' an email was sent to all staff with a 'last call for anyone who wants to submit an alternative plan or variation to the plan for professional learning and general staff meetings' to circulate a presentation to all staff.

g. On 15 November 2017, all staff had the opportunity to attend the 'professional learning day'. I infer: the agenda for that day did not contain an item that made reference to 2018 staff meetings; the 'draft PL planner 2018', including reference to staff meetings, was approved by the meeting.

h. The capacity of staff to engage in meaningful discussion of 2018 staff meetings during the meetings of 9 October 2017 and 15 November 2017 may have been adversely affected by: (1) the level of staff attendance at those meetings (15% - 25% of staff were absent); (2) the absence of an agenda item concerning 2018 staff meetings; (3) the absence of any proposed resolution concerning 2018 staff meetings; (4) the risk of confusion as a result of the failure to distinguish between 2018 meetings required by cl 9 of the School Agreement and meetings that concerned 'professional learning'; and (5) fatigue and hunger of staff when those items were reached (shortly before lunch).

The 2017 Contravention Claims Have No Reasonable Prospects of Success.

11 On any view of the facts set out in paragraph 10 above, those attending the all staff meeting on 15 November 2017: (1) had been aware since 9 October 2017 of a proposal from the principal for an allocation of time in 2018 to meetings on professional development, staff meetings and learning area time; (2) had been invited by emails on 8 November 2017 and 13 November 2017 to submit and distribute an alternative proposal; and (3) had been invited by the same emails to orally address the 15 November 2017 meeting directly on such alternative proposal. Undoubtedly, Ms Ward may have opted for alternative modes of consultation with staff. To take a (perhaps absurd) example, she may have opted to meet individually with each and every staff member and solicit their views. Alternatively, she may have opted to engage in the mode preferred by Mr Magyar, comprising agenda items and draft resolutions to be discussed at an all staff meeting which was not a professional learning day. However, as my analysis of the School Agreement in paragraphs 6-9 above demonstrate, the principal enjoys a broad discretion on the mode of consultation. She chose to distribute a draft 2018 planner on 9 October 2017 for consideration over a reasonable period and discussion (if requested) at a subsequent professional learning day on 15 November 2017 to which all staff were invited. Those steps, outlined as (1), (2) and (3), in the first sentence of this paragraph unarguably constitute full and proper consultation with staff on the timing, frequency and structure of whole of staff meetings to be held in 2018. The RGC Resolution specifically adverts to the possibility of consultation on a professional learning day. There is no arguable contravention of cl 9.3 or of cl 41.10. The consultation by Ms Ward did not extend to identifying the venue or describing the content of the agenda of 2018 whole of staff meetings. However, in October and November of 2017 and at the date that Mr Magyar lodged his application to amend this claim, it was premature for Ms Ward to engage in consultation on the venue of 2018 staff meetings or the content of the agenda of 2018 staff meetings.

Conclusion

12 The 2017 Contravention Claims have no reasonable prospects of success and the application for amendment will be refused. I am satisfied that the ultimate outcome of the 2017 Contravention Claims is not affected by unresolved questions of fact or difficult questions of law or any other factor, including the absence of evidence that would warrant the application being granted.

M. FLYNN
INDUSTRIAL MAGISTRATE

[1.] These reasons will be published on the same date as the reasons for a decision in another case involving the same parties, see File M 213 of 2017. Where apposite, it has been convenient to repeat or adapt parts of the reasons in File M 213 of 2017.

[2.] **41 GRIEVANCE RFSOLUTION PROCEDURE**

41.1 The grievance resolution procedure covers grievances about worksite matters affecting employees that are within the control or responsibility of the employer or its employees. Any resolution of a grievance under these procedures must be capable of being implemented at the workplace/worksite. This clause does not bind swimming instructors, whose procedure is outlined in clause 39.5 of this Agreement.

41.2 This grievance resolution procedure excludes those grievances more appropriately dealt with by legislation or policy involving such matters including: (a) sexual harassment; (b) equal opportunity; (c) occupational safety and health; (d) Public Sector Commission Commission's Code of Ethics; Commissioner's Instructions or the Public Sector (e) performance and disciplinary matters; and (f) criminal behaviour.

41.3 This grievance resolution procedure has been developed to achieve the following objectives: (a) resolution of grievances at the workplace level; (b) the right of employees to approach the employer or the Union for advice or assistance without any repercussions; (c) grievances are dealt with in accordance with the principles of natural justice and due process; (d) employees are informed of their rights and responsibilities in the grievance resolution process; (e) there is a proper consideration of the facts and circumstances relating to the grievance; and (f) decisions are impartial, transparent and capable of review. Whilst the grievance is the subject of this grievance resolution process, the status quo prevailing before the grievance was lodged will remain, unless otherwise agreed between the parties, or where the maintenance of the status quo is impractical.

41.4 Where a representative of the Union or the employer provides an employee with assistance in formulating a grievance, that person must exclude themselves from the Consultative Committee hearing the grievance where there is a conflict of interest or they cannot act without bias.

41.5 Fundamental principles in dealing with grievances are as follows: (a) discussion and resolution should be within a general framework of co-operation, which emphasises prevention of further grievances rather than just a resolution of the immediate matter; (b) as far as possible, grievances should be handled using the normal line management structure; (c) all employees involved in the grievance and their representatives must act in good faith, with a genuine desire to resolve any grievance at the lowest possible level if possible, and to maintain communications at all levels with a view to resolving the issue or issues; (d) resolution of grievances should occur as quickly as possible and be completed as soon as practicable; (e) employees have the right to raise legitimate grievances without threat of repercussion; (f) confidentiality must be maintained at all times in the resolution of a grievance, including the outcome, unless otherwise agreed to by all the employees involved in the grievance; and (g) employees who are not party to the grievance cannot be compelled to become involved in the grievance resolution process.

41.6 The procedures to be followed when an employee wishes to lodge a grievance are: (a) Where a grievance arises at a worksite, in the first instance the matter should be dealt with in an informal manner. The aggrieved employee should attempt to resolve the grievance with the other employee. Consultation with other officers or the Union office may take place as a normal line management process in order to attempt to resolve the matter prior to the commencement of the formal grievance procedures set out below. Employees are committed to resolving grievances cooperatively. Every effort should be made to resolve the issue informally. If a grievance cannot be resolved informally, it can be considered under the formal grievance procedure. (b) The formal grievance resolution procedure is instigated as follows: (i) The instigation of the grievance procedure in the first instance is the responsibility of the aggrieved employee and such employee must act within three weeks of the circumstances occurring from which the grievance arises. (ii) Where a grievance is lodged after three weeks, the Consultative Committee has the discretion to accept a late grievance on such grounds as the party being on sick leave or because of failed attempts to resolve the issue informally or through other processes such as mediation. The onus is on the aggrieved employee(s) to provide written reasons of the cause of the delay at the time of lodging their grievance. The Consultative Committee must provide written reasons for its decision to reject an application lodged out of the three week time limit. (iii) The grievance must be written in a clear and concise manner and include the relief sought. The response acknowledging the grievance and advice of the outcome of consideration of the grievance will also be in writing. (iv) Where an employee has a grievance with his or her principal or line manager, the employee must notify him or her. If the matter is not resolved informally between the principal or line manager and the employee, the employee is entitled to go straight to Level Two of the procedure. (v) In circumstances where the grievance relates to a School Administrator or the Regional Executive Director, the resolution process may require the grievance to be considered by another Regional Grievance Committee. (vi) In circumstances where the issues raised by the grievance may have system-wide ramifications, and are not able to be resolved at the workplace level, the matters can be referred to EREC for determination and action.

41.7 The formal grievance resolution procedure has two levels: Level One - Worksite/School and Level Two - Regional Grievance Committee.

41.8 Level One - Worksite/School (a) At this stage, the grievance should be considered formally by the Worksite/School Consultative Committee within five working days of its receipt. The committee is made up of the principal or line manager and the local Union representative. (b) In the case where there is no school site Union representative or where that person is the principal or line manager, another Union member from that school or workplace should take the position who is nominated by the President of the Union or his or her nominee. (c) The aggrieved employee may nominate and be accompanied by a support person at this and any subsequent stage. This support person can advise but not represent the aggrieved employee at any stage of the grievance. Both members of the committee may nominate a deputy member to attend in their stead. (d) A person who has initiated a grievance or who is the subject of a grievance is not to be a member of a Consultative Committee dealing with that grievance, even if they would normally be a member under the preceding provisions. If it is not possible, as a result of this, to form a Worksite/School Consultative Committee the grievance will be referred to Level Two. (e) The Worksite/School Consultative Committee will attempt to reach an agreed resolution to the grievance. These resolution(s) will be provided in writing to the employees involved in the grievance and will be binding on all employees involved in the grievance. (f) Where the Worksite/School Consultative Committee is unable to reach an agreed resolution to the grievance they will inform all employees to the grievance of this fact. The aggrieved employee has a period of five working days in which they may take the grievance to Level Two. The aggrieved employee is required to inform the Union and the Regional Executive Director.

41.9 Level Two - Regional Grievance Committee (a) At this stage, the matter should be considered formally by the Regional Grievance Committee. (b) A Regional Grievance Committee is constituted within ten working days for each grievance at this level. The Regional Grievance Committee is made up of a senior employee nominated by the Director General and one Union member nominated by the President of the Union. A person who has initiated a grievance or is the subject of a grievance is not to be a member of an Regional Grievance Committee dealing with that grievance, even if he or she would normally be a member under the preceding provisions. (c) At this stage, the Regional Grievance Committee should attempt to resolve the issue so that it can be referred back to the school for implementation. (d) If the Regional Grievance Committee believes the issues raised by the grievance have system-wide ramifications, the committee may seek advice from the Director General and the President of the Union or their nominees and take such advice into consideration in determining the grievance.

41.10 Resolutions of the Regional Grievance Committee are binding on all employees to the grievance.

41.11 Where the Regional Grievance Committee is unable to reach an agreed resolution, the issue may be raised at a formal meeting of the EREC-ICG.

[3.] **9 TEACHERS - FUNCTIONS AND RESPONSIBILITIES**

This clause is to be read in conjunction with Part 3 - Teachers of the Award.

9.1 The functions of a teacher are contained in Section 64 of the Act.

9.2 (a) Each teacher's workload is negotiated at the school level within parameters provided in the Act. (b) No teacher will be required to perform an unreasonable or excessive workload during the school year.

9.3 (a) The principal can require teachers to attend whole of staff meetings outside the normal school day or normal operating hours totalling five hours per term. These meetings will be used for collaborative purposes to improve the school's performance. Whole of staff meetings may include meetings of groups of teachers working in phases of learning or learning areas. (b) The agenda, venue, frequency and timing of scheduled meetings convened under this clause will be determined in full and proper consultation with staff. Equity considerations such as family responsibilities, professional and personal development commitments and the flexible hours arrangements will be considered in the decision making process. (c) The responsibility to ensure whole of staff meetings occur rests with the principal. (d) Staff who cannot attend a scheduled whole of staff meeting will be provided with access to agendas, minutes and tabled documents.

9.4 A part-time teacher cannot be required to attend a staff meeting on a day the teacher would not ordinarily work. Where the principal requests a part-time teacher to attend on a day the teacher would not ordinarily work, and the teacher agrees, the teacher will be paid for the time they are required to attend.

9.5 (a) Teachers are required to conduct up to two formal interviews/meetings with parent/carers outside the normal school day or normal operating hours each year to discuss students' progress. (b) The agenda, venue and timing of these meetings will be determined in full and proper consultation with staff. The final responsibility to ensure meetings occur rests with the principal.

9.6 Payment or time off in lieu (TOIL) may be considered for agreed work undertaken outside of official student instruction time for such activities as school camps, music and drama festivals and performances; and parent interviews in excess of those specified in clause 9.5.

9.7 The employer recognises that some employees are required to travel to undertake their normal teaching duties. The employer will explore time off in lieu arrangements or the payment of an allowance to compensate employees for travelling time undertaken outside normal working hours.

9.8 The Department will continue to fund low-cost access to laptop computers for teachers for personal and work use.

[4.] ***May v Thomas*** [2008] WASCA 215; ***Sino Iron Pty Ltd v Mineralogy Pty Ltd*** [2014] WASC 406.

[5.] ***SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd*** [2011] WASCA 138 [20].

[6.] ***SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd*** [20 – 25].

[7.] ***Boase v Axis International Management Pty Ltd*** (No 2) [2012] WASC 334, [57] (Beech J): 'On an application for summary disposal involving a litigant in person, the court should be astute to ensure that, in a poorly expressed or unstructured document setting out the claim, there is no viable cause of action which, with appropriate amendment, could be put into proper form: ***Wentworth v Rogers (No 5)***(1986) 6 NSWLR 534, 536, 543; ***Tobin v Dodd*** [2004] WASCA 288 [15]. … A court should be careful to see that the rights of an unrepresented litigant have not been 'obfuscated by their own advocacy': ***Neil v Nott*** [1994] HCA 23; (1994) 121 ALR 148, 150; ***Glew v Frank Jasper Pty Ltd*** [2010] WASCA 87 [10].'

2018 WAIRC 00390

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2018 WAIRC 00390
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	WEDNESDAY, 18 APRIL 2018
DELIVERED	**:**	THURSDAY, 28 JUNE 2018
FILE NO.	**:**	M 213 OF 2017
BETWEEN	**:**	MR LESLIE GEORGE MAGYAR
		CLAIMANT
		AND
		DIRECTOR GENERAL OF EDUCATION
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW (WA) – Summary judgment application by employer – Employee alleging contravention of grievance procedure in industrial agreement – Grievance procedure to be 'dealt with in accordance with the principles of natural justice and due process' – Claim has no reasonable prospects of success
Legislation	**:**	*Industrial Magistrates Court (General Jurisdiction) Regulation 2005* (WA) *School Education Act 1999* (WA) *School Curriculum and Standards Authority Act 1997* (WA) *Industrial Relations Act 1979* (WA)
Instruments	**:**	*School Education Act Employees' (Teachers and Administrators) General Agreement 2014*
Case(s) referred to in reasons	**:**	***Pannell v Pannell*** [2017] WAIRComm 834 ***Richard James Quinlivan v Austral Ships Pty Ltd*** [2003] WAIRComm 9633 ***United Voice v Minister for Health*** [2012] WAIRComm 312 ***SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd*** [2011] WASCA 138 ***Casella v Hewitt*** [2008] WASCA 13 ***Department of Education and Training v Peter Hans Weygers*** [2009] WAIRComm 41 ***Tiver v University of South Australia*** [2014] FCA 1114 ***National Tertiary Education Union v La Trobe University*** [2015] FCAFC 142 ***Construction, Forestry, Mining and Energy Union v Hay Point Services*** [2018] FCA 417
Result	**:**	Summary judgment for the respondent
Representation:		
Claimant	**:**	Mr Magyar (in person)
Respondent	**:**	Mr J. Carroll instructed by the State Solicitor of WA

REASONS FOR DECISION

1 Mr Magyar is a school teacher at Kent Street State High School. He teaches information technology. He contends that the computer facilities available to him are inadequate to prepare his students undertaking a Certificate II or Certificate III in information technology. On 30 May 2017, Mr Magyar repeated his belief in an email to his supervisor, Mr Brian Gould, and requested that particular equipment be purchased. Mr Gould did not agree to the request. Mr Magyar immediately invoked the procedure covering 'grievances about worksite matters affecting employees' in cl 41 of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2014* (the School Agreement). A committee, purportedly following the procedure set out in cl 41 of the School Agreement (the Clause 41 Procedure) and for reasons set out in a letter dated 9 June 2017, determined that Mr Magyar's grievance 'was not upheld' (the 9 June 2017 Committee Decision). On 7 July 2017, Mr Magyar commenced proceedings in this Court (the 7 July 2017 Case) alleging that the process leading to the 9 June 2017 Committee Decision contravened the School Agreement insofar as his grievance was not 'dealt with in accordance with the principles of natural justice and due process' in cl 41.3(c) (the Natural Justice Clause). Specifically, Mr Magyar alleged in the 7 July 2017 Case that he was not afforded an opportunity to address the committee on relevant matters. By consent, the 7 July 2017 Case was discontinued in anticipation of a rehearing of Mr Magyar's grievance by a reconvened committee. The reconvened committee, purportedly following the Clause 41 Procedure and for reasons set out in a letter dated 28 November 2017, determined not to uphold Mr Magyar's grievance (the 28 November 2017 Committee Decision). On 11 December 2017, Mr Magyar commenced the present claim, alleging that the process leading to the 28 November 2017 Committee Decision had contravened the Natural Justice Clause. Specifically, he claims that the committee 'relied upon evidence from a person who was not impartial (Ms Rachel Hu), thus bias cannot be ruled out'.[1] For the reasons set out below, I agree with the respondent that Mr Magyar's claim has no reasonable prospects of success and must be dismissed.

2 The Industrial Magistrates Court has the power to dismiss a claim upon an application for summary judgment.[2] It is an implied power of the court[3] or it is an incident of the specific powers conferred on the court by reg 5 of the *Industrial Magistrates Court (General Jurisdiction) Regulation 2005* (WA) to make orders for the 'efficient, economical and expeditious dealing with cases'.[4] It is for the respondent to persuade the court that there is no issue to be tried. Although there is an evidentiary burden on Mr Magyar to show a valid claim, the overall legal burden is upon the respondent. The application for summary judgment will not be granted unless the court is satisfied that this case is 'one of the clearest of cases, when there is (such) a high degree of certainty about the ultimate outcome of the proceedings if it went to trial, that summary judgment (dismissing the case) ought properly be granted'.[5] If the ultimate outcome of the case may be affected by unresolved questions of fact or difficult questions of law or any other factor, including the filling of the current evidential vacuum, then a trial is required and the application for summary judgment will be dismissed.[6] The power to order summary judgment must be exercised with great care. If relevant facts are in dispute or if an application raises difficult or substantial questions of law, summary judgment should not be given.[7]

3 The text of cl 41 of the School Agreement is set out in an endnote to these reasons.[8] The Natural Justice Clause is located in cl 41.3(c). It provides that one of the (six) objectives of the grievous resolution procedure is that 'grievances are dealt with in accordance with the principles of natural justice and due process'. The issue for me on this application is whether the respondent has satisfied me that summary judgment should be granted because of the high degree of certainty that Mr Magyar will fail to prove that there was a contravention of the Natural Justice Clause in the process leading to the 28 November 2017 Committee Decision.

Natural Justice: the Principles

4 The legal principles to be applied when assessing whether a decision maker has discharged an obligation to accord 'natural justice' are well known. What follows in this paragraph is an adaption of what was said in ***Department of Education and Training v Peter Hans Weygers*** [2009] WAIRComm 41; [30] – [39] (omitting quotations and citations). The onus of establishing that the requisite standard of fairness has not been met will lie upon the party who seeks to prove breach of natural justice. It must be shown that the procedures adopted by the decision maker were unfair in the circumstances. It is important to emphasise that it is insufficient for a party alleging a breach of natural justice to prove that better or fairer procedures could have been adopted by the decision maker. It must be shown that the adopted procedures were unfair in the circumstances. In a case where an expectation has been disappointed, the question remains whether there has been unfairness. The concern of the law is to avoid practical injustice. The precise content of the requirements of natural justice in any particular case depends critically on the legal framework within which the relevant power falls to be exercised and the facts and circumstances of the particular case. Because of the large variety of legal frameworks in which the obligation to provide natural justice arises and the infinite variety of factual circumstances in which the determination of the precise content of the requirements of natural justice might arise, it is impossible to lay down a universally valid test which can be applied to determine whether natural justice has been provided in each and every case. A court required to determine whether a decision maker has departed from the requirements of natural justice must therefore analyse all facts and circumstances relevant to the purported exercise of the power viewed in the context of the legal framework confirming the relevant power for the purposes of ascertaining whether there has been practical injustice in the particular case.

