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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2018 WAIRC 00434

PUBLIC TRANSPORT AUTHORITY RAILWAY EMPLOYEES (TRANSPERTH TRAIN OPERATIONS) INDUSTRIAL AGREEMENT 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA; THE AUSTRALIAN
RAIL TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
APPLICANTS

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM

COMMISSIONER D J MATTHEWS

DATE

WEDNESDAY, 18 JULY 2018

FILE NO/S

APPL 56 OF 2018

CITATION NO.

2018 WAIRC 00434

Result

Industrial agreement varied

Representation

(On the papers)

Public Transport Authority of Western Australia Ms J Allen-Rana

The Australian Rail Tram and Bus Industry Union of Employees, West Australian Branch Mr P Robinson and Mr G Johnston

Order

WHEREAS this is an application pursuant to s 43 of the *Industrial Relations Act 1979* (the Act) to vary the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2018* (the Agreement) filed on 12 July 2018; and

WHEREAS I am satisfied that the parties to the Agreement agree to the variations proposed in the applicants' application.

NOW THEREFORE I, the undersigned, pursuant to the powers conferred under the Act, hereby Order:

- (1) THAT the page of the Agreement titled 'SCHEDULE A – WAGES TABLE' be replaced with the page titled 'SCHEDULE A – WAGES TABLES' attached to this Order.
- (2) THAT the page of the Agreement titled '(Application of subclause 6.3.10)' be replaced with the page titled '(Application of subclause 6.3.10)' attached to this Order.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2018 WAIRC 00684

RANGERS (NATIONAL PARKS) CONSOLIDATED AWARD 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESDIRECTOR GENERAL, DEPARTMENT OF BIODIVERSITY, CONSERVATION AND
ATTRACTIONS**APPLICANT**

-v-

UNITED VOICE WESTERN AUSTRALIA

RESPONDENT**CORAM** CHIEF COMMISSIONER P E SCOTT**DATE** WEDNESDAY, 8 AUGUST 2018**FILE NO/S** APPL 32 OF 2018**CITATION NO.** 2018 WAIRC 00684**Result** Award varied**Representation****Applicant** Mr S Dane as agent**Respondent** Ms N Kefford of counsel*Order*

HAVING heard Mr S Dane as agent on behalf of the applicant and Ms N Kefford of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders –

THAT the *Rangers (National Parks) Consolidated Award 2000* be varied in accordance with the Schedule attached hereto and that such variation shall have effect on and from 8 August 2018.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

SCHEDULE

1. TITLE: delete the title of the award and insert the following in lieu thereof:

Rangers Consolidated Award 2000

2. Clause 1. – TITLE: Delete this clause and insert the following in lieu thereof:

This Award shall be known as the Rangers Consolidated Award 2000.

3. Clause 3. – AREA AND SCOPE: Delete this clause and insert the following in lieu thereof:

This Award shall apply to employees employed in classifications described in clause 17. - Wages of this Award, who are employed in the State of Western Australia.

4. Clause 5. – DEFINITIONS:**(a) Delete subclause (3) and insert the following in lieu thereof:**

(3) “Employees with No Fixed Hours” means those employees who have no fixed hours of work and who are in receipt of the loading prescribed in clause 17(2). – Wages of this Award.

(b) Delete subclause (4) and insert the following in lieu thereof:

(4) “Employer” means the Director General of the Department of Biodiversity, Conservation and Attractions.

5. Clause 9. – OVERTIME: Delete subclause (4) and insert the following in lieu thereof:

(4) Employees with No Fixed Hours

Employees with No Fixed Hours shall be exempt from the provisions of subclauses (1) and (2) of this clause.

Provided that if an employee so specified is required to work on a rostered day off duty he/she shall be paid at the rate of double time for any time so worked. The rate prescribed in this subclause is exclusive of the 25% loading prescribed for Employees with No Fixed Hours in clause 17(2) - Wages.

6. Clause 12. – PUBLIC HOLIDAYS: Delete subclause (2) and insert the following in lieu thereof:

(2) The following days, or the days observed in lieu shall, subject as hereinafter provided, be allowed as holidays, without deduction of pay, namely:

New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Western Australia Day, Sovereign's Birthday, Christmas Day and Boxing Day.

Provided that another day may be taken as a holiday by arrangement between the parties, in lieu of any of the days named in the subclause.

When any of the days mentioned in paragraph (a) hereof falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday, and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

7. Clause 14. – CONDITIONS AND ALLOWANCES: Delete subclause (2) and insert the following in lieu thereof:

(2) Subject to the provisions of this Award, the provisions of the Public Service Award 1992 at:

- (a) Clause 30. - Camping Allowance and Schedule C - Camping Allowance; and
- (b) Clause 33. - Diving Allowance, Clause 34, - Flying Allowance, Clause 52 – Sea Going Allowance and Schedule K - Diving, Flying and Sea Going Allowance.

as amended from time to time, shall apply mutatis mutandis to employees covered by this Award.