Legal Framework of the Natural Justice Clause

5 The School Agreement is expressed to 'apply to employees who are employed' by the respondent.

6 The School Agreement must be read subject to any relevant statute, including the *School Education Act 1999* (WA) (the Act). The Act provides for the establishment of government schools by the Minister (s 55). The functions of the chief executive officer (CEO) (s 61), principals (s 63) and teachers (s 64) are proscribed by the Act. The CEO determines the standard of educational instruction in government schools. The functions of the principal include responsibility for day to day management and control of the school. The functions of a teacher include the giving of competent instruction to students in accordance with the curriculum. The functions of a teacher are subject to the direction and control of the principal (s 64(2)(c)). The curriculum in a government school is determined by the CEO in accordance with the requirement of the *School Curriculum and Standards Authority Act 1997* (WA) (the Curriculum Act).

7 The Curriculum Act provides for the establishment of the *School Curriculum and Standards Authority* (s 5) and a *Curriculum and Assessment Committee* (s 7D) whose role is to provide advice to the Authority. The advice will concern certain functions of the Authority, including: establishing curriculum; issuing guidelines on courses; developing courses; and the recognition and accreditation of courses (s 7E; s 9).

8 The School Agreement contains provisions on: a teacher's responsibilities (cl 9 – 15 in Part 2); salary and associated allowances (Part 6); leave (Part 7); country and remote teaching (Parts 8 and 9); consultation and dispute resolution (cl 40 – 43 in Part 11); performance management (Part 12) and the functions of an Employee Relations Executive Committee (EREC) (Part 13). The functions of the EREC include monitoring the matters identified in Part 13. Those matters include implications of the growth of vocational education training in schools (cl 49).

9 The Clause 41 Procedure applies to 'grievances about worksite matters affecting employees' (cl 41.1). The following may be noted about the Clause 41 Procedure.

- The procedure has six stated objectives. One objective is that stated in the Natural Justice Clause ('grievances are dealt with in accordance with the principles of natural justice and due process' (cl 41.3(c)). Other objectives include that: 'there is a proper consideration of the facts and circumstances relating to the grievance' (cl 41.3(e)); 'decisions are impartial, transparent and capable of review' (cl 41.3(f)).
- The 'fundamental principles in dealing with grievances' are stated, including: 'all employees involved in the grievance must act in good faith with a genuine desire to resolve any grievance at the lowest possible level if possible' (cl 41.5(c)); 'resolution of grievances should occur as quickly as possible and be completed as soon as practicable (cl 41.5(d)).
- A grievance with a person other than the principal is dealt with as a 'Level One – Worksite/School' grievance and is resolved by a consultative committee of two persons, the principal (or line manager) and a local union representative (cl 41.7, 41.8) . The procedure for resolution is proscribed in so far as certain procedures are set out in cl 41.6 - 41.8. Clause 41.6 provides that an aggrieved employee must lodge a written grievance 'in a clear and concise manner and include the relief sought'; the grievance must be lodged 'within three weeks of the circumstances occurring from the grievance arises' (unless extended); a grievance that raises issues that 'may have system-wide ramifications' may be referred to the EREC. Clause 41.8 provides that the consultative committee must formally consider the grievance within five working days of being lodged before issuing an agreed resolution in writing which is binding on all employees; or informing the parties that agreement was not reached and the aggrieved employee may refer the grievance to a Regional Grievance Committee.

- A grievance with a principal (or referred by the aggrieved employee under cl 41.8) is dealt with as a 'Level Two – Regional Grievance Committee' grievance and is resolved by Regional Grievance Committee of two persons, a senior employee nominated by the Director General and a union member nominated by the President of the Union (cl 41.6, 41.9). The procedure for resolution is proscribed in so far as certain procedures are set out in cl 41.9. The Regional Grievance Committee must be constituted 'within 10 working days for each grievance'. Agreed resolutions are referred to the school for implementation. Clause 41.11 provides that if the Regional Grievance Committee is unable to reach agreement, the issue may be raised at the EREC.

Facts and Circumstances of the Consultative Committee Process

10 The following facts, alleged in Mr Magyar's originating claim of 11 December 2017 will, for present purposes, be assumed to be correct:

a. On 30 May 2017, Mr Magyar send an email to Mr Gould (and a copy to School Principal, Ms Ward) requesting the purchase of specified items that he considered necessary to deliver the relevant curriculum. The request was informed by a published training package that had been ratified by Government in 2012. The training package referred to the need to ensure students had access to industry current equipment, facilities and training resources. Mr Magyar's view was that to teach the relevant curriculum it was necessary to create a computer network for training purposes that was isolated from other networks. The items he required and requested were: '1 desktop computer ($900), 5 laptops ($2500) and miscellaneous items ($1000)' (the Requested Equipment). Mr Magyar's view was informed by advice he received in a letter of 29 July 2013 from Eugene Geldenhuys of TFX Pty Ltd to the effect that relevant curriculum could not 'be taught in full [unless] an isolated network is configured'. Mr Geldenhuys recommended the creation of 'a sandbox network which is isolated from the school network'.

b. On 2 June 2017, Mr Gould orally refused Mr Magyar's request. Mr Gould referred Mr Magyar to a memorandum of agreement between Kent Street Senior High School and Hands On Computer Training International Pty Ltd trading as 'Australian Institute of Commerce + Technology' (AICT) in which mention is made of the school supplying 'two 'dead' computers' in connection with the delivery of relevant curriculum.

c. On 6 June 2017, Mr Magyar wrote to School Principal, Ms Ward, lodging 'a grievance against Mr Gould' following the conversation of 2 June 2017. Mr Magyar identified three 'desired outcomes': (1) purchase of the Requested Equipment; (2) establish a 'sandbox network'; (3) obtain a report from a suitably qualified person to confirm compliance with the training package.

d. By letter dated 9 June 2017, a consultative committee comprising school principal, Ms Ward and union representative, Mr Spittle, determined that Mr Magyar's grievance 'was not upheld'. On 7 July 2017, Mr Magyar commenced proceedings in this court alleging that the process leading to the 9 June 2017 Committee Decision contravened the School Agreement insofar as his grievance was not dealt with in accordance with the Natural Justice Clause. Specifically, Mr Magyar alleged in the 7 July 2017 Case that he was not afforded an opportunity to address the committee on relevant matters. By consent, the 7 July 2017 Case was discontinued in anticipation of a rehearing of Mr Magyar's grievance by a reconvened committee.

e. By letter dated 28 November 2017, a reconvened consultative committee, comprising school principal, Ms Ward and union representative, Ms Lees, purportedly following the Clause 41 Procedure, determined (again) not to uphold Mr Magyar's grievance. The letter referred to matters taken into account by the reconvened consultative committee. It did not accept a submission by Mr Magyar that 'a suitably qualified person' to confirm compliance with the training package was the (named) manager of regulatory operations of the WA Australian Skills Quality Authority. The reconvened consultative committee had taken advice from Ms Hu of AICT in preference to the manager of regulatory operations of the WA Australian Skills Quality Authority. The reason for this preference was stated to be the fact that, pursuant to a memorandum of agreement between them, AICT was responsible for ensuring that the school complied with relevant standards. The 28 November 2017 Committee Decision was to the effect that, relying upon the advice of Ms Hu, the curriculum co-ordinator at AICT responsible for ensuring that approximately twenty schools comply with relevant standards in the delivery of information technology courses: (1) the Requested Equipment was not necessary to comply with relevant standards; (2) the establishing of a sandbox network was not necessary to comply with relevant standards.

Reasons Why Summary Judgment Against Mr Magyar's Claim Will be Granted.

11 For the reasons set out below, no arguable contravention of the Natural Justice Clause arises from the decisions of the reconvened consultative committee: (1) not to take advice from the expert recommended by Mr Magyar (i.e. the manager of regulatory operations of the WA Australian Skills Quality Authority); (2) to rely upon the advice of Ms Hu, notwithstanding the existence of a commercial relationship between her employer, AICT, and the school.

12 Two features of the legal framework in which the Clause 41 Procedure was to be administered by the reconvened consultative committee should be noted. Firstly, the procedure should occur as quickly as possible and be completed as soon as practicable: cl 41.5(d). Secondly, the effect of the Act is that ultimate responsibility for resource allocation decisions within the school is upon the principal and the CEO.

13 Resource allocation decisions will necessarily excite the interest of any teacher when the result is an impact upon the capacity or the manner in which that teacher is to deliver curriculum to students. The Clause 41 Procedure must reflect the subject matter of the decision. If the Clause 41 Procedure is available as a means of review of each resource allocation decision, then

it may be expected for advice to be sought by the consultative committee from a convenient trusted source that, apparently, has relevant technical knowledge or experience.

14 The decision to take advice from Ms Hu was not irrational and involved no unfairness to Mr Magyar. It may be inferred that the reconvened consultative committee assessed her technical advice in light of any commercial advantage to herself or to her employer that may have followed from her advice and in light of evidence that she offered in support of her conclusions. This inference is supported by the contents of the letter setting out the reasons for the 28 November 2017 Committee Decision. If it is assumed (in favour of Mr Magyar), that the use of Mr Magyar's preferred expert was conducive to a 'better' decision *and* would have resulted in a 'fairer' process, it does *not* follow that there has been an arguable contravention of the Natural Justice Clause: ***Department of Education and Training v Peter Hans Weygers*** [2009] WAIRComm 41; [30] – [39]. No practical injustice resulted from the reconvened consultative committee relying upon Ms Hu in preference to the manager nominated by Mr Magyar. Mr Magyar put his case to the reconvened consultative committee. The reconvened consultative committee considered the case in light of technical advice from a source that was not inappropriate in the circumstances. The reconvened consultative committee offered cogent written reasons for not agreeing to the desired outcomes of Mr Magyar.

Conclusion

15 In view of my conclusion above, it has not been necessary to address three further questions that have occurred to me but which the respondent has not raised in this summary judgment application. First, there may be a question about whether Mr Magyar's claim is misconceived because it concerns the conduct of a committee (comprising the principal and a local union representative) and does not concern the conduct of his employer, the respondent: see ***Tiver v University of South Australia*** [2014] FCA 1114 (White J).[9] Secondly, there may be a question about whether Mr Magyar's claim is better characterised as a dispute about a matter provided for in the Act rather than a worksite matter. Of significance is that cl 42 of the School Agreement contains a different procedure (the Clause 42 Procedure) to the Clause 41 Procedure and is expressed to apply to 'questions, difficulties or disputes that are not the subject of individual grievances'.[10] The Clause 42 Procedure is stated to be 'intended to address questions, difficulties or disputes' that include 'matters provided for in Acts and Regulations'. Thirdly, there may be a question about whether the Natural Justice Clause is aspirational and not amenable to enforcement in the manner provided by Part III of the *Industrial Relations Act 1979* (WA): see ***National Tertiary Education Union v La Trobe University*** [2015] FCAFC 142; ***Construction, Forestry, Mining and Energy Union v Hay Point Services*** [2018] FCA 417.

16 This is a case where there is such a high degree of certainty about the ultimate outcome of the proceedings if it went to trial, that summary judgment (dismissing the case) ought properly be granted'. There are no unresolved questions of fact or difficult questions of law that require a trial. I will hear from the parties on what consequential orders, including orders as to costs, ought to be made.

M. FLYNN

INDUSTRIAL MAGISTRATE

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[1] Paragraph 25 of the statement of particulars attached to the originating claim.
[2] I addressed the same issue in ***Pannell v Pannell*** [2017] WAIRComm 83 [3] and the contents of this paragraph are an adaption of my stated reasons in ***Pannell***.
[3] ***Richard James Quinlivan v Austral Ships Pty Ltd*** [2003] WAIRComm 9633 [31].
[4] ***United Voice v Minister for Health*** [2012] WAIRComm 312, [20 – 22] (Smith AP); [100] (Kenner C).
[5] ***SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd*** [2011] WASCA 138 [20].
[6] ***SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd*** [20 – 25].
[7] ***Casella v Hewitt*** [2008] WASCA 13 [36] (McLure JA).

[8] **41 GRIEVANCE RFSOLUTION PROCEDURE**

41.1 The grievance resolution procedure covers grievances about worksite matters affecting employees that are within the control or responsibility of the employer or its employees. Any resolution of a grievance under these procedures must be capable of being implemented at the workplace/worksite. This clause does not bind swimming instructors, whose procedure is outlined in clause 39.5 of this Agreement.

41.2 This grievance resolution procedure excludes those grievances more appropriately dealt with by legislation or policy involving such matters including: (a) sexual harassment; (b) equal opportunity; (c) occupational safety and health; (d) Public Sector Commission Commission's Code of Ethics; Commissioner's Instructions or the Public Sector (e) performance and disciplinary matters; and (f) criminal behaviour.

41.3 This grievance resolution procedure has been developed to achieve the following objectives: (a) resolution of grievances at the workplace level; (b) the right of employees to approach the employer or the Union for advice or assistance without any repercussions; (c) grievances are dealt with in accordance with the principles of natural justice and due process; (d) employees are informed of their rights and responsibilities in the grievance resolution process; (e) there is a proper consideration of the facts and circumstances relating to the grievance; and (f) decisions are impartial, transparent and capable of review. Whilst the grievance is the subject of this grievance resolution process, the status quo prevailing before the grievance was lodged will remain, unless otherwise agreed between the parties, or where the maintenance of the status quo is impractical.

41.4 Where a representative of the Union or the employer provides an employee with assistance in formulating a grievance, that person must exclude themselves from the Consultative Committee hearing the grievance where there is a conflict of interest or they cannot act without bias.

41.5 Fundamental principles in dealing with grievances are as follows: (a) discussion and resolution should be within a general framework of co-operation, which emphasises prevention of further grievances rather than just a resolution of the immediate matter; (b) as far as possible, grievances should be handled using the normal line management structure; (c) all employees

involved in the grievance and their representatives must act in good faith, with a genuine desire to resolve any grievance at the lowest possible level if possible, and to maintain communications at all levels with a view to resolving the issue or issues; (d) resolution of grievances should occur as quickly as possible and be completed as soon as practicable; (e) employees have the right to raise legitimate grievances without threat of repercussion; (f) confidentiality must be maintained at all times in the resolution of a grievance, including the outcome, unless otherwise agreed to by all the employees involved in the grievance; and (g) employees who are not party to the grievance cannot be compelled to become involved in the grievance resolution process.

41.6 The procedures to be followed when an employee wishes to lodge a grievance are: (a) Where a grievance arises at a worksite, in the first instance the matter should be dealt with in an informal manner. The aggrieved employee should attempt to resolve the grievance with the other employee. Consultation with other officers or the Union office may take place as a normal line management process in order to attempt to resolve the matter prior to the commencement of the formal grievance procedures set out below. Employees are committed to resolving grievances cooperatively. Every effort should be made to resolve the issue informally. If a grievance cannot be resolved informally, it can be considered under the formal grievance procedure. (b) The formal grievance resolution procedure is instigated as follows: (i) The instigation of the grievance procedure in the first instance is the responsibility of the aggrieved employee and such employee must act within three weeks of the circumstances occurring from which the grievance arises. (ii) Where a grievance is lodged after three weeks, the Consultative Committee has the discretion to accept a late grievance on such grounds as the party being on sick leave or because of failed attempts to resolve the issue informally or through other processes such as mediation. The onus is on the aggrieved employee(s) to provide written reasons of the cause of the delay at the time of lodging their grievance. The Consultative Committee must provide written reasons for its decision to reject an application lodged out of the three week time limit. (iii) The grievance must be written in a clear and concise manner and include the relief sought. The response acknowledging the grievance and advice of the outcome of consideration of the grievance will also be in writing. (iv) Where an employee has a grievance with his or her principal or line manager, the employee must notify him or her. If the matter is not resolved informally between the principal or line manager and the employee, the employee is entitled to go straight to Level Two of the procedure. (v) In circumstances where the grievance relates to a School Administrator or the Regional Executive Director, the resolution process may require the grievance to be considered by another Regional Grievance Committee. (vi) In circumstances where the issues raised by the grievance may have system-wide ramifications, and are not able to be resolved at the workplace level, the matters can be referred to EREC for determination and action.

41.7 The formal grievance resolution procedure has two levels: Level One - Worksite/School and Level Two - Regional Grievance Committee.

41.8 Level One - Worksite/School (a) At this stage, the grievance should be considered formally by the Worksite/School Consultative Committee within five working days of its receipt. The committee is made up of the principal or line manager and the local Union representative. (b) In the case where there is no school site Union representative or where that person is the principal or line manager, another Union member from that school or workplace should take the position who is nominated by the President of the Union or his or her nominee. (c) The aggrieved employee may nominate and be accompanied by a support person at this and any subsequent stage. This support person can advise but not represent the aggrieved employee at any stage of the grievance. Both members of the committee may nominate a deputy member to attend in their stead. (d) A person who has initiated a grievance or who is the subject of a grievance is not to be a member of a Consultative Committee dealing with that grievance, even if they would normally be a member under the preceding provisions. If it is not possible, as a result of this, to form a Worksite/School Consultative Committee the grievance will be referred to Level Two. (e) The Worksite/School Consultative Committee will attempt to reach an agreed resolution to the grievance. These resolution(s) will be provided in writing to the employees involved in the grievance and will be binding on all employees involved in the grievance. (f) Where the Worksite/School Consultative Committee is unable to reach an agreed resolution to the grievance they will inform all employees to the grievance of this fact. The aggrieved employee has a period of five working days in which they may take the grievance to Level Two. The aggrieved employee is required to inform the Union and the Regional Executive Director.

41.9 Level Two - Regional Grievance Committee (a) At this stage, the matter should be considered formally by the Regional Grievance Committee. (b) A Regional Grievance Committee is constituted within ten working days for each grievance at this level. The Regional Grievance Committee is made up of a senior employee nominated by the Director General and one Union member nominated by the President of the Union. A person who has initiated a grievance or is the subject of a grievance is not to be a member of an Regional Grievance Committee dealing with that grievance, even if he or she would normally be a member under the preceding provisions. (c) At this stage, the Regional Grievance Committee should attempt to resolve the issue so that it can be referred back to the school for implementation. (d) If the Regional Grievance Committee believes the issues raised by the grievance have system-wide ramifications, the committee may seek advice from the Director General and the President of the Union or their nominees and take such advice into consideration in determining the grievance.

41.10 Resolutions of the Regional Grievance Committee are binding on all employees to the grievance.

41.11 Where the Regional Grievance Committee is unable to reach an agreed resolution, the issue may be raised at a formal meeting of the EREC-ICG.

[9] At [33]: '[The employer's] first submission was that, at least on its express terms and in particular its opening sentence, cl 46.5(h) imposes obligations on a Dispute Committee, but not on [the Employer] itself. [The employer], like the staff member in respect of whom disciplinary action is contemplated, is a participant in the proceedings before the Committee. It does not control the activities of the Committee or the manner of conduct of its proceedings. Other provisions in the Collective Agreement relating to the establishment of Dispute Committees, which it is unnecessary to quote presently, indicate that they are to operate with some degree of independence of [the employer]. I accept this submission.'

[10] **42 DISPUTE SETTLEMENT PROCEDURE**

This dispute settlement procedure is for the purpose of resolving any questions, difficulties or disputes that are not the subject of individual grievances, which are to be dealt with according to Clause 41 - Grievance Resolution Procedure of this Agreement. This

dispute settlement procedure is intended to address questions, difficulties or disputes that include such matters as: (a) the interpretation or application of this Agreement; or (b) the application of system-wide policies or decisions; or (c) conditions of employment (including entitlements to salary, leave and the like); or (d) equal employment opportunity and occupational safety and health matters or other matters provided for in Acts and Regulations.