8. Clause 17. – WAGES: Renumber subclause (1)(a) to be subclause (1) by deleting "(a)".

9. Schedule A – PARTIES TO THE AWARD: Delete this Schedule and insert the following in lieu thereof:

The following are parties to this award:

The Director General of the Department of Biodiversity, Conservation and Attractions.

United Voice WA

INDUSTRIAL MAGISTRATE—Claims before—

2018 WAIRC 00679

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2018 WAIRC 00679
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : WEDNESDAY, 20 JUNE 2018, THURSDAY, 21 JUNE 2018
DELIVERED : THURSDAY, 2 AUGUST 2018
FILE NO. : M 137 OF 2016
BETWEEN : MICHAEL WILLIAM PEARCE

CLAIMANT

AND

MR. CHRISTOPHER DAWSON, COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE

RESPONDENT

CatchWords : Alleged contravention of clause 17(12) of the *Western Australia Police Industrial Agreement 2009* – Refusal to pay forensic qualification allowance – Whether application for payment of forensic qualification allowance considered in accordance with terms of the clause and forensic guidelines – Whether the Industrial Magistrates Court has power to order resumption of, or review the decision to not grant the application for, payment of the forensic qualification allowance – Whether the Industrial Magistrates Court can order payment of the forensic qualification allowance

Legislation : *Industrial Relations Act 1979* (WA)
Industrial Magistrates Court (General Jurisdiction) Regulations 2005

Instrument: : *Western Australia Police Industrial Agreement 2009*
Western Australia Police Industrial Agreement 2011
Western Australia Police Industrial Agreement 2014
Public Service and Government Officers General Agreement 2014

Case(s) referred to in reasons : *City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union* [2006] FCA 813
Director General, Department of Education v United Voice WA [2013] WASCA 287
Re Harrison; Ex parte Hames [2015] WASC 247
Kucks v CSR Limited (1996) 66 IR 182
Vincent v Department of Finance [2016] WAIRC 00035

Result : Claim is dismissed

Representation:

Claimant : Mr A. Crocker instructed by Tindall Gask Bentley Lawyers
 Respondent : Ms D. M. Underwood instructed by the State Solicitors Office

REASONS FOR DECISION

- 1 On 23 September 2016, Michael Pearce lodged a claim pursuant to s 83 of the *Industrial Relations Act 1979* (WA) (Act) claiming the Commissioner of Police, in ceasing to pay a Forensic Qualification Allowance (FQA) upon Mr Pearce's transfer to the Crime Forensic Investigations Office (CFIO), contravened cl 17(12) of the *Western Australia Police Industrial Agreement 2009* (Agreement).
- 2 In his revised claim lodged on 1 September 2017, Mr Pearce says not only did the Commissioner fail to meet his obligations under cl 17(12) of the Agreement, but he failed to act reasonably in his assessment of Mr Pearce's claim for the FQA.
- 3 Mr Pearce seeks orders that the Commissioner:
 - immediately resume payment of the FQA;
 - pay outstanding FQA from April 2015 to date; and
 - interest on the outstanding amount.
- 4 The Commissioner says Mr Pearce is not eligible for the FQA as he does not meet the requirements of cl 17(12) of the Agreement because the position of District Forensic Investigation Officer (DFIO) is not in an approved business area and there is no mandatory requirement for a forensic qualification. Further, the Commissioner says the application of the FQA and associated guidelines were applied consistently to Mr Pearce.
- 5 The Commissioner also submits the orders sought by Mr Pearce are not orders capable of being made by the Industrial Magistrates Court (IMC) under s 83 of the Act.

Preliminary or Jurisdictional Issues

- 6 The Commissioner raised a jurisdictional issue: whether the IMC, as part of the claim, can order the Commissioner to pay the FQA to Mr Pearce? A further issue arises associated with the jurisdictional issue: the proper construction of cl 17(12) of the Agreement.

Background facts not in dispute

- 7 Mr Pearce is a police officer with the current rank of senior constable. From 17 October 2005 to 13 August 2006 he was a Forensic Investigation Officer (FIO) at the rank of constable based in the Central Metro District Forensic Investigation Office. From 14 August 2006 to 19 April 2015 he was a FIO at the rank of constable based in the Forensic Field Operations (FFO) in the Forensic Division.
- 8 The Agreement was registered on 20 December 2006. The registration of the Agreement introduced the FQA at cl 17(12).
- 9 On or about 5 December 2011 Mr Pearce applied for the FQA, which was recommended for approval by the Commissioner's delegate effective from 15 August 2010.
- 10 The position held by Mr Pearce at the time of the application and its recommendation for approval was FIO with position description (PD) 1005. This position had been deemed eligible to receive the FQA the subject of cl 17(12) of the Agreement.
- 11 From 15 August 2010 to 19 April 2015 Mr Pearce received the FQA. In March 2015 Mr Pearce was informed his tenure as a FIO at FFO would not be extended, he had exceeded tenure and he was informed he must transfer to another position within the WA Police.
- 12 The Commissioner's decision to transfer Mr Pearce, and the WA Police's tenure policy, is not the subject of the claim.
- 13 On 20 April 2015 Mr Pearce commenced as a DFIO with PD 1400 at the rank of constable within CFIO. Mr Pearce ceased receiving the FQA upon his transfer to CFIO.
- 14 On 7 July 2015 Mr Pearce submitted a grievance, in part, contesting the cessation of the FQA. Relevantly, Mr Pearce's grievance also requested a review of PD 1400 and for PD 1400 to be changed to PD 1005. Mr Pearce's grievance went through the chain of command and on 21 December 2015 the then Commissioner, Dr Karl O'Callaghan, advised him his grievance was not upheld.
- 15 On 9 June 2016 the CFIO, including officers with PD 1400, moved to the WA Police Forensic Division.
- 16 On 8 November 2017 PD 1400 and PD 1005 were updated and registered.

Parties' Contentions

- 17 Mr Pearce's contentions are:
 1. the Commissioner has breached cl 17(12) of the Agreement in denying the FQA payment to Mr Pearce since 2015;
 2. up until November 2017, the PDs for PD 1005 and PD 1400 are almost identical in terms of the essential requirement for diploma education, but further to that the two positions undertake the same work;
 3. the true test of whether cl 17(12) of the Agreement is not to look at the words of the PDs, but to look at what in reality is happening in relation to the work undertaken; and
 4. under guidelines published by the Commissioner, Mr Pearce is entitled to the continuity of the FQA when he transferred to CFIO.

18 The Commissioner's contentions are:

1. the Commissioner complied with cl 17(12) of the Agreement;
2. Mr Pearce initiated the grievance procedure and the Commissioner did not uphold his grievance as it related to review of PD 1400 and payment of the FQA;
3. the proper construction of cl 17(12) of the Agreement means there is no substantive right to be granted the FQA, but a procedural right for an employee to be assessed, a determination made, which are discretionary decisions exercised by the Commissioner;
4. the Commissioner considered Mr Pearce's application for the FQA on its merits and he is not eligible; and
5. the IMC does not have jurisdiction to consider the underlying merits of Mr Pearce's eligibility for payment of the FQA, but is only able to determine whether the Commissioner has done what is required of him under cl 17(12) of the Agreement.

Issues for Determination

19 Having regard to the claim and response to the claim, the principle issues for determination are:

1. what is the proper construction of cl 17(12) of the Agreement?;
2. what orders can be made by the IMC s 83 of the Act?; and
3. what is the character of Mr Pearce's claim and is the IMC empowered to make the orders sought?

Principles of Agreement Construction

20 The Commissioner in his written submissions sets out the legal principles of constructing an agreement or instrument. Mr Pearce raised no issue with these principles and I set them out below.

21 In *City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union* [2006] FCA 813 his Honour French J (as he then was) said:

53. *The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument....*

57. *It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities – City of Wanneroo v Holmes (1989) 30 IR 362 at 378–379 and cases there cited. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned – see eg George A Bond & Co Ltd (in liq) v McKenzie [1929] AR (NSW) 498 at 503–504 (Street J). It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in City of Wanneroo v Holmes (at 380):*

Awards, whether made by consent or otherwise, should be made sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties.

22 In *Kucks v CSR Limited* (1996) 66 IR 182 Madgwick J set out the legal principles applicable to the interpretation of industrial instruments. He said at page 184:

Legal Principles

It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framers(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.

23 In *Director General, Department of Education v United Voice WA* [2013] WASCA 287 Buss JA cited the above comments in *Kucks* which was also adopted by his Honour Justice Beech in *Re Harrison; Ex parte Hames* [2015] WASC 247.

24 The general principles applicable in the construction of an industrial agreement were summarised by Beech J in *Hames* at [50] to [51] as follows:

1. the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;

2. it is objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
3. the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
4. the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
5. an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
6. an instrument should be construed as a whole. A construction that make the various part of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have the same operation.

25 Further, at [51] and [53]:

1. the starting point of the task of construction is the text;
2. the industrial character and purpose of an industrial agreement is part of the context in which it is to be construed; and
3. that there is a need to avoid a narrow or pedantic approach to construction does not detract from the fact that construction is a text-based activity.

What is the proper construction of clause 17(12) of the Agreement?