2018 WAIRC 00377

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2018 WAIRC 00377
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 10 MAY 2018
DELIVERED	**:**	WEDNESDAY, 20 JUNE 2018
FILE NO.	**:**	M 42 OF 2017
BETWEEN	**:**	COLIN SHARROCK
		CLAIMANT
		AND
		DOWNER EDI MINING PTY LTD
		RESPONDENT

CatchWords	**:**	Jurisdiction of Industrial Magistrates Court – Enforcement of, and powers of the Industrial Magistrates Court in, a contractual claim under the small claims procedure – Meaning of '*to pay an amount*' and '*pay the amount under this Act*' as it relates to an amount to be paid by the employer under s 545(3) and s 548(1A)(i) of the *Fair Work Act 2009* (Cth).
Legislation	**:**	*Fair Work Act 2009* *Industrial Relations Act 1979* (WA)
Instrument	**:**	*Downer EDI Mining – Surface Metalliferous Enterprise Agreement 2012*
Case(s) referred to in reasons	**:**	***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** (2009) 239 CLR 27 ***Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited*** *[2014] FCA 878* ***Casey Grammar School v Independent Education Union of Australia*** *(2010) 204 IR 52* ***Commissioner of Taxation v Consolidated Media Holdings Ltd*** *(2012)* 250 CLR 503 ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited*** (No 2) [2010] FCA 652 ***Construction, Forestry, Mining and Energy Union & Ors v RGN Mining Services Pty Ltd & Anor*** [2017] FCCA 1546 ***Murrihy v Betezy.com.au Pty Ltd*** *[2013] FCA 908* ***Project Blue Sky Inc v Australian Broadcasting Authority*** *(1998) 194 CLR 355* ***Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union*** [2016] FCAFC 122 ***Thomson v Commonwealth of Australia*** [2013] FCCA 2168 ***Whitfield v One Key Resources Pty Ltd*** [2014] 553
Result	**:**	Claim dismissed for want of jurisdiction
Representation:		
Claimant	**:**	Mr C. Young (industrial agent)
Respondent	**:**	Mr T. Caspersz instructed by Corrs Chambers Westgarth

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REASONS FOR DECISION

1 On 9 March 2017, Colin Sharrock lodged a claim under the *Fair Work Act 2009* (Cth) (FWA) electing to have the claim dealt with as a small claims procedure pursuant to s 548 of the FWA.

2 The initial claim was a failure by Mr Sharrock's former employer, Downer EDI Mining Pty Ltd, to comply with a fair work instrument, *Downer EDI Mining – Surface Metalliferous Enterprise Agreement 2012*. The particulars of the claim allege that after 27 August 2015 until mid-August 2016 Downer EDI Mining failed to pay Mr Sharrock the contractual amount for all

work performed and any form of paid leave taken referred to in a letter of offer dated 7 July 2014 when Downer EDI Mining unilaterally reduced the flat hourly rate from $42.17 per hour to $39.65 per hour following a work place vote.

3 Mr Sharrock claims the difference between the flat hourly rate amount of $39.65 paid after the work place vote and the flat hourly rate amount of $42.17 referred to in the letter of offer for ordinary hours worked and various leave entitlements contained in the *Downer EDI Mining – Surface Metalliferous Enterprise Agreement 2012*. He seeks an order for Downer EDI Mining to pay $7,569.83, the amount he says is owed under the terms of the letter of offer.

4 At the start of the hearing, Mr Sharrock advised that following the decision in ***Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union*** [2016] FCAFC 122, the nature of the claim was revised and was now limited to a contractual entitlement claim only. That is, Mr Sharrock conceded the letter of offer did not form part of the enterprise agreement between he and Downer EDI Mining and he sought to enforce the terms of the agreement he says is contained in the letter of offer.

5 Downer EDI Mining objected to the Industrial Magistrates Court (IMC) hearing the revised claim saying the IMC lacked jurisdiction to make the order sought by Mr Sharrock in the small claims procedure when regard is had to the provisions of s 545(3) and s 548 of the FWA.

6 Mr Sharrock's position is that failing to pay entitlements under a contract of employment is a contravention of s 323 of the FWA, a civil remedy provision, and a failure to pay in full contractual entitlements is a failure to pay an amount required to be paid under the FWA.

The Preliminary Issue

7 Thus, a preliminary issue was identified, namely: whether the IMC in a small claims procedure has jurisdiction to enforce payment arising solely from Mr Sharrock's contract of employment under s 323 of the FWA?

Effect of Determining the Preliminary Issue

8 If the answer to the preliminary issue is yes, the claim can be heard and determined.

9 If the answer to the preliminary issue is no, the claim must be dismissed for want of jurisdiction.

Parties' Contentions

10 Downer EDI Mining's contentions on the preliminary issue are:

1. on a proper construction of s 26 and s 27 of the FWA, a claim for payment under a contract of employment (without any reference to a fair work instrument or the FWA) is excluded from the application of the FWA in the IMC;
2. section 548(1A)(a)(i) of the FWA, when read with s 545(3), limits the powers of the IMC in small claim proceedings to making orders for the payment of amounts that are required to be paid under the FWA or a fair work instrument (cf. as opposed to an amount required to be paid under a contract of employment only); and
3. section 323 of the FWA does not enliven the IMC's jurisdiction to enforce payment under a contract of employment.

11 Therefore, as I understand Downer EDI Mining's contentions, it includes both an objection to the IMC having jurisdiction to hear the subject matter of the application (being the revised claim) as a small claims procedure and having the power to make the order sought by Mr Sharrock under s 548 of the FWA.

12 Mr Sharrock's contentions on the preliminary issue are:

1. the operation of s 26 and s 27 of the FWA does not exclude the IMC's jurisdiction to enforce payment under a contract of employment, as there is no inconsistency between the FWA and the *Industrial Relations Act 1979* (WA) preventing a claimant from choosing the jurisdiction (state or federal) to enforce such a claim; and
2. the plain and ordinary meaning of the words in s 323 of the FWA, when read with s 548 of the FWA, enables the IMC to make an order for 'an amount owing' to an employee if the employer is required to pay the amount in full under the FWA.

Issues for Determination

13 Having regard to the preliminary issue, there are other secondary issues relevant to the preliminary issue:

1. what orders can be made by the IMC under s 545(3) and s 548(1) of the FWA?;
2. what is the meaning of 'to pay an amount' and 'pay the amount under this Act (or a fair work instrument)' as it relates to an amount to be paid by the employer under s 545(3) and s 548(1A)(i) of the FWA?; and
3. what is the character of Mr Sharrock's claim and is this relevant to the order sought and capable of being made by the IMC in the small claims procedure?

Principles of Statutory Construction

14 The starting point to determine the meaning of a statutory provision is the text of the statute, having regard to context in which the text appears and the general purpose and policy of the legislation: ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355; ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited*** (No 2) [2010] FCA 652.

15 Extrinsic materials cannot be relied upon to displace the clear meaning of the language contained in the text of the legislation: ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** (2009) 239 CLR 27.

16 Where only one meaning is reasonably open on the language of a provision, the court must adopt that meaning. Even if a drafting error is suspected or the literal meaning gives rise to absurdity, that meaning must prevail unless an alternative interpretation is reasonably open on the language in fact used by the legislature: ***Commissioner of Taxation v Consolidated Media Holdings Ltd (2012)*** 250 CLR 503.

17 Where more than one meaning is reasonably open, the court may adopt that meaning which best achieves the purpose or object of the statutory provision. The court must always consider context and extrinsic material in the first instance regardless of whether ambiguity appears on the face of the legislation: ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue***.

Small Claims Procedure

18 Section 548(1) and (2) contain four conditions for proceedings to be dealt with under the small claims procedure:

1. the application is for an order (not a pecuniary penalty order) under Division 2, Part 4-1, Chapter 4 of the FWA from a magistrates court or the Federal Circuit Court;
2. *the order* relates to an amount referred to in s (1A) being (relevant to this case), *an amount that an employer was required to pay to, or on behalf of, an employee*:
    - 2.1 *under this Act or a fair work instrument*; or
    - 2.2 because of a safety net contractual entitlement; or
    - 2.3 because of an entitlement of the employee arising under s 542(1);
3. an indication in the prescribed manner that the person wants the small claims procedure to apply to the proceedings; and
4. the award sought is not more than $20,000 or a higher amount if prescribed by the relevant regulations.

(emphasis added)

19 Subdivision A, Division 2, s 539(2) tabulates civil remedy provisions for which orders may be sought in respect of contraventions of certain provisions of the FWA. In addition, the table in s 539(2) details the persons who may make the application and the court which may hear and determine the application. It is clear from the table that in respect of some applications only certain persons may make the application and only certain courts may hear and determine the application.

20 For the purposes of this claim, an 'eligible State or Territory court' may hear and determine an application for orders in relation to an alleged contravention of s 323(1) and (3) of the FWA. A 'magistrates court' is an 'eligible State or Territory court' and a 'magistrates court' means, relevantly, a court constituted by an industrial magistrate: s 12 of the FWA. The IMC is a court constituted by an industrial magistrate.

21 However, notably, the Federal Court and Federal Circuit Court is also empowered to hear and determine the same type of application, albeit that in the small claims procedure an application may only be made to the Federal Circuit Court or a magistrates court.

What does this mean for the IMC in relation to s 323 of the FWA?

22 Section 323(1) of the FWA provides that:

> *An employee must pay an employee amounts payable to the employee in relation to the performance of work: (a) in full (except as provided by section 324); and (b) in money by one, or a combination, of methods referred to in subsection (2); and (c) at least monthly.*

23 In ***Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited*** [2014] FCA 878, Buchanan J determined that the ordinary language of s 323 was sufficiently wide to enable an application that there have been breaches of s 323 through a failure to pay contractually obligated amounts (at [37]). His Honour's determination follows on from the decision in ***Murrihy v Betezy.com.au Pty Ltd*** [2013] FCA 908 where Jessup J stated that a significant innovation introduced by the FWA was the imposition of an obligation upon a 'national system employer' to pay its employees amounts payable to them in relation to the performance of work in full at least monthly: s 323(1). Accordingly, his Honour determined the legislation picks up entitlements arising under contracts of employment and gives statutory consequences to an employer's failure to make good on them. In that respect, s 323(1) is a civil remedy provision (at [142]).

24 Further, in ***Construction, Forestry, Mining and Energy Union & Ors v RGN Mining Services Pty Ltd & Anor*** [2017] FCCA 1546, Barnes J, referring to ***Murrihy*** and ***Professional Engineers***, and as a matter of judicial comity, determined that a failure to pay a contractual obligation of two months' payment in lieu of two months' written notice contravened s 323 of the FWA.

25 There are a number of distinguishing features with respect to these three cases, as compared to Mr Sharrock's claim. Each of these cases were commenced in the Federal Court or the Federal Circuit Court where the orders capable of being made are broader than that capable of being made by the IMC: s 545(1) and (2) of the FWA.

26 In ***Association of Professional Engineers***, the applicant relied on s 323 to establish a breach of a civil remedy provision, but not as a foundation for recovery of any alleged underpayment of a bonus and incentive based payments. Recovery of the unpaid amounts was sought pursuant to s 545 of the FWA, namely compensation for loss suffered as a result of contravention of a civil remedy provision. Notably, at [38], the court stated that if the breach was established, it would have power to order compensation. Buchanan J also considered, at [17], that contractual entitlements of the kind sought seemed to be a 'safety net contractual entitlement' having regard to s 139(1) of the FWA.

27 In ***Murrihy***, the applicant relied on s 323 to establish the failure to pay commission under two commission agreements and sought compensation pursuant to s 545(2)(b) of the FWA and the imposition of a penalty for the alleged contravention of s 323. Jessup J found the respondents were non-compliant with the commission agreements and the applicant was entitled to

damages to be assessed. I note that there was a further question as to whether damages should be awarded or compensation ordered under s 545(2)(b) of the FWA, the resolution of which may have had consequences for the power to award interest. However, what was accepted is that under the commission agreements, commission ought to have been paid monthly (which it was not) and the failure to do so contravened the least frequent basis of payment under s 323(1).

28 In ***RGN Mining Services***, the applicant (in a revised claim) relied on s 323 to claim the respondent failed to provide written notice of termination or payment in lieu of notice in accordance with his employment contract (the applicant also alleged other failures related to the FWA). The applicant sought orders for compensation for breach of contract and the imposition of a penalty. Barnes J, at [66] to [69], referred to ***Professional Engineers*** and ***Murrihy***, and concluded that the application of s 323 was not limited to periodic payments and that a payment in lieu of notice was payable to the applicant as the respondent's employee on termination of his employment and that it was in relation to the performance of work. It was an amount that had 'become payable' and it was payable 'in full' under the applicant's employment contract and the respondent failed to 'make good' on this entitlement. I note reference was made that in the event a breach of s 323 was established, the court had power to order payment of compensation and, in fact, at [151] made an order for compensation for the loss arising from the particular contraventions of the FWA.

29 Giving proper regard to those decisions, a failure to pay a contractual entitlement is capable of contravening s 323 of the FWA. Given such a contravention of s 323 is capable of being heard and determined in an eligible state or territory court as a civil remedy provision, it follows that it is open for an application for an order relevant to a contravention of s 323 (as it relates to a breach of a contractual entitlement) to be made to eligible state or territory court (the IMC). Nothing in the decisions or the language of the text relevant to the IMC otherwise appears to limit or exclude the application of s 323 as it relates to a failure to pay a contractual obligation.

30 Therefore, it seems that Mr Sharrock's revised claim, meets the first condition in s 548(1) of the FWA, being the application of a contravention of a civil remedy provision capable of being heard in a magistrates court or the Federal Circuit Court.

31 The third and fourth conditions are uncontentious in this case because Mr Sharrock properly indicated that he wanted the small claims procedure to apply to the proceedings and the amount sought is less than $20,000.

32 Thus, the secondary issues for determination, which form the basis of the second condition, are seminal to determining the preliminary issue.

What orders can be made by the IMC in the small claims procedure?

33 The small claims procedure sits within Division 3 of Part 4-1. A reasonable reading of Division 3 is that it does not confer any additional powers on the IMC with respect to the orders that can be made, but is directed towards a simplified court procedure for mostly self-represented litigants.

34 The only relevant order that can be made is that which relates to an amount referred to in s. 548(1A); an amount required to be paid under the FWA or a fair work instrument (Mr Sharrock conceding that the reference to fair work instrument is not applicable in his case). While Mr Sharrock's claim involves the alleged failure to pay a contractual entitlement, it does not relate to a safety net contractual entitlement, as that term is defined in s. 12 of the FWA, because it relates only to the difference between applicable hourly rates of pay in the letter of offer and not to any subject matter in s 61(2) or s 139(1) of the FWA (there being no applicable modern award).

35 The wording in s 548(1A)(i) mirrors that in s 545(3) of the FWA being an eligible state or territory court can order an employer to pay an amount to or on behalf of an employee if the court is satisfied that:

a) the employer was required to pay the amount under this Act or fair work instrument; and

b) the employer has contravened a civil remedy provision by failing to pay the amount.

36 This order is contrasted with the scope of orders open to the Federal Court and Federal Circuit Court, which may make 'any order the court considers appropriate' if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision: s 545(1). Further, the Federal Court and the Federal Circuit Court may make an order granting an injunction, awarding compensation for loss that person has suffered because of the contravention, or an order for reinstatement of the person: s 545(2).

37 The difference in scope of orders capable of being made in the IMC as compared to the Federal Circuit Court must have significance with respect to the subject matter of the application the IMC and Federal Circuit Court can hear and determine in the small claim procedure (noting the small claims procedure is applicable in the Magistrates Court or Federal Circuit Court).

38 In oral submissions the parties each submitted that the differing orders in s 545 do not apply to the small claims procedure in s 548 of the FWA. As I understood the parties' submissions the Federal Circuit Court and the IMC can only make orders in a small claim procedure in relation to the payment of an amount of money and no other order.

39 I do not wholly agree with the parties' submissions that s 545 does not apply to s 548, but that may be a matter of misunderstanding about what, in fact, the parties meant. If the parties meant the Federal Circuit Court could not make an order for an injunction in the small claim procedure, then I tend to agree. However, if the parties meant the Federal Circuit Court could not make an order for compensation, then I do not agree.

40 Mr Sharrock provided two cases regarding the small claims procedure heard and determined in the Federal Circuit Court: ***Whitfield v One Key Resources Pty Ltd*** [2014] 553 and ***Thomson v Commonwealth of Australia*** [2013] FCCA 2168. In both of those cases the court assumed the orders in s 545 applied to the small claim procedure because they were prepared to countenance an order made under s 545(2)(b) being an order for compensation 'for loss that a person has suffered because of the contravention'. In addition, in ***Whitfield*** Lucev J considered the limitation period in s 544 of the FWA applies to the small claim procedure under s 548.

41 It is difficult to see why, without express exclusion, that s 548 stands alone from the other sections in Part 4-1 when it is so closely tied to Division 2. Further, there is no indication that some sections in Part 4-1 should apply, such as the limitation period, and other should not.

42 Further, s 548 does no more than establish an informal procedure for certain claims under $20,000 (or as prescribed in the regulations). It does not prescribe the actual order or orders to be made, save that the order relates to an amount. Therefore, recourse must be had to s 545 for the actual order or orders that can be made by the Magistrates Court or the Federal Circuit Court in the small claim procedure.

43 The only order capable of being made by an eligible state or territory court in the small claim procedure is that referred to in s 545(3), namely that 'an employer to pay an amount to, or on behalf of, an employee', but only if the court is satisfied: (a) the employer was required to pay the amount under this Act or a fair work instrument; and (b) the employer has contravened a civil remedy provision by failing to pay the amount.

44 The Federal Circuit Court may make an order for compensation under s 545(2) of the FWA, which for reasons detailed below is also 'an amount'.

What then is meant by 'to pay an amount' and 'an amount that an employer was required to pay' in s 545(3) and s 548(1A) of the FWA?

45 In oral submissions the parties submitted the character of Mr Sharrock's claim was largely irrelevant; that is, from Downer EDI Mining's perspective whether the character of Mr Sharrock's claim was for a debt for non-payment of wages or a claim for liquidated damages did not change the fact that the claim was not for an amount payable under the FWA. However, from Mr Sharrock's perspective the character of his claim was irrelevant because an amount payable in full was not confined to a debt or damages, but was referable to an amount to be paid under s 323 of the FWA. My understanding of Mr Sharrock's submission, and consequently claim, is that s 323 grounds not only the order sought in the application (being the alleged contravention of a civil remedy provision) but also the remedy claimed being the payment of an amount in full required to be paid under the letter of offer.

46 I agree, in part, with the parties' submissions that the character of Mr Sharrock's claim is irrelevant, but only to the extent that it goes to the meaning 'to pay an amount' and 'an amount that an employer was required to pay' in s 543(3) and s 548(1A) of the FWA, respectively.

47 'An amount' is not defined in the FWA. Giving 'amount' its common meaning, having regard to its context in the FWA and, more specifically, s 545(3) and s 548, 'amount' must mean an amount of money. However, the FWA is also silent as to how this amount is ascertained. Having regard to the orders that can be made by the Federal Circuit Court and Magistrates Court relevant to Part 4-1, it seems that in the small claims procedure the amount can be ascertained by reason of a debt or by an assessment of damages or some other method, provided the amount relates to one of the three items in s 548(1A)(i), (ii) or (iii). In that sense, for the purposes of demonstrating the claim is capable of being dealt with as a small claim procedure, relevant to s 548(b) and s 548(1A)(a), at first instance a person need do no more than establish that an amount of money was required to be paid by the employer, howsoever this arises.

48 Thereafter, to continue in the small claims procedure the amount of money must relate to one of the three items in s 548(1A)(i), (ii) or (iii).

49 Relevant to Mr Sharrock's revised claim, the amount must relate to what Downing EDI Mining was required to pay under the Act.

What is meant by what the employer is required to pay under this Act?

50 Mr Sharrock contends that s 323 of the FWA is broad enough to encompass the payment of contractual entitlements and the words 'amount payable in full' is a right or requirement to be paid in full under the FWA. Further, Mr Sharrock says he is not claiming enforcement of a contractual term but an order to be paid an amount in full under the FWA.