26 The FQA was introduced in 2006. The FQA is a means of retaining staff in roles that require mandated qualification requirements and acts as an incentive for police officers to obtain certain qualifications and as a means of succession planning for specialist forensic disciplines¹.

27 Clause 17(12) of the Agreement provides:

- (a) *Subject to the employer's approval, an employee who has:*
 - (i) *successfully completed a qualification at Diploma level or above which is a mandatory requirement for the employee's position; and*
 - (ii) *prepared or delivered expert evidence used by the courts; and*
 - (iii) *four years continuous experience in the forensic field;**will receive payment of 10% of the base salary rate of the employee's substantive rank.*
- (b) *An employee must be working in the field in which the employer has assessed them to be eligible for the forensic qualifications allowance to receive payment of the allowance.*
- (c) *Sole discretion regarding determination and assessment for eligibility of forensic qualifications allowance remains with the employer.*

28 Mr Pearce contends that the proper construction of cl 17(12) is that an applicant who meets the criteria in subclause 12(a)(i), (ii) and (iii) is eligible for the FQA.

29 Thereafter the only barrier to an applicant receiving the FQA is the field in which the applicant works as provided in subclause 12(b). Mr Pearce contends that provided the applicant is working in a forensic field (as opposed to say traffic or general duties) then an applicant should receive the FQA. Further, Mr Pearce submits that if an employee in a particular position satisfies cl 17(12), the employer cannot avoid cl 17(12) by words used in a PD or by deeming certain PDs outside the scope of the clause and regard is to be had to what the employee actually does in the position rather than what the PD describes their role to be.

30 However, conversely Mr Pearce says the content of PD 1005 and PD 1400 are not only instructive but are determinative for the purposes of subclause 12(a)(i) and subclause 12(b). Meaning, if a PD provides for a qualification at diploma level or above as an essential requirement of the position, then that of itself is sufficient to meet the requirement of subclause 12(a)(i) and subclause 12(b) and by extension the Commissioner is required to pay the FQA.

31 To the extent that cl 12(c) has work to do, that work is limited to the Commissioner exercising his discretion in approving the criteria in cl 12(a) and does not apply as an over-arching discretion to cl 17(12).

32 The Commissioner contends that cl 17(12) is subject to the Commissioner's approval, both in respect of the criteria for eligibility and the field of work and, further, the Commissioner has the sole discretion with respect to assessment and determination of eligibility.

33 The Commissioner says cl 17(12) provides no right to the FQA, but provides a procedural eligibility to apply for the FQA. An applicant must meet all the criteria in subclauses 12(a) and (b), but the Commissioner retains sole discretion with respect to the field of work and the qualification/experience.

34 The Commissioner says Mr Pearce's construction of cl 17(12) should be rejected because it fails to properly consider the importance of the Commissioner's sole discretion regarding the determination and assessment for eligibility of the FQA or that the FQA is subject to his approval.

- 35 Further, when read with s 83 of the Act, the IMC cannot order reinstatement or payment of the FQA because the IMC would then be standing in the shoes of the person tasked with the sole discretion in assessing and determining eligibility. At best, the only order that is capable of being made is for the Commissioner to exercise his discretion in accordance with the terms of the Agreement.
- 36 At least in part the Commissioner's construction of cl 17(12) is preferred. In my view, the language and text of cl 17(12) of the Agreement, when read with the whole of cl 17, demonstrates there is no right to the FQA irrespective of whether the applicant meets the criteria of subclause 12(a) and works in a forensic field or area.
- 37 Clause 17 of the Agreement provides for additional allowances to be paid to employees in certain areas of work or in certain circumstances. The payment of some allowances is made as a matter of course without the Commissioner's approval or any other discretionary decision making. For example: cl 17(14) – Internal Affairs Investigators Allowance; cl 17(15) – Tactical Response Group Allowance; cl 17(10) – Boot Allowance. Other payments of allowances are discretionary. For example: cl 17(6) – Subsidised Housing and cl 17(7) – Locality Allowance.
- 38 Clause 17(12) is not an allowance paid as a matter of course, unlike the allowances paid in clauses 17(14) and (15) to employees attached to the Internal Affairs Unit and Tactical Response Group. That is, merely working in forensics or carrying out forensic duties, whatever or wherever they might be, or having certain forensic qualifications, skill or experience does not entitle an employee to payment of the FQA.
- 39 Clause 17(12) provides a staged approach for eligibility for the FQA.
- 40 First, to be eligible for the FQA the applicant is to have the requisite education, experience in the forensic field and skill: subclause 12(a)(i) to (iii). Even if the applicant fulfils the criteria, the payment of 10% of the base salary rate is subject to the Commissioner's approval (or delegated approval as the case may be).
- 41 Second, the applicant must be working in 'the field in which the Commissioner has assessed them to be eligible to receive the FQA': subclause 12(b). Field is not defined in subclause 12(b), thus alternatives are, arguably, open to the Commissioner, but the field in which the Commissioner has assessed them to be eligible may not be confined to a forensic field (by way of example, Forensic Division).
- 42 An employee may have the requisite education, experience and skill, but be working in a field or area that does not require the employee to use any or all of the criteria to carry out their primary duties, (for example, a police officer working in traffic may incidentally collect forensic evidence or have the skill and education to know what forensic evidence to collect or a police prosecutor may prosecute a charge requiring the presentation of forensic evidence).
- 43 Alternatively, an employee may have the requisite education, experience and skill and may work in a forensic area or field, but the Commissioner has assessed the forensic area or field as ineligible for the FQA.
- 44 Alternatively, an employee may have the requisite education, experience and skill and not work in a forensic area or field, but the Commissioner has assessed the area or field as eligible for the FQA.
- 45 Third, consistent with subclause 12(c), these are all decisions within the sole discretion of the Commissioner.
- 46 Consistent with Senior Sergeant Wells' explanation, the FQA is open to employees who demonstrate the requisite education, experience and skill, but only in those fields or areas the Commissioner has assessed as eligible to receive the FQA. Further, the FQA provides incentives to employees to obtain higher qualifications, skill and experience related to forensics and recognises the value of ensuring future officers have an opportunity to undertake work in the forensic area (wherever that might be).
- 47 When understood in this way, four things are apparent: (1) notwithstanding an employee may meet the criteria in subclause 12(a), they may not receive the FQA; (2) the Commissioner may indirectly benefit from the employee fulfilling the criteria in subclause 12(a) but not pay or be required to pay the FQA; (3) only those fields assessed as eligible to receive the FQA will receive the payment; and (4) these are matters for the Commissioner.

What orders can be made under section 83 of the Act?

- 48 Mr Pearce's claim is made pursuant to s 83 of the Act. Mr Pearce has not expressly sought to enforce cl 17(12) of the Agreement, but seeks orders requiring immediate resumption of the FQA and for the Commissioner to pay him the FQA from April 2015 to date (or alternatively to pay the FQA from April 2015 to November 2017 when PD 1400 was formally adopted) (with interest).
- 49 Section 83 of the Act provides:
- (1) *Subject to this Act, where a person contravenes or fails to comply with a provision of an instrument to which this section applies any of the following may apply in the prescribed manner to an industrial magistrate's court for the enforcement of the provision —*
1. *the Registrar or a deputy registrar;*
 2. *an industrial inspector;*
 3. *in the case of an award or industrial agreement, any organisation or association named as a party to it;*
 4. *in the case of an award, industrial agreement or order, an employer bound by it;*
 5. *any person on his or her own behalf who is a party to the instrument or to whom it applies;*
 6. *if an employee under an employer-employee agreement is a represented person, a representative acting on his or her behalf.*

- (2) *In this section —*
instrument to which this section applies means —
- (a) *an award; and*
 - (b) *an industrial agreement; and*
 - (c) *an employer-employee agreement; and*
 - (d) *an order made by the Commission, other than an order made under section 23A, 32, 44(6) or 66.*
- (3) *An application for the enforcement of an instrument to which this section applies shall not be made otherwise than under subsection (1).*
- (4) *On the hearing of an application under subsection (1) the industrial magistrate's court may, by order —*
- (a) *if the contravention or failure to comply is proved —*
 - (i) *issue a caution; or*
 - (ii) *impose such penalty as the industrial magistrate's court thinks just but not exceeding \$2 000 in the case of an employer, organisation or association and \$500 in any other case;*
- or*
- (b) *dismiss the application.*
- (5) *If a contravention or failure to comply with a provision of an instrument to which this section applies is proved against a person as mentioned in subsection (4) the industrial magistrate's court may, in addition to imposing a penalty under that subsection, make an order against the person for the purpose of preventing any further contravention or failure to comply with the provision.*
- (6) *An order under subsection (5) —*
- (a) *may be made subject to any terms and conditions the court thinks appropriate; and*
 - (b) *may be revoked at any time.*
- (7) *An interim order may be made under subsection (5) pending final determination of an application under subsection (1).*
- (8) *A person shall comply with an order made against him or her under subsection (5).*

Penalty: \$5 000 and a daily penalty of \$500.