51 Downer EDI Mining submits the FWA was never intended to include claims for a denial of a contractual benefits claim (that is, a 'non-excluded matter' without any other reference to the FWA) and Mr Sharrock's contentions are too broad where the words 'under this Act' must relate to Division 2 and reflect the powers of the IMC to make orders with respect to money payments.

52 Downer EDI Mining contrasted the situation with respect to safety net contractual entitlements where a breach of a safety net contractual entitlement is not a civil remedy provision and pursuant to s 543 of the FWA an employee can apply to the Federal Court or Federal Circuit Court, rather than the IMC, to enforce an entitlement under s 542(1) (being a safety net contractual entitlement).

53 Claims for breach of a contractual entitlement against a national system employer may be commenced in more than one jurisdiction. While Downer EDI Mining argues that s 26 and s 27 of the FWA limits the Federal jurisdiction, in my view, this is not necessarily the case.

54 Section 26(1) of the FWA provides that the FWA is intended to apply to the exclusion of all state or territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer. In Western Australia this includes the *Industrial Relations Act 1979 (WA)* (IR Act). However, s 26(1) of the FWA does not apply to a common law claim for breach of contractual entitlements.

55 Section 27 of the FWA enables or preserves the application of certain state and territory laws from the operation of s 26, including at s 27(1)(c) 'non-excluded' matters which includes at s 27(2)(o) 'claims for enforcement of contracts of employment, except so far as the law in question provides for a matter to which paragraph 26(2)(e) applies'. Again, this says nothing relevant to a common law claim for breach of contractual entitlements.

56 The effect of this in Western Australia is that s 29(1)(b)(ii) of the IR Act enables the referral of an industrial matter to the Industrial Relations Commission by an national system employee against a national system employer for claim of a denial of a contractual benefit, provided the claim is not excluded from being determined under s 29AA(4) of the IR Act.

57 Therefore, in Western Australia, a national system employee and national system employer has at least three avenues to pursue a claim for breach of a contractual entitlement:

1. Federal Court and Federal Circuit Court (subject to the breach being a civil remedy provision via s 323);
2. State courts; and
3. Industrial Relations Commission (subject to certain conditions in s 29AA(4) of the IR Act).

58 However, dealing with the established three avenues, none can reasonably be said to encroach on the other. That is, an employee or employer can, in effect, make an election as to what jurisdiction they wish to pursue the claim for breach of contractual entitlement, subject to certain requirements contained in the FWA (as it relates to the federal courts) and the Industrial Relations Commission (as it relates to the Western Australian Industrial Relations Commission) and state courts.

59 Having regard to my earlier comments, in my view, the IMC may have jurisdiction to hear a claim for breach of contractual entitlement in the small claim procedure, depending on the basis of claim as it relates to the order sought where the IMC may not be able to order the particular remedy claimed.

60 By way of example, if the application for an order is a contravention of a civil remedy provision by reason of a of a contravention of s 323 (relevant to a breach of a contractual entitlement) and the amount sought to be paid in full (which is less than $20,000) is because of a failure to pay an amount under a contract entitlement more than otherwise required for the minimum standards for annual leave (by definition an amount required to be paid because of a safety net contractual entitlement: s 61(2)), there appears to be no barrier to the IMC hearing the application and making the order.

61 That is, the application is for an order capable of being heard by the IMC as it involves a contravention of s 323. The amount required to be paid in the example is an amount the employer was required to pay because of a safety net contractual benefit (in this example, annual leave over the required minimum standard) and how the amount is calculated (damages for breach of contract or a debt) appears not to matter.

62 But does this example apply to Mr Sharrock's claim where it is solely referrable to the letter of offer and where Mr Sharrock relies upon a purported contravention of s 323 to not only apply for the order but also to ground the order for the remedy sought?

What is Mr Sharrock's claim about?

63 Mr Sharrock claims the difference between the flat hourly rate of $42.17 contained in the letter of offer and flat hourly rate of $39.65 he says was unilaterally reduced by Downer EDI Mining on or around 15 August 2015. The claim includes an amount for all work performed and any form of paid leave taken.

64 Mr Sharrock concedes the letter of offer is no longer referrable to the *Downer EDI Mining – Surface Metalliferous Enterprise Agreement 2012* to which he and Downer EDI Mining were parties, and the letter of offer is a stand-alone document upon which he relies to ground his claim.

65 Accordingly, if the IMC has jurisdiction to hear Mr Sharrock's claim, he will be required to prove on the balance of probabilities the following:

- the existence of an agreement between him and Downer EDI Mining;
- the terms of the agreement;
- there has been a breach of one or more terms of the agreement; and
- a remedy exists for the breach (in Mr Sharrock's case he claims an amount of money he says is owed under the terms of the contract).

66 Thus, notwithstanding Mr Sharrock's submission the amount of the claim is capable of certainty his revised claim is for breach of contract, the remedy for which is damages (if the breach is proven).

67 Absent the letter of offer, based on Mr Sharrock's revised claim, he has no other cause of action against Downing EDI Mining and if successful any amount payable will result because of Downing EDI Mining's failure to pay an amount owed under the letter of offer.

68 In ***RGN Mining***, ***Professional Engineers*** and ***Murrihy***, the court considered the appropriate remedy in analogous claims to be damages for breach of contractual entitlement for which it was open to the Federal Court and Federal Circuit Court to make an order for compensation. Of course, none of these claims were commenced as a small claims procedure and the orders made were not confined due to any jurisdictional issue.

69 Downer EDI Mining's contention is where enforcement of a safety net contractual entitlement is limited to the Federal Court or the Federal Circuit Court, it cannot have been Parliament's intention to enable an application involving a broader contractual entitlement to be made to the IMC under the small claims procedure: see s 542(1) and 543 of the FWA.

70 Mr Sharrock contends that s 323 of the FWA not only enables the application for an order, but is also the statutory basis under the FWA requiring Downer EDI Mining to pay the contracted amount in full in relation to the performance of work.

71 Buchanan J in ***Professional Engineers*** briefly discusses this issue where he notes the applicant does not rely on s 323 as a foundation for recovery of any underpayment, but relies upon the section to establish a breach of a civil remedy provision (at [31]). Recovery of the underpayments were sought under s 545 as compensation for loss suffered as a result of the contravention.

72 Section 323 of the FWA reinforces a legal obligation to pay an amount in full for performance of work for which there are additional consequences on the employers if they do not pay their employees in full. It does not provide the remedy or create an 'underlying legal obligation pay' for which the employer is responsible: ***Casey Grammar School v Independent Education Union of Australia*** *(2010) 204 IR 52.*

73 The words required to pay the amount 'under this Act' in s 545(3) of the FWA must have work to do or meaning in the context of the amount required to be paid by the employer. These words in effect qualify what amount the employer is required to pay. Otherwise the section could merely have referred to any amount the employer might be required to pay without reference to the FWA or any other federal instrument.

74 Therefore, Mr Sharrock's claim needs to be referrable to another section of, or obligation under, the FWA over and above the legal obligation to pay in full in s 323 in order for any amount sought to be paid by Downer EDI Mining. No other section or requirement has been established by Mr Sharrock.

75 The IMC is not empowered under s 545(3) or s 548(1A) to make an order for compensation and the order sought by Mr Sharrock is an amount for damages for an alleged breach of contract and not one which is referrable to any amount required to be paid by Downer EDI Mining under the FWA.

76 While s 323 of the FWA opens the door to a claim under the FWA by placing a legal obligation on the employer to pay in full amounts owed, it does not, of itself, empower the IMC to make the order sought by Mr Sharrock by: (1) providing a remedy; or (2) specifying an obligation on the employer as to what the employer is required to pay under the FWA.

77 Contrast this with the Federal Circuit Court which is empowered to make an order for compensation, albeit that in Mr Sharrock's case the same issue may arise with respect to the basis of the amount claimed, being one which is capable of meeting the second condition in s 548(1A) of the FWA.

78 If the Federal Circuit Court determined that it similarly did not have jurisdiction to hear the application, it is open to Mr Sharrock to commence a claim in a state court (e.g. the minor case jurisdiction of the Magistrates Court) or in the Industrial Relations Commission. The point being is that Mr Sharrock is not locked out from making any claim in any forum.

79 Therefore, in my view, there may be circumstances where the IMC can hear and determine a claim for breach of contractual entitlements in the small claim procedure, however in the case of Mr Sharrock's revised claim it cannot.

80 Accordingly, Mr Sharrock's revised claim is not a proceeding which can be dealt with under s 548(1) of the FWA and his claim is dismissed for want of jurisdiction.

81 I will hear from the parties in respect of the order and any further application.

D. SCADDAN
INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2018 WAIRC 00380

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WARREN CONWAY
	APPLICANT
	-v-
	THE TRUSTEE FOR PINTO BROS UNIT TRUST
	T/A: CAVERSHAM 7 DAY PHARMACY
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 22 JUNE 2018
FILE NO/S	U 60 OF 2018
CITATION NO.	2018 WAIRC 00380

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 1 June 2018.

2. On 21 June 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 00254

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00254
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 9 APRIL 2018
DELIVERED	**:**	MONDAY, 16 APRIL 2018
FILE NO.	**:**	U 15 OF 2018
BETWEEN	**:**	MR ALAN CLARENCE JACOBS Applicant AND TRAFFIC WARDEN STATE MANAGEMENT UNIT Respondent

CatchWords	**:**	Unfair dismissal application - Respondent contends applicant not dismissed because employment ended due to passage of time - Preliminary hearing - Issue of whether applicant dismissed unable to be decided - Matter to proceed to substantive hearing
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Matter to proceed to substantive hearing
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr A Chapple and with him Ms D Glynn as agents

Reasons for Decision

1 On 2 February 2018 the applicant lodged a claim that he had been unfairly dismissed from his position as a Traffic Warden.

2 In his Notice of Answer, filed 22 February 2018, the respondent contended:

> "The Western Australian Police Force wholly denies the claim on the basis that the applicant was not an employee beyond the expiration of his fixed term contract. The application should be dismissed."

3 This is essentially a plea that the ending of the applicant's employment was not the result of the applicant being dismissed but rather due to the end of the fixed term contract, a matter that involved no action by the respondent which could be described as a dismissal.

4 The matter was brought on for a preliminary hearing on the issue raised by the respondent in his Notice of Answer.

5 The preliminary hearing gave the respondent the opportunity to establish as a fact that the applicant had not been dismissed or, looked at in another way, to meet the assertion by the applicant that he had, as a matter of fact, been dismissed.

6 However, at the conclusion of the preliminary hearing I find myself unable to decide whether or not the applicant was dismissed. The matter, in my view, will need to proceed to a full hearing at which that matter remains live.

7 Before I give my reasons for this I note that there is no question at this time of the applicant having failed to discharge an onus to make out that he had been dismissed or the respondent having failed to discharge an onus to make out that the applicant was not dismissed. I have simply not been convinced either way on the material before me and the matter will have to be decided as part of the substantive hearing.

8 The uncontroversial facts set out at the hearing were that the applicant commenced working for the respondent as a Traffic Warden around 10 years ago. Originally the employment was subject to written contracts which expressly dealt with tenure. In 2011, however, this changed and the applicant and respondent entered into a contract which provided the applicant with ongoing employment.

9 In July 2016 the applicant was dismissed from his employment by the respondent. He was reinstated by my order made 30 November 2016.

10 By letter dated 8 December 2016 the respondent wrote to the applicant (and I am told all Traffic Wardens) in the following terms:

> Dear Traffic Warden
>
> Please be advised we have initiated a new recruitment and selection process for the 2017 school year. This will involve the issuing of new Contracts of Employment to successful applicants.
>
> We have invited you to advise us of your interest to work as a Traffic Warden next year. Please note your employment as a Casual Traffic Warden will be subject to a satisfactory WA Police Integrity Check
>
> If you have expressed interest to be considered for the 2017 intake, **please complete the attached Integrity Check Application Form and return in the attached 'reply paid' envelope by Friday, 16 December 2016.**
>
> If you are not interested in the January 2017 intake, **please return all WA Police equipment to your local Police Station by Monday, 19 December 2016.**
>
> Should you have any queries with regards to this new process, please contact Carole Taylor on 62748731. I would however like to remind you that from 23 December 2016 to 9 January 2017 the Traffic Warden Unit will be closed.
>
> Kind regards

11 The applicant ticked a box indicating that he would like to be considered for the "Traffic Warden 2017 intake" and by letter dated 31 January 2017 the applicant was offered a contract of employment as a Traffic Warden.

12 That offer, signed by the applicant on 7 February 2017, relevantly provided that he would be in "casual employment", that the "commencement date" would be "1 February 2017", the "end date" would be "14 December 2017" and that:

> "The offer of this contract in no way implies the expectation or otherwise of continued employment beyond the period described in this contract and there is no obligation upon either party to enter into further employment arrangements."

13 In light of the contract of employment executed 7 February 2017, the respondent contends that, as a matter of fact, the applicant was employed on a fixed term contract, the contract ended on 14 December 2017 and, accordingly and as a matter of fact, the applicant was not dismissed.

14 However, the fact that a person was on a fixed term contract does not necessarily decide the question of fact, or perhaps more accurately the mixed question of law and fact, whether a person was dismissed.

15 There are many authorities where a person has been found to have been dismissed despite there being a contract of employment which ostensibly ends due to the passage of time and no more.

16 Some of the matters I would need to hear more about include:

(1) whether any general law or equitable principles impact upon the enforceability of the fixed term contract;

(2) related to the above, the significance, if any, of the applicant having been an ongoing employee and then, without any explanation from the respondent as to the implications of it, being offered further work only if he signed a fixed term contract;

(3) related to the above, the significance, if any, of the applicant's advanced years and employability in the general market at the time he was told his continued employment depended on him entering into a fixed term contract which ended his employment as an ongoing employee;

(4) the reasoning behind the decision to compel the applicant to enter a fixed term contract if he wanted further work and the extent, if any, to which the applicant having an ongoing contract of employment was a consideration;

(5) the significance of whether the ostensible purpose of the change to contractual arrangements, the production of "a satisfactory WA Police Integrity Check", if that was in whole or part the purpose, could have been achieved by a direction to ongoing employees such as the applicant;

(6) the lawfulness of a "fixed term contract for casual employment" and especially in light of clauses 12 and 13 of the Western Australian Police School Traffic Warden's Agreement 2011 which appear to contemplate the only forms of employment for Traffic Wardens being on an "ongoing casual" basis or a "permanent part time" basis.

17 I cannot on the material before me, and in light of my interest in the matters listed above, decide the matter put before me at the preliminary hearing.

18 The matter of whether the applicant was dismissed or not will however obviously remain a live one at the substantive hearing.

19 The respondent ought note that the matter being a live one at the substantive hearing that it is possible that a finding will be made that the applicant was dismissed and, if so, the fairness of that dismissal will also be heard and determined.

20 The respondent may wish to give consideration to amendment to its Notice of Answer.

2018 WAIRC 00375

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00375
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 9 APRIL 2018, TUESDAY, 22 MAY 2018
DELIVERED	**:**	MONDAY, 18 JUNE 2018
FILE NO.	**:**	U 15 OF 2018
BETWEEN	**:**	MR ALAN CLARENCE JACOBS Applicant AND COMMISSIONER OF POLICE Respondent

CatchWords	**:**	Industrial Law WA - Claim of unfair dismissal - Respondent contends employment relationship ended due to effluxion of time and that applicant not dismissed - Principles in *Gallotti* discussed - Found all circumstances of employment relationship must be taken into account in this matter - Found applicant dismissed from employment - Applicant dismissed unfairly - Reinstatement and compensation ordered
Legislation	**:**	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979*
Result	**:**	Application allowed; orders for reinstatement and payment of compensation

Representation:

Applicant	:	In person
Respondent	:	Mr J Carroll, of counsel
Solicitors:		
Respondent	:	State Solicitor's Office

Cases referred to in reasons:

Gallotti v Argyle Diamond Mine Pty Ltd [2003] WASCA 166

Khayam v Navitas English Pty Ltd (2017) 273 IR 44

Metropolitan (Perth) Passenger Transport Trust v Erhard Gersdorf (1981) 61 WAIG 611

Ryde-Eastwood Leagues Club Ltd v Taylor (1994) 56 IR 385

Swan Yacht Club (Inc) v Leanne Bramwell (1998) 78 WAIG 579

Reasons for Decision

1 In the last year of his employment with the respondent as a traffic warden the applicant was on a fixed term or, probably more accurately although nothing turns on it, an "outer limit" contract.

2 The relevant terms of the contract of employment provided that he was a casual employee and that his employment could be terminated by him or the respondent on one hour's notice and that the "end date" of the contract was 14 December 2017, with the contract expressly providing that entry into it "in no way implies the expectation or otherwise of continued employment beyond the period described in this contract and there is no obligation upon either party to enter into further employment arrangements."

3 The respondent did not employ the applicant after the end date. He decided to not "enter into further employment arrangements" with the applicant. The applicant wished to "enter into further employment arrangements" with the respondent.

4 The applicant says he was unfairly dismissed from his employment. The respondent says, and this is the only argument he puts up, that the applicant was not dismissed. The respondent says the applicant's employment came to an end due to the effluxion of time and not because of dismissal.

5 The term "dismissal" means, in this jurisdiction, to send away or remove a person from the employment relationship. (See *Swan Yacht Club (Inc) v Leanne Bramwell* (1998) 78 WAIG 579; *Ryde-Eastwood Leagues Club Ltd v Taylor* (1994) 56 IR 385; *Metropolitan (Perth) Passenger Transport Trust v Erhard Gersdorf* (1981) 61 WAIG 611.)

6 There is certainly an argument available that the cessation of the relationship of employer and employee by the effluxion of an agreed term of employment is not a "dismissal" for the purposes of the *Industrial Relations Act 1979*. Indeed there is, as the Industrial Appeal Court noted at [5] of *Gallotti v Argyle Diamond Mine Pty Ltd* [2003] WASCA 166, "ample authority for the proposition."

7 That simple proposition was obviously sufficient to quickly dispose of the matter before the Industrial Appeal Court in *Gallotti* given that there was a relatively short history of employment pursuant to a series of fixed term contracts between a relatively highly paid and sophisticated employee and his employer.

8 I hesitate, however, to conclude, on the basis of *Gallotti*, that the Industrial Appeal Court meant to say that the existence of a relevant agreed term would, without further enquiry, answer the question of whether a dismissal had occurred in all circumstances and for all time. I doubt the Industrial Appeal Court sought by its decision to prevent the Western Australian Industrial Relations Commission from looking, where warranted, at wider circumstances in assessing whether there had been a dismissal. I doubt that the Industrial Appeal Court meant to conclusively decide that such wider circumstances would never be relevant on an application before the Western Australian Industrial Relations Commission and would only be relevant as a shield and not a sword in civil matters before it where a plaintiff seeks to enforce a contract and a defendant says there are vitiating factors present.

9 While I would consider myself bound by *Gallotti* in a similar, or broadly similar, factual situation to the one in that case, I do not think I am where there are factors which genuinely, and on their face, reasonably invite consideration of factors beyond the four corners of the contract of employment.

10 There may be, in my respectful view, cases where, despite the presence of a fixed term contract, there will be a need to consider other circumstances to decide whether an employer has removed a person from the employment relationship.

11 In my view the cessation of employment at the end of a fixed term contract may constitute a dismissal if the circumstances warrant such a finding.

12 In a case where an employee argues for this result it is, in my view, appropriate, except in clear cases, to allow that employee to make such an argument and to lead evidence in support of it and for the Western Australian Industrial Relations Commission to decide whether, in all of the circumstances, the simple proposition arising out of *Gallotti* disposes of the matter or whether consideration of the wider circumstances is warranted.

13 I have read the recent decision of the Full Bench of the Fair Work Commission in *Khayam v Navitas English Pty Ltd* (2017) 273 IR 44.

14 The case contains a comprehensive review of the decisions in that jurisdiction on the meaning of the word "dismissed" in the *Fair Work Act 2009* (Cth).

15 While noting that the provisions under consideration in that case are different from those here, and that there is a different legislative history and a different body of precedent authority in that jurisdiction, I am of the view that if "dismissal" in the Western Australian Industrial Relations Commission means to remove or send an employee away from the employment relationship, as it does, then, given this is broadly similar to the question at a federal level of whether the employment relationship has been terminated at the initiative of the employer, there is a basis to have regard to the decision.

16 Having regard to it, as I do, I am attracted to the reasoning of the majority therein and in particular to the following propositions, which are drawn from the headnote but which in my view accurately reflect the majority decision:

(1) The definition of "dismissed" in s 386(1)(a) of the Act should not be read as excluding in all circumstances a termination of employment that occurs at the end of a time-limited contract of employment.

(2) The mere fact that an employer has decided not to offer a new contract of employment at the end of a time-limited contract which represents a genuine agreement by the parties that the employment relationship should come to an end not later than a specified date will not by itself constitute a termination at the initiative of the employer.

(3) In the case of an employment relationship made up of a sequence of time-limited contracts of employment, where the termination has occurred at the end of the term of the last of those contracts, the analysis may, depending on the facts, require consideration of the circumstances of the entire employment relationship, not merely the terms of the final employment contract.

(4) In circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry is whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment.

(5) In circumstances where the parties to a time-limited contract have agreed that their contract will expire on a specified date but have not agreed on the termination of their employment relationship, it may be the case that the termination of employment is effected by the expiry of the contract, but that does not exclude the possibility that the termination of employment relationship occurred at the initiative of the employer — that is, as a result of some decision or act on the part of the employer that brought about that outcome.

17 I consider that where a person comes to the Western Australian Industrial Relations Commission and establishes that he or she did not wish the employment relationship to end when it did, and asks the Western Australian Industrial Relations Commission to consider whether they were, in fact and at law, removed or sent away from the employment relationship by their employer, the Western Australian Industrial Relations Commission should, if it appears warranted, consider the circumstances of the entire employment relationship and not merely the tenure term of the final employment contract.

18 The applicant in this case has established very clearly that he did not wish the employment relationship to end. The question is whether he was, in truth, sent away or removed from his employment by the respondent or whether, in truth, his employment came to an end because, even though he now complains about it, he agreed that this is what would occur when his last fixed term contract finished.

19 Looking at the entire employment relationship, which I consider reasonable, and in fact necessary here, the following relevant factors loom large:

(1) The *Western Australia Police School Traffic Wardens Agreement 2011*, which applied from 8 September 2011, does not provide for fixed term contracts. It provides for casual employment and permanent part time employment. Clause 12.2(a) of the agreement provides that "nothing in this clause shall confer 'permanent' or 'fixed term contract' employment status" giving rise to a conclusion that the kinds of employment that are provided for in the agreement are supposed to "cover the field." It is relevant, in my view, that the employer here reserved, or purported to reserve, a contractual right, despite the terms of the agreement, to not employ the applicant beyond a particular date when he already had the ability to end the employment relationship on the giving of one hour's notice, so long as he had reason to do so. In my view, the employer was giving himself an additional ability to send the applicant away from his employment, and one not contemplated by the agreement. That is, an ability to end the relationship without reason.

(2) The respondent chopped and changed the applicant's employment status during the course of his employment, or purported to do so, giving rise to a conclusion that the final fixed term contract did not, in truth, represent an agreement that the employment relationship would end at a particular time. Initially, the applicant was on fixed term contracts despite being a casual. Between 30 March 2011 and 7 February 2017, the applicant was an "ongoing casual" without him needing to sign a contract from year to year. In December 2016 he was told he would have to sign a fixed term contract to remain in employment. If the applicant's employment truly was that he was employed for particular periods, and not as an ongoing casual throughout his employment, this history would not have occurred, unless there were genuine work-related reasons for it. None were pointed to by the respondent as genuinely warranting changes to the working arrangements.

(3) The paperwork reveals that fixed term contracts were likely reintroduced in December 2016 because the respondent wished traffic wardens to get a WA Police Integrity Check if they were to continue in work. In other words, the respondent seems to have decided he was not going to offer further work to anyone who could not obtain a WA Police Integrity Check and likely decided that the way to achieve this was to reintroduce fixed term contracts and only give a contract to those with a WA Police Integrity Check. The employer, it would seem, wished to decide at this point whether the employment relationship of each traffic warden, including the applicant, would continue or not. That is, the reintroduction of fixed term contracts related directly to the respondent wishing to reserve to himself the ability to end the employment relationship by his own actions and, what is more, without reason.

(4) The applicant signed a fixed term contract for 2017, and thus went back onto fixed term contracts, because he felt he had no choice, a fair assumption and one made more poignant by the fact the applicant was well over 70 years of age at that time and basically unemployable on the open market. The applicant's ongoing employment, such as it was given he was a

casual, should not have been disturbed in the way it was. It was unfair to present the applicant with what he accurately describes as, for him, a "Hobson's choice." Given his age and employability on the open market he had no choice but to sign the fixed term contract. The respondent took advantage of him and his overall situation to reserve to himself an argument that the applicant's employment could end without reason and without dismissal. He attempted to remove, most unfairly, the applicant's legal entitlement to his employment ending only for a good reason.

20 I consider an argument that the applicant truly agreed with the respondent that his employment relationship with the respondent would end after nine years on 14 December 2017 to be, with respect, fanciful.

21 I rely on the following for this conclusion:

(1) the provisions of the *Western Australia Police School Traffic Wardens Agreement 2011* as set out above and the inconsistency between it and the fixed term contract the applicant was subject to;

(2) the fact that nothing changed for the applicant throughout his career with the respondent, whether he was on a fixed term contract or not, giving me grounds for a belief that fixed term contracts were, when used, not a genuine agreement about the real situation. The real situation was that the applicant was, throughout his employment, a casual employee with, by the time the final fixed term contract was entered into, an ongoing expectation of work;

(3) that the respondent, when he insisted the applicant sign a new fixed term contract to continue in his employment, clearly did so in circumstances where he wished to exercise unilateral control over whether the employment relationship with the applicant would continue. That is, the final fixed term contract did not in any way reflect the situation where the two parties agreed that the employment relationship should end at a certain time;

(4) the overall circumstances in which the respondent had the applicant become, again, subject to fixed term contracts, that process being attended by a lack of information and the taking of advantage of the applicant given his stage of life.

22 I have no hesitation in finding that the applicant was dismissed from his employment.

23 The respondent informed me that if I decided the applicant had been dismissed he did not wish to be heard on the question of whether the dismissal was unfair. I have found the applicant was dismissed. That dismissal was unfair given that there is no evidence of there being any reason for it nor any fair process leading up to it.

24 No issue was put up by the respondent as making the reinstatement of the applicant impracticable. I will order the reinstatement of the applicant.

25 I will also make orders under s 23A(5) of the *Industrial Relations Act 1979* that continuity of the applicant's employment be maintained and that the respondent pay to the applicant the remuneration lost by him because of the dismissal. No argument that the applicant had failed to mitigate his loss was made, unsurprisingly, given the applicant's age.

26 In relation to the order for remuneration lost, I intend to set the date for the applicant's reinstatement as 16 July 2018 in a minute of proposed order and ask that, taking that date, the respondent informs me and the applicant of the remuneration the applicant will have lost from the date of his dismissal to that date. I make this request because I do not have good evidence before me of the days the applicant would have worked if he had not been dismissed. Hopefully provision of a figure by the respondent can allow my chambers to facilitate the entry of an agreed amount in the final order.

Note: [19](3) amended by corrigenda 2018 WAIRC 00392

2018 WAIRC 00392

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR ALAN CLARENCE JACOBS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 29 JUNE 2018
FILE NO.	U 15 OF 2018
CITATION NO.	2018 WAIRC 00392

Corrigendum

At [19](3) 2018 WAIRC 00375 of the Reasons for Decision dated 18 June 2018, delete "police clearance" and insert "WA Police Integrity Check" in lieu thereof.

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

2018 WAIRC 00397

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR ALAN CLARENCE JACOBS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 2 JULY 2018
FILE NO/S	U 15 OF 2018
CITATION NO.	2018 WAIRC 00397

Result	Application allowed; orders for reinstatement and payment of compensation
Representation	
Applicant	In person
Respondent	Mr J Carroll, of counsel

Orders

HAVING heard the applicant on his own behalf and Mr J Carroll, of counsel, for the respondent;

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

1. The name of the respondent in U 15 of 2018 be changed to "Commissioner of Police";
2. The applicant be reinstated to his former position on conditions at least as favourable as the conditions on which the applicant was employed immediately before dismissal on and from 16 July 2018;
3. The applicant's employment be considered continuous for all relevant purposes; and
4. The respondent pay to the applicant the sum of $4,900.96 forthwith.

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

2018 WAIRC 00349

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VALERIA LUCCHITTO
	APPLICANT
	-v-
	GATEWAY MOTEL
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 6 JUNE 2018
FILE NO/S	U 25 OF 2018, B 25 OF 2018
CITATION NO.	2018 WAIRC 00349

Result	Application and claim dismissed
Representation	
Applicant	In person
Respondent	Mr K Barret and Mrs G Barrett

Order

WHEREAS the applicant filed a notice of claim of harsh, oppressive or unfair dismissal and a notice of claim of entitlement to a benefit under a contract of employment on 8 March 2018

WHEREAS a conference was held in relation to both matters on 5 June 2018;

WHEREAS during that conference the parties agreed to settle the matters by payment of a sum of money by the respondent to the applicant;

WHEREAS the Western Australian Industrial Relations Commission informed the parties on 5 June 2018 that evidence of the payment should be provided to the Western Australian Industrial Relations Commission at which time the Western Australian Industrial Relations Commission would issue an order dismissing the application and the claim;

WHEREAS the respondent has provided evidence of payment of the settlement sum to the applicant to the Western Australian Industrial Relations Commission on 5 June 2018;

WHEREAS the applicant confirmed she had received the settlement sum on 6 June 2018;

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

THE application and claim be dismissed.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Margaret Grace Hudston	Christine Bruce Mental Health Unit Sir Charles Gairdner Hospital	U 26/2018	Commissioner T Emmanuel	Discontinued
Young Sik Hwang	Mrs M Jeon & Mr M Kim trading as J.K. Good Tiling (ABN 91 360 209 944)	B 37/2017	Senior Commissioner S J Kenner	Discontinued

CONFERENCES—Matters arising out of—

2018 WAIRC 00406

DISPUTE RE UNION MEMBER'S EMPLOYMENT STATUS AND CONDITIONS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

THE CHIEF EXECUTIVE
HEALTH SUPPORT SERVICES

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER T EMMANUEL

DATE TUESDAY, 10 JULY 2018

FILE NO PSAC 16 OF 2018

CITATION NO. 2018 WAIRC 00406

Result Application discontinued

Representation (by correspondence)

Applicant Ms P Marcano (as agent)

Respondent N/A

Order

WHEREAS this is an application under s 44 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 27 June 2018, the applicant filed a Form 14 – Notice of withdrawal or discontinuance;

NOW THEREFORE the Public Service Arbitrator, 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,
Commissioner,
[L.S.] Public Service Arbitrator.

CONFERENCES—Matters referred—

2018 WAIRC 00214

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 3 APRIL 2018
FILE NO/S	CR 33 OF 2017
CITATION NO.	2018 WAIRC 00214

Result	Orders made
Representation (by correspondence)	
Applicant	Mr G Walsh
Respondent	Ms J Vincent of counsel

Orders

HAVING heard Mr G Walsh for the applicant and Ms J Vincent, of counsel, for the respondent by correspondence on 28 March 2018 and by consent;

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

(1) The hearing listed Wednesday, 4 April 2018 be vacated;

(2) That an Agreed Statement of Facts and Agreed Bundle of Documents be filed on or before 6 April 2018;

(3) The applicant file and serve written submissions on or before 26 April 2018;

(4) The respondent file and serve written submissions on or before 3 May 2018.

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

2018 WAIRC 00379

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00379
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	WEDNESDAY, 20 JUNE 2018
FILE NO.	**:**	CR 33 OF 2017
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Applicant's member challenges reasonableness of respondent's findings - Matter heard "on the papers" - Found respondent's findings not reasonably open on materials before her - Respondent's findings and penalties quashed
Legislation	**:**	*Industrial Relations Act 1979* *Industrial Relations Commission Regulations 2005* *Public Sector Management Act 1994* *School Education Regulations 2000*
Result	**:**	Application upheld; Findings of breach of discipline and penalties quashed

Representation:

Applicant	:	Mr G Walsh, as agent
Respondent	:	Ms J Vincent, of counsel
Solicitors:		
Respondent	:	State Solicitor's Office

Case referred to in reasons:

Ex Parte Hill, Director of WA Prisons Department v Ormsby No 1987 of 1985

Cases also cited:

B v Brisbane City Council T/A Brisbane Transport [2010] FWA 3856

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

Belinda Pinker v Director General Department of Education (2014) 94 WAIG 1928

Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission (2000) 203 CLR 194

Edward Michael v Director General, Department of Education and Training (2009) 89 WAIG 2266

Gregg Hattrick Meikle v Director General, Department of Education (2017) 97 WAIG 1810

House v The King (1936) 55 CLR 499

Peter John Ayling v Director General, Department of Education (2009) 89 WAIG 824

Puccio v Catholic Education Office (1996) 68 IR 407

Shane Jamieson v The Director General, Department of Education 98 WAIG 235

The State School Teachers' Union of WA (Incorporated) v Director General, Department of Education (2012) 92 WAIG 362

The State School Teachers' Union of WA (Incorporated) v Director General, Department of Education (2008) 88 WAIG 333

TWU v Tip Top Bakeries (1994) 58 IR 22

Reasons for Decision

1 The applicant's member, David Mattin, was found by the respondent to have committed the following breaches of discipline:

"1. On 30 March 2017 at Waroona District High School you committed a breach of discipline contrary to section 80(c) of the *Public Sector Management Act 1994* in that you committed an act of misconduct.

Particulars

a. You are employed as a Deputy Principal at Waroona District High School.

b. You were supervising a student in the reflection room.

c. You stood in the doorway and pushed the student in his chest when he attempted to leave the room to obtain his recess food.

d. The degree of physical force you used was not reasonable or necessary to manage the student.

2. On 30 March 2017 at Waroona District High School you committed a breach of discipline contrary to section 80(c) of the *Public Sector Management Act 1994* in that you committed an act of misconduct.

Particulars

a. You are employed as a Deputy Principal at Waroona District High School.

b. You were supervising a student in the reflection room.

c. You took hold of the student's arm while telling him to get out of your personal space.

d. You pushed the student on his chest, causing the student to move backwards.

e. You then approached the student while he was using his mobile phone.

f. You pushed the student on his shoulder which caused him to move backwards into a desk.

g. The degree of physical force you used was not reasonable or necessary to manage the student."

2 For each breach Mr Mattin was reprimanded and fined one day's pay. The applicant referred the matter to the Western Australian Industrial Relations Commission by means of an application for a conference under section 44 *Industrial Relations Act 1979*.

3 The matter did not settle at the conference and, subsequent to it, the parties provided an agreed document to assist me in the preparation of the memorandum required by regulation 31 *Industrial Relations Commission Regulations 2005*.

4 I drew up a memorandum based on the document provided by the parties and accordingly the matter referred to me was whether, in respect of each breach, the respondent's decision to reprimand and fine Mr Mattin was fair and reasonable in the circumstances.

5 In answering the above question, the memorandum posed the following sub-questions which I set out in full with new numbering:

> "(1) whether the respondent made findings that were reasonably open to her based on the material that was before her – namely, that Mr Mattin had committed two breaches of discipline contrary to s 80(c) of the *Public Sector Management Act 1994* (WA) in that:
>
> (a) on 30 March 2017 at Waroona District High School he committed an act of misconduct by using a degree of physical force that was not reasonable or necessary to manage a student (Allegation 1); and
>
> (b) on 30 March 2017 at Waroona District High School he committed an act of misconduct by using a degree of physical force that was not reasonable or necessary to manage a student (Allegation 2).
>
> and
>
> (2) whether, in all of the circumstances, the penalty imposed was proportionate?
>
> (3) In answering Question 1 (a), the following sub-questions are also referred to the Commission for hearing and determination:
>
> (a) Whether the respondent ought to have found that Mr Mattin's conduct was allowed by virtue of Regulation 38 of the *School Education Regulations 2000* (WA)?
>
> and
>
> (b) Whether it was reasonably open to the respondent to have regard to the findings in the Investigation Report (D17/0357912) authored by the Senior Investigator?"

6 As appears clear from the above, the nature of the substantive challenge to the respondent's decisions is that it was not reasonably open for the respondent to make the findings she did on the material before her.

7 Also clear is that the applicant says that the respondent ought to have found Mr Mattin's uses of force were reasonable to achieve one of the purposes in regulation 38 *School Education Regulations 2000*.

8 There is also a challenge to the respondent having regard to "the findings in the Investigation Report authored by the Senior Investigator."

9 Consistent with the above I was provided with all of the material that was before the respondent. I was also provided with written submissions from each party going to the questions raised by the memorandum of matters.

10 The parties, by agreement, have not sought there to be a "hearing de novo", that is a "hearing of the proceedings all over again." The parties have also not sought to supplement the record by adducing further evidence.

11 The parties have sought to have the matter dealt with by me "on the papers."

12 Before I signed the memorandum of matters and agreed to hear the matter on the papers I had to satisfy myself that "the procedure to be adopted [would] enable full and complete justice to be done." (see *Ex Parte Hill, Director of WA Prisons Department v Ormsby* No 1987 of 1985 as per Burt CJ at [11].)

13 In my view, if the applicant's challenge is to the reasonableness of the respondent's decisions on the material before her, and neither the applicant nor the respondent seek to adduce further evidence to explain or amplify or clarify that material, then it cannot be said that "full and complete justice" cannot be done by confining myself to that question and following a procedure which is consistent with best answering it, that is to consider the material before the respondent, and the submissions of the parties, and decide whether the respondent acted reasonably.

14 I find that the respondent did not act reasonably for the following reasons.

15 The allegations put to Mr Mattin in the letter dated 29 May 2017 quoted in [1] herein, both allege that "the degree of physical force you used was not reasonable or necessary to manage [the student involved]."

16 Wherever the concept of reasonableness operates in the law what is reasonable is determined and then the question of whether someone's acts or omissions culpably depart from that standard is decided.

17 Reasonableness is a comparative standard and to operate as such a standard there is a need for alternatives to what was done or not done to be considered.

18 Reasonableness is, of course, to be determined objectively and, when applied to a teacher, that objective enquiry must take into account the skills and level of responsibility that a teacher possesses. That is, the question is what the "reasonable teacher" would do or not do.

19 Accordingly, in my view, it is crucial, in deciding whether a teacher has acted unreasonably in using force, for the record to reflect that the respondent considered and decided what the reasonable teacher would have done and to articulate why the conduct of the teacher in question departed from that standard to a culpable degree. It is also necessary to give the teacher the opportunity to comment on those considerations.

20 In this case the uses of force that brought Mr Mattin undone were found by the respondent to be, so far as discipline or control goes, "the wrong options." There was no suggestion that the force was a completely arbitrary and outrageous use of violence. In my view, it is vital that the process that results in such a finding involve detailed consideration of what were the right options. It is also vital that consideration be obvious when reading the material before the respondent and that the teacher have a chance to comment.

21 I find such consideration and opportunity to be substantially absent here.

22 In each case I have read the material before the respondent looking for articulation of what would have been reasonable and the ways in which Mr Mattin's conduct departed from that standard. I looked also for Mr Mattin having had the opportunity to comment on these matters. I have done so with the concept that reasonableness is a comparative standard being at the front of my mind.

23 Despite the comprehensive nature of the investigation conducted and the wealth of paperwork produced I do not find a cogent and evidence-based assessment of the reasonableness of Mr Mattin's uses of force, taking into account all of the circumstances. I do not find clear identification of exactly how Mr Mattin went wrong against a transparent and clear consideration of the alternatives that a reasonable teacher would have used.