- 50 Mr Pearce has standing to bring the claim as the Agreement is an instrument to which s 83 of the Act applies.
- 51 The IMC powers on the hearing the claim are set out in sections 83(4), (5) and (6) of the Act.
- 52 The Commissioner refers to the IMC decision *Vincent v Department of Finance* [2016] WAIRC 00035 and says that the powers in sections 83(4) and (5) of the Act do not extend to the making of orders of the type Mr Pearce seeks.
- 53 Mr Pearce says *Vincent* is distinguished from the facts in his case, principally because cl 22 of the *Public Service and Government Officers General Agreement 2014* is predicated on a discretionary arrangement between the employer and employee to take purchase leave, whereas cl 17(12) of the Agreement is directive where the employee meets the requirements of subclauses 12(a) and (b).
- 54 In my view, s 83 of the Act does not enable the IMC to order the Commissioner to 'immediately resume payment of the FQA'. Section 83(4) of the Act empowers the IMC, if a contravention or failure to comply with Agreement is proved, to issue a caution or impose a penalty or dismiss the application. The relief provided by s 83(5) of the Act is injunctive in nature and is aimed at preventing further specific contraventions of the application instrument.
- 55 Similar to that in *Vincent*, the Agreement is an industrial instrument having statutory force. The IMC's powers in enforcing statutory rights afforded by industrial instruments are limited to those provided by s 83 of the Act, which does not give the IMC power to substitute its own decision for the decision made by the Commissioner, either in relation to the Commissioner's approval of an applicant's education, experience and skill for the purposes of payment of the FQA, or the field in which the Commissioner has assessed an applicant as eligible for the FQA or determination and assessment of eligibility more broadly.
- 56 The IMC is limited to determining whether the Commissioner has done that required of him by cl 17(12) of the Agreement.
- 57 This then leads to the question of the character of Mr Pearce's claim which is relevant to the order sought by him for the Commissioner to pay him the FQA from April 2015 to date (or alternatively to November 2017).

What is Mr Pearce's claim about?

- 58 It is apparent that much of Mr Pearce's evidence concerns the merits of his application for the FQA². His affidavit sets out his WA Police service history of employment (including service history in forensics), his qualifications, his roles and responsibilities as a FIO and DFIO.
- 59 In addition, Mr Pearce relies upon the affidavit evidence of Deborah Amelia Freegard and Craig Markham. Ms Freegard explains the similarity between her positions as a DFIO at West Metropolitan District Forensic Investigation Office to DFIO at West Kimberley District Forensic Investigation Office. Notably Ms Freegard states the primary function of a Metropolitan District Forensic Investigation Office is to investigate volume crime and the primary difference between FIO and DFIO roles is that one attends major crime scenes and one primarily attends volume crime scenes³.

- 60 However, if forensic capacity is exceeded those DFIOs with relevant experience can be tasked to attend major crime scenes which is commonly referred to as 'surge' capacity⁴. Senior Sergeant Wells, Officer in Charge of FFO, explains 'surge' capacity as the exhaustion of human resources at FFO and the activation of DFIOs to take up tasking roles within their skill set⁵.
- 61 Ms Freegard also explains the similarities between DFIO and FIO, albeit she acknowledges the FIO role requires a higher level of knowledge of processing crime scenes and use of additional equipment and supplies⁶.
- 62 Noticeably absent from Ms Freegard's evidence is whether she was paid the FQA while a DFIO at West Metropolitan District Forensic Investigation Office. In February 2018, she transferred to West Kimberley District Forensic Investigation Office as a DFIO (where she was also located from 2011 to 2013).
- 63 I note that regional WA DFIOs (PD 1419) are experienced forensic officers isolated by distance and required to work independently when attending to a variety of crime scenes⁷. PD 1419 is a position eligible for the FQA (as it relates to the forensic qualification requirement)⁸ and it is reasonably inferred the isolation and the requirement to work independently on a variety of crime scenes is a significant difference in the determination of eligibility for the FQA between PD 1419 and PD 1400 (metropolitan DFIO).
- 64 Mr Markham makes similar comments to Ms Freegard and Mr Wells in relation to the similarity between the FFO and DFIO roles⁹. I note he also states that FFO attend Category A crime scenes and on 'rare' occasions he is called upon to assist in resource allocation when at 'surge' capacity.
- 65 One of the areas of dispute raised by Mr Pearce is that the position he now occupies as a DFIO at CFIO is indistinguishable from the position he previously occupied as a FIO at FFO. That is, Mr Pearce says, notwithstanding his transfer in April 2015, he is undertaking substantially the same work at CFIO as he was at FFO and his qualifications and experience have not changed between the two positions.
- 66 As I understand it, the real gravamen of Mr Pearce's claim is that his transfer from PD 1005 to PD 1400 is a difference without distinction and the Commissioner is receiving the benefit of his qualifications, experience and skills without paying the FQA for him to undertake substantially the same work.