24 Before I commence my consideration of the breaches I emphasise that I have looked at the allegations as cast by the letter dated 29 May 2017 and have accepted that the respondent found as facts the matters particularised in those allegations.

25 I note that in some of the paperwork before me it is imagined that it is open to talk about allegation one in terms of Mr Mattin pushing the student in the chest after he had left the room and was attempting re-entry, or that Mr Mattin had pushed the student in the chest when he attempted to leave the room to get a drink, rather than when he attempted to leave the room to obtain his recess food. Such imaginings are not open. The respondent can only have been dealing with the facts as alleged against Mr Mattin and her findings of fact, if she found the allegations proven, must line up, and are assumed by me to line up, entirely with the facts alleged. A different situation may have fairly developed at a hearing de novo but no such hearing was conducted here.

The First Breach of Discipline

26 The alleged facts were that Mr Mattin was supervising a student in the "reflection room" and that Mr Mattin "stood in the doorway and pushed [the student] in his chest when he attempted to leave the room to obtain his recess food."

27 I note that employees at the school called the room the "isolation" room as at the time of the incident and that the more palatable description of the "reflection" room seems to have been introduced later, and perhaps following guidance from higher levels within the Department of Education.

28 The surrounding circumstances, as the materials before the respondent would have shown relatively uncontroversially, were that the student had been sent to the "reflection" room because of misbehaviour in his regular class and that the idea of the "reflection" room was to give misbehaving children a supervised environment in which to settle down and return to good behaviour. That is, being sent to the "reflection" room was an escalation in the management of a student's behaviour.

29 At recess the students in the reflection room were invited by Mr Mattin to go and fetch their snacks from their bags. However, the student in question volunteered that his snacks were in his sister's bag. The student's sister was in the primary school next to the high school. High school students needed permission to go to the primary school, against the background of a general rule that it was not allowed.

30 Mr Mattin refused the student permission to go to the primary school.

31 It appears, and here we move from uncontroversial to controversial factual matters, that the investigator came to the conclusion, and the respondent accepted, that after Mr Mattin had refused the student permission to leave the room for the purpose of going to the primary school, the student attempted to leave the room anyway and Mr Mattin, who was standing at the door with the clear intention of blocking passage through the door unless he permitted it, placed his hands on the student's chest and pushed him backwards.

32 Mr Mattin denied the contact but the respondent found it occurred.

33 The situation then was that Mr Mattin had made it clear to the student, who had been sent to the "reflection" room due to misbehaviour in his regular classroom, that he was not to leave the room for his intended purpose and that Mr Mattin was standing at the door, signalling that it was not to occur. The student then attempted to leave by advancing upon Mr Mattin and Mr Mattin stopped his advance by pushing him back.

34 To assess the reasonableness of Mr Mattin's conduct the alternatives open to him, that is the alternatives a reasonable teacher would have used, must be considered and stated by the respondent and Mr Mattin must have an opportunity to comment upon them. This is the only way in which the reasonableness of what Mr Mattin did can be fairly tested and assessed.

35 I turn then to the material before the respondent in this regard.

36 At [3.12] of the investigator's report the following appears:

> "It is clear the relationship between Mr Mattin and the student was troubled, as is evidenced by the action plan which was put in place in the weeks prior to this incident. Ms Garwood gave evidence that she advised Mr Mattin three days prior to the incident that the action plan detailed that Mr Mattin needed to ensure another stipulated staff member was present should he need to deal with the student for behaviour related matters, and instead of Mr Mattin dealing with the student, he was to suggest that the student go to the principal or Ms Garwood. Mr Mattin expressed that whilst he was aware of this plan, he believed he did not have to comply with it as it was written by Ms Garwood who is a lower level than him."

37 At [3.14] of the investigator's report the following appears:

> "The circumstances of the student attempting to leave the room do not warrant Mr Mattin using his body to block the classroom door and then pushing the student in his chest. While it is clear the student was not complying with Mr Mattin's direction not to leave to get his recess, having consideration to Regulation 38 as stated at 2.137, Mr Mattin's actions were not in proportion to the circumstances. While the student was disrespectful of Mr Mattin's instruction, his behaviour was not so out of order to warrant any physical contact being required."

38 The action plan was the subject of an exchange during the interview between the investigators and Mr Mattin.

39 The action plan was attached to the investigation report.

40 Under cover of letter dated 18 September 2017 from the respondent Mr Mattin was provided with a copy of the investigation report.

41 The letter stated that the respondent considered it open to her to form the view that Mr Mattin had committed the breach of discipline. There was no elaboration on how or why this view was "open" beyond reference to the contents of the investigation report.

42 By letter dated 16 October 2017 Mr Mattin replied and submitted relevantly, and in a sentence which is apparently intended to cover all allegations and which abandons the denial that force was used in this incident, that he "used reasonable contact within the scope of the regulation as the child's behaviour inside and outside of the classroom required them to be reasonably restrained in order to care for them and to maintain/re-establish order"

43 By letter dated 19 October 2017 the respondent wrote to Mr Mattin stating in part:

> "Paramount is the requirement to avoid unnecessary physical contact with students and to respect the uniqueness and dignity of students. The community has an expectation that Department of Education employees will behave in an exemplary manner and uphold the values of the Department. To avoid any further allegations of misconduct, I am directing you to avoid the behaviour that resulted in this finding of a breach of discipline."

44 On 3 November 2017 a briefing note regarding Mr Mattin's letter of 18 October 2017 went to the respondent. It relevantly said "it would not be considered reasonable in the circumstances of [the student] attempting to walk out of a classroom to his recess or a drink, that Mr Mattin push him in the chest back into the classroom."

45 I interpose that reference to the possibility the student was attempting to walk out for "a drink" is odd, given this formed no part of the allegation, but nothing turns on this.

46 By letter dated 7 November 2017 the respondent wrote to Mr Mattin stating in part:

> "In respect of allegation one, you described that the student was acting in a 'low key' manner and you gave him permission to leave the room to get a drink and you state no physical contact occurred. Neither of these situations would warrant any physical contact being necessary."

47 The question I consider crucial is whether the material before the respondent allowed her to properly asses the "reasonableness" of Mr Mattin's actions, being those actions alleged against Mr Mattin which the respondent must necessarily have found to have taken place, and showed that Mr Mattin had an opportunity to address the material relied upon for that assessment.

48 In my view the material does not do this.

49 The facts as found were that the student had volunteered that he was intending to leave the room for a purpose that Mr Mattin made clear was not a legitimate one. It was found that Mr Mattin was blocking the doorway with his body. It was found that the student attempted to leave anyway and in doing so advanced upon Mr Mattin. It was found that Mr Mattin pushed him back with his hands.

50 It is not clear from the materials where exactly Mr Mattin went wrong in those particular circumstances. It is not clear how the use of force was unreasonable.

51 It is suggested at paragraph 3.12 of the investigation report that Mr Mattin had been instructed not to discipline the student and that this was clear from the "action plan".

52 Having read the action plan, and all the commentary upon it, I am not at all sure what its contents mean, nor how it was meant to apply, either generally or in these particular circumstances. Its provenance, date of operation and enforceability as against a Deputy Principal are not clear to me. In particular I am unable to conclude that it applied to Mr Mattin's supervision of the "reflection" room in the circumstance that the student was sent to the room while Mr Mattin was in charge of it.

53 In any event, Mr Mattin was not, at the relevant time, dealing with a "behaviour related matter" on the facts as found. He was initially attempting to maintain order by refusing permission to the student to go to the primary school and by placing his body at the door in furtherance of this. Thereafter he was not "disciplining" the student, he was dealing with the student advancing on him with the apparent intention of leaving the reflection room anyway.

54 The investigation report simply says, and the briefing note repeats, that "in the circumstances" the student attempting to leave the room "did not warrant Mr Mattin using his body to block the classroom door and then pushing the student in the chest", with the investigation report elaborating to the extent that "Mr Mattin's actions were not in proportion to the circumstances" and that the student's behaviour was "disrespectful…(but) not so out of order to warrant any physical contact being required."

55 I do not consider that all of the "circumstances" have been properly considered in the materials before the respondent.

56 In particular it is not made clear what Mr Mattin should have done, which is vital to consideration of the question of reasonableness or proportionality or whether something was "warranted".

57 Should Mr Mattin have not blocked the door in the first place, allowing free egress? If so why?

58 Should Mr Mattin have said to the student "you can't go to the primary school but I won't stop you" and then reported it if the student left? Should he have reported it straightaway to try and prevent it happening or later so that the student could be disciplined? Given that Mr Mattin is the Deputy Principal who exactly should he have reported it to?

59 If standing at the door was not in itself a breach of discipline, then should Mr Mattin have jumped out of the way if the message being sent, that egress is up to me, was not heeded? Was it possible to do this in the time available? Was it relevant in any way that the student being sent to the "reflection" room was already an escalation in management of the student on the

day? That is, would a classroom teacher be expected to behave differently to a Deputy Principal in charge of the "reflection" room?

60 These are the kinds of questions which needed to be considered, and commented upon by Mr Mattin, if a fair assessment of reasonableness was to occur.

61 In my view, there was no proper assessment of reasonableness evident on the materials before the respondent.

62 I do not mean to imply by this any criticism of the investigators into this matter. If I were in the shoes of the respondent I would commend the investigators on the performance of their role, that is the gathering of primary evidence.

63 Where the process falls down is that it does not have built into it the need to gather material to inform the matter of assessment of reasonableness.

64 Someone experienced in matters of discipline and order in schools needed to look at the material gathered by investigators and express a view on what could have and should have been done by a reasonable teacher. The teacher facing the allegations then must have an opportunity to comment, if the expert opinion on what should have been done differs from what the teacher did. Only after this would the material before the respondent be a reliable source for arrival at a view that the teacher has acted unreasonably.

65 Such a view could come, of course, from the Director General herself, but need not do so.

66 If it does come from the Director General herself it still needs to be put to the teacher concerned.

67 I should add here that the comment by the applicant in its written submissions that the respondent's "own teaching experience and knowledge of the role of staff teaching in schools is relevantly more than twenty years out of date", if it was made to suggest that she would not have the necessary expertise to assess reasonableness in all of the circumstances, and I can only assume that this was the point of the comment, is unwarranted and wrong. The Director General is the head of the Department of Education and it is offensive to suggest she cannot assess the reasonableness of teacher's actions in all the circumstances simply because she has not been a classroom teacher for some years. She has skills and expertise that include, but which also go far beyond, those of an ordinary classroom teacher or Deputy Principal or Principal. She can, of course, come to conclusions on reasonableness, so long as her reasoning is cogent and well exposed.

68 At the moment the papers reveal that the Director General had before her only the thoughts of the investigator on matters of reasonableness, proportionality and, to use a phrase that appears in the paperwork, "warrant." This is not enough, unless those thoughts are properly informed and very clearly set out. The exact basis for the thoughts and the necessary clarity are absent from the report.

The Second Breach of Discipline

69 Following on from the events relevant to the first breach of discipline it seems that the student involved in that matter, that is the first breach, did leave the "reflection" room. Another student in the room, who had also been sent there for bad behaviour in his regular classroom, decided he too wanted to leave. His desire to do so did not relate to any particular purpose, or at least none he expressed; he just wanted to leave.

70 The facts as found by the respondent appear to be that Mr Mattin blocked the door. The student tried to get to the door handle and in doing so came close to Mr Mattin who moved his arm, to frustrate his attempt to open the door, and pushed him back with moderate force.

71 The student then sat on a couch in the room and started using his mobile phone, apparently to text his father.

72 Mobile phone use was not allowed in the "reflection" room.

73 Mr Mattin approached the student and held out his hand requesting that the student give him the mobile phone. The student refused. The student, quoting from paragraph 3.26 of the investigation report, "took a step toward Mr Mattin and Mr Mattin then pushed [the student] in his chest."

74 The investigation report contains these further relevant paragraphs:

> "3.35 It is apparent that the student was trying to exit the classroom and Mr Mattin was attempting to prevent him from leaving. Mr Mattin described that at no time did he feel threatened by the student and that the student was not acting aggressively towards him.
>
> 3.36 Having consideration to Regulation 38 as stated at 2.137, it does not appear that the student's behaviour at the door was so out of order to warrant Mr Mattin taking hold of his arm and then pushing him back in the classroom. The action of pushing the student in his chest to get to remain in the classroom, is not considered reasonable and alternative de-escalation techniques should have been employed by Mr Mattin. While Mr Mattin maintains that the student was 'in his space' this would have been avoided if Mr Mattin stepped aside and allowed the student to exit the room and dealt with his resulting non-compliance at a later time. The level of intervention was not in proportion to the circumstances of the student's behaviour in attempting to leave the room.
>
> 3.37 It is apparent that the student was refusing to give Mr Mattin his mobile phone when Mr Mattin pushed him however this action appears to be disproportionate to the student's behaviour. While Mr Mattin again maintains that the student was in his space, Mr Mattin could have stepped away from the student, but instead he chose to push the student back into a desk as Mr Mattin stated 'the student was winding him up and trying to challenge his authority'. There appears to be no valid reason for Mr Mattin to make any physical contact with the student under these circumstances.
>
> 3.38 The evidence supports that Mr Mattin took hold of the student's arm and then pushed him on the chest back into the isolation room at the door and he then pushed the student when the student refused to give Mr Mattin his mobile phone.

> 3.39 It would appear based on the available evidence that Mr Mattin has used a degree of physical force which was not reasonable or necessary to manage the student."

75 The allegation letter dated 29 May 2017 alleges that in relation to both uses of force for the second breach the degree used "was not reasonable or necessary to manage [the student]."

76 By letter dated 18 September 2017 the respondent wrote to Mr Mattin telling him that on the basis of the evidence before her, which was basically the investigation report, "it is open to me to form the view that you have committed [the] breach of discipline."

77 I have already set out Mr Mattin's relevant comments from his letter of 16 October 2017.

78 By letter dated 19 October 2017 the respondent wrote to Mr Mattin stating in part:

> "Paramount is the requirement to avoid unnecessary physical contact with students and to respect the uniqueness and dignity of students. The community has an expectation that Department of Education employees will behave in an exemplary manner and uphold the values of the Department. To avoid any further allegations of misconduct, I am directing you to avoid the behaviour that resulted in this finding of a breach of discipline."

79 In the briefing note that went to the respondent on 3 November 2017 it was emphasised that in the first incident involving this student the student was not aggressive and that Mr Mattin did not feel threatened and in relation to the second incident it was emphasised that the student's behaviour was not so out of order to "require him being pushed, particularly when no other de-escalation strategies were employed prior to physical contact being made."

80 By letter dated 7 November 2017 the respondent wrote to Mr Mattin stating in part:

> "I have found there is clear and sufficient evidence, including your own admissions in respect to allegation two; which substantiates that you made physical contact with both students. Your assertion that physical contact was justified and reasonable, is not supported by the evidence of the students and witnesses, nor by your account in respect of allegation two that the student was acting in a non-aggressive manner towards you and that you did not feel threatened by him when you pushed him in the chest on two occasions."

81 I repeat what I have had to say regarding matters of reasonableness and the need for the respondent to consider a teacher's actions in the context of the alternatives to decide whether what was done was reasonable or not.

82 Here the first use of force was related to Mr Mattin preventing the student leaving the "reflection" room after Mr Mattin had made it clear to him that he was not allowed to do this. The relevant actions were the bodily blocking of the door and the hold on the arm and push on the student when the student made an attempt to leave despite that bodily presence.

83 It may be that to send the message to a student that he may not leave a room it is unreasonable to stand in front of the exit door. This may be the case even when the teacher is a Deputy Principal in charge of a "reflection" room, which is an escalated behaviour management situation. It may be that, having done so, if a student nonetheless attempts to leave it is no defence to say that the student is "in my personal space", as Mr Mattin did, because Mr Mattin should never have been at the door. It may be that this teacher on this day in relation to this student should have simply let the student leave the room. It may be that the teacher should have warned the student about the consequences of leaving but not have actually tried to send the message that exit was not allowed by standing at the door.

84 The material before the respondent simply does not tell me what should have happened and why what did happen was, in all of the circumstances, unreasonable.

85 There is some attempt by the investigation report to put Mr Mattin's conduct in a relevant context. However, the analysis is far too vague for me to come to a conclusion that it gave the respondent proper information to assess the reasonableness of Mr Mattin's conduct at the door.

86 The investigation report notes that the student was not being aggressive and that his behaviour at the door was not "so out of order" to give Mr Mattin a warrant to push him and that "alternative de-escalation techniques should have been employed by him." The investigation report goes on to suggest that Mr Mattin should have allowed the student to leave the room and dealt with the matter at a later time.

87 This is a useful identification of the issues but not a proper assessment of Mr Mattin's conduct in the context of reasonableness.

88 If Mr Mattin should not have been at the door what should he reasonably have done to try and ensure a student who was supposed to be in the reflection room as a form of behaviour management, having already misbehaved in his regular classroom, was not at large? Does he need to try an ensure this at all? If a student ignores the physical message implied by the blocking of a door what are the "alternative de-escalation techniques" that the investigation report says ought to have been employed consideration of which, although not articulated, supposedly made Mr Mattin's actions unreasonable?

89 I note that Mr Mattin did not push the student because he was "out of order" or "disrespectful" but because the student entered into his personal space in an attempt to get out of the room. That is, the contact was related to management and control, not discipline. It is not clear from the materials that this difference was fully appreciated.

90 The investigation report says Mr Mattin should have stepped aside from the door and allowed the student to leave the room. This implies that it was not, after all, inappropriate for Mr Mattin to stand at the door. The report says expressly, however, that once the student tried to get out Mr Mattin should have "stepped aside." Was there truly time for this or was that option overtaken by the student's entry into the teacher's personal space? Was it wrong to deflect a first attempt to leave the room by moderate force with the teacher being mindful that if matters escalated it would be the lesser of the evils available to allow the student to leave the room? The material does not ask nor attempt to answer these relevant questions.

91 I note that ultimately the matter was resolved by the student being released with the knowledge and pursuant to the approval of his mother, something that would have been unlikely to have occurred if the student was at large outside the "reflection" room. Does this make a difference?

92 In my view the investigation report contains what I might colloquially refer to as "conversation starters" rather than an analysis of reasonableness.

93 In relation to the second use of force on this student it is clear that it did not relate to any attempt by Mr Mattin to take away the student's mobile phone. The investigation report at paragraph 3.37 says that "it is apparent that the student was refusing to give Mr Mattin his mobile phone when Mr Mattin pushed him however this action appears to be disproportionate to the student's behaviour." The refusal to hand over the phone and the contact were not related. Mr Mattin did not push the student "when [the student] refused to give [him] his mobile phone." The push related to the student moving forward and into what Mr Mattin described as his personal space.

94 A full analysis of the reasonableness of that action in all of the circumstances was not attempted by the investigation report or anywhere else in the material that I can see.

95 The comments I have made differ in their thrust depending on what particular matter is being addressed but they reveal, I hope, an overall thrust that the materials lack a cogent, evidence-based assessment of reasonableness taking into account all of the circumstances with those circumstances including detailed identification and consideration of alternatives and why those alternatives were reasonable and the actions of Mr Mattin unreasonable.

96 I note reference to the Department of Education's Code of Conduct and the Department of Education's "Physical Contact with Students" policy in the respondent's written submissions.

97 The investigator says at paragraph 2.136 of the investigation report that she has examined the Code of Conduct but as the Code of Conduct was not referenced in either of the two breaches of discipline with which this decision deals it may be put to one side.

98 I can find no reference to the "Physical Contact with Students" policy in the materials that would have been before the respondent so I put it to one side also. I must confine myself to the materials before the respondent. It is, of course, entirely possible, indeed highly likely, that the respondent is mindful of the policy when deciding matters but, unless her knowledge appears in the papers, and Mr Mattin was given an opportunity to comment upon it, I can hardly have regard to what I imagine that knowledge would be.