Organisation of the WA Police Forensic Area

- 67 The Forensic Division of the WA Police is overseen by a Divisional Detective Superintendent. Leaving aside the administrative support and forensic science consultancy, there are three subdivisions under the direction of the Superintendent, each overseen by an Inspector: Analysis and Regional Coordination, Technology Crime Services and FFO¹⁰.
- 68 Technology Crime Services (digital evidence, cybercrime, technology crime, etc.) is a stand-alone forensic division and is not relevant for the purposes of this claim.
- 69 Analysis and Regional Coordination includes the subdivisions of: Forensic Training Unit, Forensic Imaging Unit, Forensic Photography Processing Unit, Forensic Fingerprint Bureau, Volume Crime Desk and Major Case Team¹¹.
- 70 The Major Case Team subdivision includes four or five FIO positions at the rank of constable with PD 1005. Four additional FIO positions are 'out posted' to Homicide Squad, Cold Case Squad and Serious Crime Squad.
- 71 FFO includes the subdivisions of: CFIO, Forensic Investigator (Science) and a broad category of FIOs (which include bomb scene/disaster victim identification, blood pattern analysis, physical evidence/ballistics/surveying)¹².
- 72 Senior Sergeant Alexander Wells describes three major disciplines: fingerprint identification, crime scene investigation (CSI) and firearms investigation of which CSI and firearms investigation are within FFO¹³.
- 73 Notably, save for the 40 constable FIO positions with PD 1005, the other positions within the broad category of FIOs are Sergeant positions¹⁴. As a generalisation, the broad category of FIOs are considered forensic sub discipline specific services headed by a Sergeant with constables working in the area¹⁵.
- 74 Within the CFIO subdivision there are three constable DFIO positions with PD 1400¹⁶.
- 75 From 14 August 2006 to 19 April 2015 Mr Pearce was a FIO at the rank of constable within the broad category of FIOs with PD 1005.
- 76 From 20 April 2015 Mr Pearce is a DFIO at the rank of constable within CFIO with PD 1400.

CFIO vs FFO

- 77 Since 2015 CFIO is within the Forensic Division of WA Police.
- 78 There are six CSI teams within FFO with the constables in each team holding the position of FIO with PD 1005. These teams, including the constables, are required, and be trained, to attend Category A to D crimes¹⁷.
- 79 According to Senior Sergeant Wells the CFIO provide forensic services for volume crime and selected crime offences, including forensic response to clandestine drug laboratories. The constables with PD 1400 are required, and trained, to attend Category C to D crimes¹⁸. Mr Pearce disputes this saying that in his role as a DFIO requires him to deal primarily with Serious Crimes, or what I infer to be Category C crimes rather than Volume Crime or what I infer to be Category D crimes¹⁹. I note Mr Pearce provided a spreadsheet of completed work and I will refer to that.
- 80 Mr Markham states that as OIC of metropolitan DFIO he will be called upon to assist with resource allocation for Category B and C crimes and on rare occasions Category A crimes²⁰.

81 Mr Pearce also refers to the review of CFIO conducted by Sergeant Tubman in 2017 in support of his assessment of the crimes attended by a DFIO²¹. Sergeant Tubman's review of CFIO was limited to the facilities, practices and procedures adopted by that office and it is apparent that he was attempting to bring CFIO practices into line with FFO, particularly in relation to exhibit and case management. It says little, if anything, about the roles and qualifications of the officers working in the area.

82 Mr Pearce referred to the position description documents for PD 1005 and PD 1400 asserting that they contained the same essential work-related requirements relevant to a commitment to the forensic division training regime, inclusive of achieving the Diploma of Public Safety (Forensic Investigation) within four years²². I note PD 1400 has since been revised as of November 2017 removing the essential work-related educational requirement²³.

83 Mr Pearce places significant emphasis on the similar essential work-related educational requirements of PD 1005 and PD 1400 as demonstrative of him meeting the criteria in subclause 12(a)(i). That is, prior to November 2017, because PD 1005 and PD 1400 both contained the same or very similar essential work related educational requirements, this satisfies the mandatory requirement for his position in PD 1400.

84 The Commissioner's response to this is two-fold:

1. the position descriptions within the Forensic Division were reviewed by Senior Sergeant Wells and he re-drafted PD 1005 in consultation with the WA Police Employee Relations Branch to mandate a study requirement and level of qualification²⁴. The revised PD 1005 was formally adopted in November 2017.

While there was some confusion in Senior Sergeant Wells' oral evidence, it was apparent, when clarified, that his understanding of the situation was once he re-drafted PD 1005 in 2014, the revised version was adopted by Employee Relations immediately or shortly thereafter. However, this was not the case and the revised version was adopted from November 2017. It was not until the date of the hearing that he appreciated the delay from his re-drafting PD 1005 to its adoption. It was further apparent that his understanding of the different mandatory and non-mandatory work-related educational requirements between PD 1005 and PD 1400 was based on his re-drafting PD 1005 consistent with the *Australian New Zealand Police Advisory Agency Education and Training Guidelines for Forensic Investigation 2014*²⁵.