99 I note with interest paragraphs 20, 27 and 28 of the respondent's written submissions. In these paragraphs the respondent sets out what Mr Mattin, in the circumstances, ought to have done in relation to each of the three incidents I have dealt with.

100 Unfortunately, I do not find a similar analysis for any of the incidents in the materials before the Director General. I certainly do not find in the materials any evidence going to exactly why Mr Mattin should have, as a reasonable teacher, done, in all of the circumstances, the things now suggested by the respondent.

101 The applicant's application will succeed and the findings of a breach of discipline are quashed. It follows that the penalties are also quashed.

102 My answers to the questions in the memorandum, as I have renumbered them at [5] herein, are as follows:

1(a) and (b):	No
2:	Not applicable
3(a):	I don't know, there is not enough information to decide this question. In my view it is not necessary for me to positively find that the uses of force were allowed by regulation 38 *School Education Regulations 2000* (WA) to decide that it was not reasonably open for the respondent to find the allegations proven on the materials before her.
3(b):	The investigation report comes to no "findings." It is incapable of doing so, findings being a matter for the decision maker, here the respondent.

2018 WAIRC 00383

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 25 JUNE 2018
FILE NO/S	CR 33 OF 2017
CITATION NO.	2018 WAIRC 00383

Result	Application upheld; Findings of breach of discipline and penalties quashed
Representation	
Applicant	Mr G Walsh, as agent
Respondent	Ms J Vincent, of counsel

Order

HAVING heard Mr G Walsh, as agent, for the applicant and Ms J Vincent, of counsel, for the respondent on the papers;

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

The respondent's findings made and penalties imposed on 7 November 2017 be quashed.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Medical Association (WA) Incorporated	The East Metropolitan Health Services	Emmanuel C	PSAC 16/2017	13/07/2017 29/08/2017 10/10/2017 20/10/2017	Dispute re union member's employment status	Referred for hearing and determination
Western Australian Police Union of Workers	Commissioner of Police	Kenner SC	PSAC 8/2018	12/04/2018	Dispute re alleged contravention of clause 45(4) of the Western Australia Police Industrial Agreement 2017	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00393

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADIB ABDENNABI
	APPLICANT
	-v-
	THE COMMISSIONER OF POLICE
	WA POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 29 JUNE 2018
FILE NO/S	APPL 42 OF 2016
CITATION NO.	2018 WAIRC 00393

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

Order

WHEREAS this is an appeal filed on 13 July 2016 pursuant to section 33P of the *Police Act 1892* against a decision by the Commissioner of Police to take removal action;

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

AND WHEREAS on 12 January 2018, the WAIRC issued an order ([2018] WAIRC 00041) adjourning the appellant's appeal for a further six months and that the Commissioner of Police need not comply with regulation 91 of the *Industrial Relations Commission Regulations 2005* until further order;

AND WHEREAS on 29 June 2018, the appellant wrote to the WAIRC requesting a further adjournment of ten months. The appellant attached evidence that the Commissioner of Police does not object to the further adjournment;

AND WHEREAS having considered the circumstances of this matter and in accordance with section 33T(6) of the *Police Act 1892*, the WAIRC will grant a further adjournment as it is in the interests of justice to do so;

AND WHEREAS the WAIRC is also of the opinion that it is appropriate that the Commissioner of Police not be required to file documents in relation to the appeal at this stage;

NOW THEREFORE the WAIRC, pursuant to the powers conferred on it under section 33T of the *Police Act 1892*, hereby orders –

(1) THAT the orders issued on Friday, 12 January 2018 in this appeal ([2018] WAIRC 00041) cease to have effect on and from the date of this order.

(2) THAT the hearing of the appeal be adjourned until 10 May 2019.

(3) THAT the appeal be listed for mention at 10.30am on 10 May 2019.

(4) THAT compliance with regulation 91 of the *Industrial Relations Commission Regulations 2005* by the Commissioner of Police need not occur until further order.

(5) THAT either party may apply to vary the terms of this order.

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] For and On behalf of The Western Australian Industrial Relations Commission.

2017 WAIRC 00184

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YOUNG SIK HWANG
	APPLICANT
	-v-
	MRS M JEON & MR M KIM TRADING AS J.K. GOOD TILING (ABN 91 360 209 944)
	RESPONDENT
CORAM	
DATE	TUESDAY, 28 MARCH 2017
FILE NO.	B 37 OF 2017
CITATION NO.	2017 WAIRC 00184

Result	Direction issued
Representation	
Applicant	No appearance required
Respondent	Mrs M Jeon

Direction

HAVING heard Mrs M Jeon on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

THAT the time for the filing of the notice of answer in the herein proceedings be and is hereby extended to 11 April 2017.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Main Roads APEA Enterprise Bargaining Agreement 2018 PSAAG 6/2018	07/02/2018	Commissioner of Main Roads, The Association of Professional Engineers, Australia (Western Australian Branch)	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2018 AG 11/2018	07/10/2018	Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner D J Matthews	Agreement Registered
Shire of Murray (Administration Staff) Enterprise Bargaining Agreement 2018 AG 9/2018	07/01/2018	Western Australian Municipal Administrative, Clerical and Services Union of Employees (WASU)	The Shire of Murray	Commissioner D J Matthews	Agreement Registered

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2018 WAIRC 00174

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES FLOYD BEDFORD BROWNE

APPLICANT

-v-

DIRECTOR GENERAL

DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER

DATE TUESDAY, 13 MARCH 2018

FILE NO. APPL 2 OF 2018

CITATION NO. 2018 WAIRC 00174

Result Direction issued

Representation

Applicant Mr A Drake-Brockman as agent

Respondent Mr R Andretich of counsel

Direction

HAVING heard Mr A Drake-Brockman as agent on behalf of the applicant and Mr R Andretich of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker.

(2) THAT the applicant file and serve upon the respondent any signed witness statements upon which he intends to rely by no later than 29 March 2018.

(3) THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely by no later than 12 April 2018.

(4) THAT the parties file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 19 April 2018.

(5) THAT the matter be listed for hearing for one day on a date to be fixed.

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

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

2018 WAIRC 00319

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00319
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 12 FEBRUARY 2018, THURSDAY, 10 MAY 2018
DELIVERED	**:**	MONDAY, 28 MAY 2018
FILE NO.	**:**	APPL 2 OF 2018
BETWEEN	**:**	FLOYD BEDFORD BROWNE Applicant AND DIRECTOR GENERAL DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION Respondent

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Catchwords	**:**	*Industrial Law (WA) - Redeployment, redundancy, termination of registered employee - Referral to Commission under Public Sector Management Act 1994 - Application of Regulation 13 of the Public Sector Management (Redeployment and Redundancy) Regulations 2014 - Meaning of "continuous service" and "in the Public Sector" - Service outside of Western Australia - Break in continuous service - Consideration of applicant's initial service in Western Australia and subsequent service in Tasmania in the calculation of severance pay entitlements.*
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Interpretation Act 1984* (WA) *Public Sector Management Act 1994* (WA) *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) *Public Service Award 1992* (WA)
Result	**:**	Declaration and order made
Representation:		
Counsel:		
Applicant	**:**	Mr A Drake-Brockman as agent
Respondent	**:**	Mr R Andretich of counsel
Solicitors:		
Applicant	**:**	
Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Attorney-General v Gray [1977] 1 NSWLR 406

The Minister for Education and The Director General of the Education Department of Western Australia v The Civil Service Association of Western Australia (Inc). (1997) 77 WAIG 2185

Muller v Dalgety Co Ltd (1909) 9 CLR 639

Producers' Co-operative Distributing Society Ltd v Commissioner of Taxation (NSW) (1944) 69 CLR 523

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Van Heerden v Hawkins 2016 WASCA 42

Case(s) also cited:

Director General Department of Justice v Civil Service Association 2004 WAIRC 13765

Tooheys Pty Ltd v Blinkhorn [2008] NSWSC 499

In re Wood's Estate; Ex parte Her Majesty's Commissioners of Works and Buildings (1886) 31 Ch. D. 607

Portsmouth Corporation v Smith (1885) 10 App. Cas. 364

Reasons for Decision

Application and background

1 The applicant was employed by the former Environmental Protection Authority (EPA) in Western Australia from October 2011. Machinery of Government changes implemented in July 2017, led to the EPA becoming a part of the respondent. The applicant was employed in the position of Environmental Officer. The applicant also had a prior period of service in the Western Australian public service between September 1991 and May 1995. From May 1995 to October 2011, the applicant was engaged in the Tasmanian public service, initially on a six-month secondment basis and then as a permanent officer.

2 Because of the availability of an offer of targeted voluntary severance under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) (the Regulations), the applicant contended that he ultimately accepted an offer from the respondent on 7 December 2017. The offer the applicant says that he accepted, included his prior service in the Tasmanian public service and his prior service in the Western Australian public service. This resulted in a total estimated severance payment to the applicant of $179,094 nett. Subsequently, on 11 December 2017, the applicant was advised that following reconsideration, his prior service in the Tasmanian public service and his period of service in the Western Australian public service over the total period from September 1991 to October 2011, would no longer be recognised. This led to a revised offer of voluntary severance of $65,508.92 nett.

3 The applicant is aggrieved by this decision and brings these proceedings under s 95 of the *Public Sector Management Act 1994* (WA) (PSM Act). The applicant complained that the Regulations were not fairly or properly applied by the respondent in his case. He maintained that the respondent was obliged to have regard to his prior service in the Tasmanian public service and all his prior service in Western Australia. The applicant seeks the restoration of the position as it was, prior to the respondent's revised offer made in mid-December 2017.

4 Whilst the applicant claimed in his notice of application to the Commission for the respondent "to honour the original contract", this aspect of the Commission's jurisdiction under s 95 of the PSM Act, does not provide for the vindication of a person's contractual rights. Claims of that kind must proceed elsewhere in the Commission's jurisdiction or in the civil courts. The present matter involves the ascertainment of statutory rights and obligations between the parties and whether the Regulations have been "fairly and properly applied".

Factual outline

5 Ultimately, there was little factual dispute in these proceedings.

6 The applicant commenced his initial employment in the public service in Western Australia with the EPA on 18 September 1991. Later in May 1995, he was formally seconded to the Department of Environment and Land Management in Tasmania. A formal secondment agreement was made between the Tasmanian department and the EPA on 1 May 1995. This secondment was to be initially for a period of six months. Sometime later, on 3 June 1997, the applicant was appointed on a permanent basis to the Tasmanian public service. Whilst the applicant testified that he was subject to a period of probation for six months and ultimately did not get confirmation of his permanency, having worked in the Tasmanian public service for over 16 years, it is untenable to suggest that he could have remained a permanent employee in the Western Australian public service for that time.

7 The applicant was successful in an application for a position to return to the EPA in Western Australia in October 2011. The applicant resigned from the Tasmanian public service, effective on 18 October 2011 and commenced in his new position on 24 October 2011. In the five-day period between these dates, which included three working days, the applicant testified that he was required to pack up his then household with his wife and arrange to travel from Tasmania to Perth. He has remained employed by the formerly named EPA, up to the present time.

8 As to his period of service in Tasmania, the applicant testified that in early to mid-2012, for the purposes of long service leave and personal leave benefits, his prior service in Tasmania was recognised for benefit purposes by the EPA. The applicant attached correspondence to confirm this, to his witness statement.

9 Moving forward to the events of October 2017. The applicant testified that in response to the seeking of expressions of interest to participate in the "Voluntary Targeted Separation Scheme for Public Sector Renewal 2017" (the Scheme), he made enquiries with human resources staff of the respondent, whether service in other States and in the Commonwealth public sector, would count as service for the purposes of the Scheme. The applicant testified that he was told by the human resources staff that such service would be portable and reference was made to cl 25(11) of the *Public Service Award 1992* (WA), a copy of which was provided to him in correspondence. The applicant then expressed an interest in the Scheme on 20 October 2017.

10 Sometime later in mid-November 2017, the applicant said he was told in a regular meeting with his manager at the EPA, that his expression of interest to take part in the Scheme had been accepted. He understood he would receive the "full amount". The "full amount" refers to the maximum entitlement under the Scheme of 52 weeks' pay. The applicant said that no specific sum of money was mentioned in that meeting, but he would receive a formal letter of offer in due course. Later, on 24 November 2017, the applicant did receive a letter from the respondent described as an "offer of voluntary severance". The letter was dated 22 November 2017 and it was from the Director General of the respondent. The estimated severance amount referred to in the letter was $148,479.24 nett.

11 Further discussions took place between the applicant and human resources staff of the respondent in late November 2017, concerning his initial period of service in Western Australia from September 1991. A further revised severance pay estimate was provided to the applicant in an email dated 1 December 2017. This revised estimate included his initial period of service in Western Australia from 1991 to 1995. The final nett figure was $179,094.40. In email exchanges on that day, Ms Brinsley from the respondent, informed the applicant that once the applicant accepts and provides a definite termination of employment date, a new letter described as the "final letter", would be provided to the applicant. Ms Brinsley described the original letter, that being the letter dated 22 November 2017, as "a basic estimate".

12 A little later on 6 December 2017, in another email from Ms Brinsley, the applicant was informed that the Public Sector Commission was investigating the issue of whether "continuous service" included service in government outside of the Western Australian public service. The next day on 7 December 2017, the applicant testified he hand-delivered a signed copy of the original letter dated 22 November 2017, received by him on 24 November 2017. On the letter, the applicant wrote that he accepted the offer of voluntary severance, the effective date of his resignation would be 20 December 2017 and his last day of employment would be 27 December 2017.

13 Subsequently on 11 December 2017, Ms Brinsley informed the applicant that following the PSC investigation, it had been concluded that "continuous service" for severance pay purposes, did not include any service with another State or the Commonwealth. Only service in the Western Australian public sector would be considered. This led to the revised letter of offer dated 11 December 2017, which did not include the applicant's service in Tasmania, mentioned above. Apparently also, the revised offer did not include the applicant's service originally with the EPA, between 1991 and 1995.

14 I find accordingly.

The statutory scheme

15 It is convenient to set out the relevant statutory provisions at this point. The public service and broader public sector in Western Australia is established and administered under the PSM Act. Part 6 makes provision for the redeployment and redundancy of employees engaged in the public sector. The "Public Sector" is defined in s 3 of the PSM Act to mean all agencies, ministerial offices and non-SES organisations. The significance of this definition is a matter I will come to in due course. Section 94 of the PSM Act provides that the Governor may make regulations under s 108 prescribing arrangements for certain classes of employees, described as "registrable employees" in relation to redeployment and retraining and redundancy. Sections 94(2) and (3), set out in some detail, what the content of the relevant regulations may include. There is no definition of "continuous service" in s 3 of the PSM Act.

16 The Regulations were subsequently made and give effect to the intended purposes set out in s 94 of the PSM Act. Relevant for present purposes, is Part 3 – Voluntary Severance. This part comprises regs 11 to 17. Regulation 11 provides that "registrable employees" may be offered voluntary severance by their employing authorities. The amount of any severance payment is to be determined in accordance with reg 13, which includes a formula setting out how the calculation is to be performed. Under reg 13(4) the maximum amount of a severance payment cannot exceed 52 weeks' pay. The relevant regulation in Part 3, which is contentious in these proceedings, is reg 13(2). It provides as follows:

> **13. Amount of severance payment**
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> …
>
> (2) Subject to subregulations (3), (4) and (5), a severance payment made to an employee is the payment of an amount equal to 3 weeks' pay for each complete year of continuous service served by the employee in the Public Sector (including a ministerial office).

17 A reference to "continuous service" is also made in reg 13(3) but it is not relevant to this case. In reg 3(1) terms used in the Regulations are set out. "Continuous service" is defined and it says:

> ***continuous service*** has the same meaning as it has in the *Wages Employees Long Service Leave General Order* of the Industrial Commission;

18 There is also a definition of "period of continuous service" however that does not appear to have any material bearing on the issue to be determined in these proceedings.

19 Regulation 16 then provides for the relevant Minister to approve a "targeted separation scheme", which was the case in this matter. The gazettal of the scheme, as required by reg 16(3), appeared in the Government Gazette, WA on 15 September 2017 at p 4825. Notably, by reg 16(5) of the Regulations, the amount of severance pay payable under a "targeted separation scheme", as opposed to that applying to a "registrable employee" generally, may exceed 52 weeks' pay, in accordance with the relevant provisions of the scheme. Thus, under Part 3, there appear to be two streams of voluntary severance: that applying generally to registrable employees and secondly, that applying specifically under a targeted separation scheme, approved by the Minister.

20 The General Order in relation to long service leave conditions for State government wages employees was made with effect from 1 January 1986: (1986) 66 WAIG 319 (General Order). The General Order remains in force and effect and prescribes the entitlement and conditions attaching to, the grant of long service leave for "Government wages employees employed by a Public Authority". Relevant provisions of the General Order for the purposes of these proceedings appear at cl's 2, 3, and 16. Those clauses provide as follows:

> 2. (a) For the purpose of these conditions "service" means service as an employee of a Public Authority and shall be deemed to include:—
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> (i) absence of the employee on annual leave or public holidays;
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> (ii) absence of the employee on paid sick leave or on an approved rostered day off;
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> (iii) absence of the employee on approved sick leave without pay except that portion of a continuous absence which exceeds three months. Provided that prior to 1 July 1957 only two weeks in any year shall be allowed and provided that prior to 1 April 1974 and after 1 July 1957 only six weeks in any year shall be allowed;
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> (iv) absence of the employee on approved leave without pay, other than sick leave without pay but not exceeding two weeks in any qualifying period;

(v) absence of the employee on National Service or other military training, but only if the difference between the employees' military pay and his civilian pay is made up, or would, but for the fact that his military pay exceeds his civilian pay, be made up by his employer;

(vi) absence of the employee on workers' compensation for any period not exceeding six months, or for such greater period as the Minister for Industrial Relations may allow;

(vii) absence of the employee on long service leave which accrues on or after 1 April 1974;

(viii) absence of an employee on approved leave to attend Trade Union training courses or on approved leave to attend Trade Union business; and

(ix) employment in the service of the Commonwealth or another State of Australia as provided in Clause 16 hereof, when employment in the State Government commences on or after 1 April 1974.

(b) The Service of an employee shall be deemed NOT to include:—

(i) service of an employee after the day on which he has become entitled to 26 weeks' long service leave until the day on which he commences the taking of 13 weeks of that leave;

(ii) any period of service with an employer of less than 12 months. Provided where after 1 April 1974 an employee has service of a month or more but less than 12 months immediately prior to being transferred by one State Government employer to another; becoming redundant or qualifying for pro rata payment in lieu of leave pursuant to Clause 11, then such period of service shall count;

(iii) any period during which an employee has been paid as a casual;

(iv) any other absence of the employee except such absences as are included in service by virtue of subclause (a) hereof; and

(v) any service of an employee prior to 1 April 1974 where that employee was less than 18 years of age.

3. Subject to the provisions of Clause 2 of these conditions the service of an employee shall not be deemed to have been broken —

(a) by resignation, if he resigns from one Public Authority in this State and commences with another Public Authority in this State within one working week of the expiration of any period for which payment in lieu of annual leave and/or public holidays has been made by the employer from which he resigned, or, if no such payment has been made, within one working week of the day on which his resignation became effective;

(b) if his employment is ended by his employer for any reason other than serious misconduct, but only if —

(i) the employee resumes employment with the Government not later than six months from the day on which his employment was ended; and

(ii) payment pursuant to Clause 11 of these conditions has not been made; or

(c) by any absence approved by the employer as leave whether with or without pay.

…

16. (a) Subject to subclause (c) of this clause where an employee was, immediately prior to being engaged, employed in the service of the Commonwealth or another State of Australia and that employment was continuous with this service under Clause 3 of these conditions that employee shall be entitled to long service leave determined in the following manner:

(i) Service with the previous employer shall be converted into service for the purpose of these conditions by calculating the proportion that the service with the previous employer bears to a full qualifying period in accordance with the provisions that applied in the previous employment and applying that proportion to a full qualifying period in accordance with the provisions of these conditions.

(ii) Service with the State necessary to complete a qualifying period for an entitlement of long service leave shall be calculated in accordance with the provisions of these conditions.

(iii) An employee shall not become entitled to long service leave or payment for long service leave unless he has completed three years' continuous service with the State.

(iv) Where an employee would but for the provisions of paragraph (iii) hereof have become entitled to long service leave before the expiration of three years' continuous service with the State, service subsequent to that date of entitlement shall count towards the next grant of long service leave.

(b) No employee shall be entitled to the benefit of this clause if service with the previous employer was terminated for reasons which would entitle that employer to dismiss the employee without notice.

(c) Nothing in these conditions confers on any employee previously employed by the Commonwealth or another State of Australia any entitlement to a complete period of long service leave that accrued prior to the date on which the employee was employed by the State.

(d) Any dispute as to the application of paragraph (i) of subclause (a) hereof or whether the employee was previously engaged in the service of the Commonwealth or another State of Australia shall be determined by the Long Service Leave Appeal Committee.

21 Having set out the statutory and other provisions, I now turn to the arguments put by the parties in support of their respective positions.

Contentions of the parties

22 The applicant contended that the terms of the General Order set out above, apply to the Regulations regarding severance payments in the same manner as it does to long service leave. That is, as with the calculation of long service leave entitlements, where an employee has a period of service outside of the State of Western Australia, in the service of another State or the Commonwealth, that service is deemed to be "continuous service" for the purposes of Part 3 of the Regulations. Thus, in the present matter before the Commission, the applicant's service in Tasmania from May 1995 to October 2011 should be included as service in calculating his severance pay entitlements.

23 As to the meaning of "continuous service" in reg 3 of the Regulations, the applicant submitted that the effect of this definition is to incorporate the relevant parts of the General Order, set out above, into and to form part of the Regulations. This being so, it was submitted that cl 2.(a) of the General Order, at pars (i) to (ix) must be given their full terms and effect. Paragraph (ix) makes it plain that "service" as an employee of a "Public Authority" *shall be deemed to include* all service with another State or the Commonwealth, if the employee's employment commenced on or after 1 April 1974. The further submission was made by the applicant that for the purposes of the General Order and the Regulations, the meaning of "Public Authority" must mean and include, as a matter of common sense, those bodies set out in the definition of "Public Sector" in s 3 of the PSM Act. No issue appeared to have been taken with this contention by the respondent.

24 When read with cl's 2 and 3, the applicant submitted that cl 16(a) of the General Order made it clear that where an employee was employed previously in the service of another State or the Commonwealth, immediately prior to their "present" employment, and that was continuous service for the purposes of cl 3, then that prior service with the Commonwealth or another State, should be "converted" into service for the purposes of the relevant entitlement. Thus, applying these provisions of the General Order, which by reg 3 of the Regulations, the applicant contended must follow, the applicant's service in Tasmania is to be regarded as "continuous service" in order to calculate his severance entitlements under the Regulations.

25 Thus, it was submitted that the respondent's initial "indicative" or estimate of the applicant's severance pay entitlement, as set out in its letter of 22 November 2017, which incorporated the applicant's Tasmanian service, was correct. The submission was made by the applicant that there would be little point in inserting the definition of "continuous service" in reg 3 of the Regulations, if it was not construed for those purposes, in the same way as continuous service is construed for long service leave purposes under the General Order. Furthermore, as to the respondent's point taken in the notice of answer, that there was a break in the applicant's service from his ceasing employment on 19 October 2011 in Tasmania and taking up his new employment in Western Australia on 24 October 2011, the applicant maintained that contention must be rejected. In this respect, the applicant referred to comparable provisions in cl 25(11)(a) of the *Public Service Award 1992* and cl 22.42(a)(i) of the *Public Service and Government Officers CSA General Agreement 2017*. In both, there is an allowance made of a period of one week for the cessation of service in one State of Australia and the taking up of employment in Western Australia, for the purposes of portability of long service leave entitlements.

26 Furthermore, as to this latter point, the applicant drew attention to cl 3 of the General Order where service for long service leave purposes is not deemed to have been broken, if an employee resigns from one Public Authority in Western Australia and commences with another Public Authority in Western Australia, within one working week. By parity of reasoning, the submission was made that the applicant should not be penalised in this case, particularly where he was required to pack up his home in Tasmania and return to Perth in circumstances where the applicant submitted, it would not have been possible to have commenced in his new employment any earlier.

27 On behalf of the respondent several submissions were made. It was contended that the emphasis in reg 13(2) of the Regulations should be placed on the words "continuous service served by the employee *in the Public Sector*…" Whilst not defined in the Regulations, it is trite to observe that the definition of Public Sector as found in s 3 of the PSM Act will apply in the Regulations and have the same meaning: s 44(1) *Interpretation Act 1984* (WA). Furthermore, in the absence of any definition of "continuous service" in the PSM Act, then the definition as contained in the Regulations is to be given its full force and effect: s 43(1) *Interpretation Act*.

28 The respondent submitted that whilst reg 3 refers to "continuous service" having the same meaning as it does in the General Order, there is no actual definition expressed in those terms. The General Order does provide a definition of "service", which has been set out in the extracts above. When looking to cl 2(a) of the General Order, the respondent submitted that par (ix), which refers to employment in the service of the Commonwealth or another State of Australia, is inconsistent with the words "service in the Public Sector" as set out in the PSM Act. Thus, the respondent's submission was that there is, in effect, a conflict between the terms of reg 13(2) and the literal meaning of the definition of "continuous service" as set out in reg 3. To the extent that the definition extends to cl 2(a)(ix) of the General Order, it should give way to the defined meaning of service "in the Public Sector", under the PSM Act.

29 Support for this proposition was said to be obtained from a decision of the High Court in *Producers' Co-operative Distributing Society Ltd v Commissioner of Taxation (NSW)* (1944) 69 CLR 523. In that case, Latham CJ at 531, when considering a case involving the importation of a definition from one statute into another, said:

> It appears to me that the incorporation of a definition of a particular term stands upon a different footing from the incorporation of a section of an Act. The meaning of a section may be ascertainable only after consideration of other

sections with which it is associated. But it would be an inversion of ordinary methods to approach the section to interpret a definition by reference to the provisions in which the defined terms was used.

30 Furthermore, in referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at pars 69-71, it was submitted by the respondent that consideration must be given to a reconciliation of conflicting provisions, to determine which of them should give way.

31 Developing the argument further, the respondent submitted that the terms of cl 16(a) of the General Order qualify how, for the purposes of the accrual of long service leave benefits, service with another State may be considered. The submission was that when one examines pars (i) to (ix) of cl 2(a), it is apparent that the approach adopted for the purposes of calculating service for long service leave, cannot apply to the calculation of an amount of voluntary severance pay under reg 13(2) of the Regulations.

32 This being so, the respondent submitted that the only meaningful part of the General Order dealing with "continuous service", is that found in cl 3, set out above. That is, "subject to the provisions of clause 2", cl 3 refers to the resignation of an employee from one Public Authority in Western Australia and the commencement with another Public Authority in Western Australia within one working week; where employment is ended other than for serious misconduct; or where an employee is absent on either leave with or without pay. Thus, looked at in this way, the respondent contended that what the draftsperson of reg 3 meant by the reference to "continuous service", is service rendered in the employment of a Public Authority in Western Australia, despite the interruptions contemplated by cl 3 of the General Order. If this is correct, then the applicant's service in Tasmania, cannot be considered for the purposes of calculating his voluntary severance payment under cl 13(2) of the Regulations.

33 Regardless of this, the further submission was made that irrespective of the approach taken to construction by the respondent, and in any event, the applicant had a break in service from the time he ceased employment with the Tasmanian government and when he recommenced with the West Australian government on 24 October 2011. Thus, this means the prior service, even if the applicant's construction of the legislation is to be preferred, cannot be included. For these reasons, as a matter of construction, the respondent submitted that the applicant's Tasmanian government service cannot be considered in properly applying the Regulations.

34 In the alternative, as to any merit argument made by the applicant regarding the initial letter of offer dated 22 November 2017 erroneously including such service, the respondent submitted that the entitlement to severance pay under the Regulations is statutory. This being so, any payment by the State can only be made in accordance with the statute and any payment made contrary to statute constitutes a void transaction and is recoverable: *Attorney-General v Gray* [1977] 1 NSWLR 406; *The Minister for Education and The Director General of the Education Department of Western Australia v The Civil Service Association of Western Australia (Inc).* (1997) 77 WAIG 2185. Thus, the respondent submitted that whilst the applicant's expectations may have been raised, he gained no rights from the initial letter and the terms of the statutory entitlement, as authorised by the Parliament, must prevail.

Consideration

35 This case involves an interesting point, not considered by the Commission previously, as far as I am aware.

36 The principles of statutory interpretation are well settled. The task of statutory construction begins and ends with the text. In *Van Heerden v Hawkins* 2016 WASCA 42, the Court of Appeal said as follows at pars 93-96:

> 93 In ***Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*** [2012] HCA 55; (2012) 250 CLR 503, French CJ, Hayne, Crennan, Bell and Gageler JJ observed:
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> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text' ***(Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** [2009] HCA 41; (2009) 239 CLR 27 at 46 [47]). So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself [39].
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> See also ***Saeed v Minister for Immigration and Citizenship*** [2010] HCA 23; (2010) 241 CLR 252 [31] (French CJ, Gummow, Hayne, Crennan& Kiefel JJ); ***Thiess v Collector of Customs*** [2014] HCA 12; (2014) 250 CLR 664 [22] (French CJ, Hayne, Kiefel, Gageler & Keane JJ).
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> 94 The modern approach to statutory construction is purposive. The statutory text is the surest guide to Parliament's intention. A decision as to the meaning of the text requires consideration of the context, in its widest sense, including the general purpose and policy of the provision. See ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby & Hayne JJ); ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*** [2009] HCA 41; (2009) 239 CLR 27 [47] (Hayne, Heydon, Crennan & Kiefel JJ); ***Travelex Ltd v Federal Commissioner of Taxation*** [2010] HCA 33; (2010) 241 CLR 510 [82] (Crennan & Bell JJ).
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> 95 The context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed. See ***CIC Insurance Ltd v Bankstown Football Club Ltd*** [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ).
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> 96 The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. See ***Certain Lloyd's Underwriters v Cross*** [2012] HCA 56; (2012) 248 CLR 378 [26] (French CJ & Hayne J). The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose. See ***Minister for Employment and Workplace Relations (Cth) v Gribbles Radiology Pty Ltd*** [2005] HCA 9; (2005) 222 CLR 194 [21] (Gleeson CJ, Hayne, Callinan & Heydon JJ).

37 In this case, the outcome turns on the proper construction of the Regulations, when read with the relevant terms of the General Order. Whilst reg 3 purports to import a "definition" of "continuous service" contained in the General Order, from the terms set out earlier in these reasons, it is apparent that there is really no definition, at least expressed as such, in the General Order. What the General Order contains in at least cl's 2 and 3 is the device of deeming. These provisions set out for the purposes of the accrual of long service leave by government wages employees, what is and what is not, deemed service for long service leave benefit purposes.

38 Accordingly, in terms of the *Producers' Cooperative Society* case, the approach to reg 3 of the Regulations is somewhat of a hybrid. It is in part a definition and in part also, the effective incorporation of substantive parts of another instrument. Ultimately however, the task for the Commission is to determine the meaning of these provisions, from their text and in context.

39 The scheme of the General Order sets out an entitlement to and exclusions from, the accrual of long service leave rights for government wages employees. Clause 1 provides that the entitlement to long service leave for such employees first accrues after 10 years "continuous service". Further entitlements are prescribed in respect of each subsequent seven years of "continuous service". Clauses 2 and 3, immediately following, then set out what is and what is not "service" "for the purposes of these conditions". To make sense of this, I consider that this must be construed as meaning what the draftsperson of the General Order understood as "continuous service" under cl 1. It would be nonsensical to construe it in any other way. It is then provided in cl 2(a) that the types of service in pars (i) to (ix) are "deemed" "service as an employee of a Public Authority". As I have mentioned earlier, it was not controversial in the proceedings that a "Public Authority" as referred to in the General Order, would embrace and be in accord with those bodies and organisations as broadly defined as the "Public Sector" in the PSM Act and for the purposes of the Regulations.

40 The device of deeming is a common technique in legislative drafting. It is a form of a "statutory fiction" to extend the meaning of a subject matter beyond the bounds of what it might normally be understood to mean: *Muller v Dalgety Co Ltd* (1909) 9 CLR 639 per Griffith CJ at 696, as cited and discussed in DC Pearce and RS Geddes *Statutory Interpretation in Australia* 8th Edition at par 4.45 (see too par 4.45 generally). The deemed service extends to what one might expect to find in such a provision, such as absences on various types of leave etc, through to military service and controversially in this case, employment in the service of the Commonwealth or another State. Ordinarily, of course, service with another State or the Commonwealth would not be "service as an employee of a Public Authority", without such deeming.

41 Clause 2(b) then goes on to provide what is not continuous service for the purposes of the General Order. Then, in cl 3, the scheme of the General Order as to continuous service, includes the termination of an employee's employment by resignation or dismissal, other than for serious misconduct. Later, in cl 16(a), where cl 2(a)(ix) has application, a mechanism is prescribed for working out how the prior service with the Commonwealth or other State is to apply. Notably, as pointed out by the applicant in his submissions, in cl 16(a)(i) it is stated "Service with the previous employer shall be converted into service for the purposes of these conditions…".

42 Returning to the Regulations, I can well appreciate the contention of the respondent that the reference to "continuous service" in reg 13(2), when read with the words "*in* the Public Sector*"* (as defined in s 3 of the PSM Act), is, on its face, at odds with the concept of recognition of prior service outside the Public Sector. All other things being equal, as the argument runs, the latter words must prevail over inconsistent provisions of the General Order, despite reg 3. At first blush, this argument has some attraction. However, one then needs to consider the deeming provisions of the General Order. As to what is taken to be "service" in cl's 2 and 3, the position changes. Just as for the purposes of the General Order in cl 2(a) "service as an employee of a Public Authority" includes the various matters in par (i) to (ix), so too does "service served by the employee in the Public Sector …", as specified in reg 13(2). The deeming provisions apply to both the General Order reference to "service as an employee of a Public Authority" and the Regulation's reference to "continuous service served by an employee in the Public Sector", and extend their meaning.

43 Additionally, the draftsperson of reg 3 must be taken to have turned his or her mind to the detail of the terms of the General Order. As the prior discussion illustrates, there is no pithy definition of "continuous service" that appears in the General Order. To ascertain what this means, requires a close reading of the quite detailed and lengthy provisions in cl's 2, 3 and partially at least, 16, taken together as a part of a scheme. Importantly, the words the draftsperson used in reg 3 are "continuous service has the *same meaning* as it has …". The term is not qualified or restricted in any way. Had the draftsperson of reg 3 wished to exclude from the scope of "continuous service", prior service by a Public Sector employee with the Commonwealth or another State, or for that matter any other absence, it would have been quite a simple matter to have said so and to insert an exclusion, by explicit reference to cl 2(a)(ix) or other provision of the General Order.

44 Whilst it is the case that the mechanism prescribed in cl 16(1)(a), to work out long service leave for an employee who has had prior service in another State or the Commonwealth is not directly applicable to the method of calculation of severance pay under the Regulations, it is the recognition of the prior service and its "conversion" into service in the Public Sector that is important. It would be odd to include all else in cl's 2 and 3 of the General Order as service for severance pay purposes but exclude, by a reading down of the provisions, cl 2 (a)(ix), without at least some express indication that this was the intended effect.

45 An issue that arose in the proceedings was that of the potential for an employee to "double dip", by way of the receipt of a severance payment from any prior employment with the Commonwealth or another State. This is in part dealt with in cl 16(a) and (c) of the General Order in relation to long service leave. The intention of the General Order in relation to continuous service for long service purposes, is not to enable an employee to derive an additional benefit from the recognition of prior service. In my view, the same principle must apply in the case of severance pay. The continuous service provisions of the General Order should never be construed to confer on an employee under the Regulations, an entitlement to a severance

payment, including prior service in the Commonwealth or another State, where that service has already been included in making an earlier severance payment to an employee.

46 The Regulations and the General Order must be construed in a common-sense fashion. It could never be credibly argued in my view, that it would be a fair application of the Regulations for the purposes of s 95(5) of the PSM Act, for an employee to benefit from both a severance or like payment arising from prior service with the Commonwealth or another State, as well as receiving a severance payment under the Regulations, which included that very same service. That outcome would be a windfall for the employee. If any such payment has been made in a case, that prior service must be discounted, to enable the Regulations to be fairly applied to the employer. To hold otherwise would be contrary to the Commission's statutory duty to determine matters in accordance with equity, good conscience and the substantial merits of the case under s 26(1)(a) of the *Industrial Relations Act 1979* (WA).

47 Having considered the matter, the approach adopted by the applicant to the construction of the Regulations and the General Order is to be preferred to that adopted by the respondent. Therefore, the original letter from the respondent to the applicant, dated 22 November 2017, including his initial service in the Western Australian public service and his subsequent service in Tasmania, was correct. For the purposes of s 95(5) of the PSM Act, I consider that the proper application of the Regulations requires the applicant's service in Tasmania to be recognised in the calculation of his severance pay entitlements under Part 3 of the Regulations.

48 Finally, is the argument that the period of three working days or so, between the dates of 19 October and 23 October 2011, when the applicant resigned his Tasmanian employment and resumed employment in Western Australia, broke his service for benefit purposes. In this respect, cl 3 of the General Order recognises a break in service of a maximum of one working week, where an employee resigns from one position and resumes in another. Clause 16(a) also refers to an employee who "was, immediately prior to being engaged, in the service of the Commonwealth or another State of Australia and that employment was continuous with this service under Clause 3…". This means therefore, construing the General Order, that a break in service of no more than one working week does not break service for continuity of service purposes. Furthermore, in any event, even if cl's 3 and 16(a) did not apply in this way, in my view it would not be a fair application of the Regulations, to penalise the applicant by regarding this relatively short period, necessary for him to pack up and travel with his family to Perth, as breaking his continuity of service.

49 The Commission will declare and order accordingly.

2018 WAIRC 00325

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FLOYD BEDFORD BROWNE
	APPLICANT
	-v-
	DIRECTOR GENERAL
	DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 30 MAY 2018
FILE NO/S	APPL 2 OF 2018
CITATION NO.	2018 WAIRC 00325

Result	Declaration and order issued
Representation	
Applicant	Mr A Drake-Brockman as agent
Respondent	Mr R Andretich of counsel

Declaration and Order

HAVING heard Mr A Drake-Brockman as agent on behalf of the applicant and Mr R Andretich of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

(1) DECLARES that for the purposes of Regulations 3 and 13(2) of the Public Sector Management (Redeployment and Redundancy) Regulations 2014 "continuous service" includes service in the employment of the Commonwealth or of another State in accordance with clauses 2, 3 and 16 of the Government Wages Employee's Long Service Leave General Order (1986) 66 WAIG 319.

(2) ORDERS that for the purposes of the calculation of the applicant's severance payments under Part 3 of the Public Sector Management (Redeployment and Redundancy) Regulations 2014 the applicant's service in the Public Sector in Western Australia be and is hereby deemed to include the period from 18 September 1991 to the date of the termination of the applicant's employment.

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

PUBLIC SECTOR MANAGEMENT ACT 1994—Notation of—

The following were matters before the Commission under the Public Sector Management Act 1994.

Application Number	Parties		Commissioner	Matter	Dates	Result
APPL 67/2017	Nabeel Ashraf	Ms Michelle Hoad (MD) NMTAFE	Matthews C	Referral to Commission under Public Sector Management Act 1994	14/09/2017	Discontinued