Seen in this context, it is understandable why Senior Sergeant Wells understood and maintained in his evidence that PD 1400 did not include a mandated study requirement and why he advised Acting Superintendent Roberts in an email sent on or around 28 July 2015 that PD 1400 was not a specialist PD and did not have any mandated qualification requirement²⁶; and

2. Employee Relations maintains a document entitled 'Approved positions with a mandatory forensic qualification requirement'²⁷. The first version of this document is dated 2 May 2014²⁸. The second version of this document is dated 1 April 2015²⁹.

According to Helen Mashiah, Workforce Consultant at the WA Police, the approved positions document was compiled via a number of sources and details those positions which have been approved as having the mandatory forensic qualification requirement (consistent with subclause 12(a)(i))³⁰. It is apparent this requirement changes from time to time depending on the creation or abolition of new positions, indicating the mandatory qualification requirement is fluid rather than stagnate³¹.

3. In her oral evidence Ms Mashiah clarified that she has no direct involvement in determining what positions are subject to the mandatory forensic qualification requirement, but relies upon advice provided by the Forensic Division. Further, Ms Mashiah confirmed that the approved positions document may contain PDs that have yet to be updated, therefore there may be an incongruency between the approved positions document and a PD where the PD has not yet been updated. She referred to end of page 5 of 'HJM2' where the Director Human Resources approved the use of the list in lieu of updated PDs being completed.

85 Ms Mashiah's and Senior Sergeant Well's evidence is consistent with an email sent by Ms Mashiah to Mr Pearce on 5 August 2014 where she informed him of a review being undertaken with the Forensic Division of all PDs and that this may impact on eligibility for the FQA³². Further, she stated the PDs had yet to be finalised, but it was ascertained PD 1005 and PD 1419 (DFIO for regional WA) require a mandatory forensic requirement, but PD 1400 did not. That is, consistent with Senior Sergeant Well's evidence that he re-drafted PD 1005 in 2014 to include a mandatory forensic qualification requirement, the same requirement was not required in PD 1400, and the first version of the approved position list document contained PD 1400, but the second (and later) version of the approved position list document did not.

What, if anything, is the difference between PD 1400 and PD 1005?

86 Mr Pearce submits that, in relation to subclause 12(a)(i), greater weight should be given to the essential work-related requirement of PD 1400 and little if any relevance can be attributed to the list of approved positions with a mandatory qualification requirement.

87 I am unable to accept that submission. While the PD 1005 and PD 1400 have in their respective PD documents the same or at least very similar essential work-related requirement of commitment to forensic division training and achieving the Diploma of Public Safety within four years, it is apparent from the other content, roles and responsibilities of the positions are different.

88 Further, the evidence demonstrates that in 2014 the positions were under review, information which was conveyed to Mr Pearce in August 2014.

89 The PDs do no more than inform an employee of the roles and responsibilities of a position and indicate criteria of suitability for the position. In relation to cl 17(12) of the Agreement, the PD forms no part of the clause and no reference is made to any position as eligible for the FQA. In that sense, as stated in cl 17(12), it is a matter for the Commissioner to determine eligibility for payment of the FQA.

- 90 However, when regard is had to the PDs for PD 1005 and PD 1400 and the evidence, it is apparent there are differences between the two roles, both in form and in substance:
- the role of the work unit and investigation and forensic response between PD 1005 and PD 1400 contained in the PDs is different;
 - Ms Freegard states her primary role as a DFIO is responding to volume crime scenes and undertaking an investigation³³. She provides assistance to FFO with major crime attendances if they are unavailable or on an ad hoc basis³⁴. The differences between FIO and DFIO includes FFO attends primarily to major crime and DFIO attends to volume crime. The major difference depends on the seriousness of the crime³⁵;
 - Mr Markham states major crime is classified as homicide and sex offences. By way of example, serious crime is classified as attempted murder, wounding offences, armed robberies, large drug investigations and aggravated burglaries. By way of example, volume crime is classified as frequent offences including assaults, stealing, car theft, burglaries and robberies³⁶. DFIO role is primarily to provide forensic response to volume crime scenes³⁷. On a weekly basis, approximately, FFO operations manager will call upon him to assist with category B and C incidents and on rare occasions Category A incidents³⁸. He is aware that Mr Pearce's role is working with Category B and C incidents³⁹. In respect of this last assertion I will comment further in relation to the spreadsheet compiled by Mr Pearce;
 - Senior Sergeant Wells states officers occupying PD 1005 are mandated to investigate Category A, B, C and D crimes as required (that is, all levels of crime including volume crime)⁴⁰. Surge capacity happens infrequently and officers are tasked to undertake basic roles and not higher level roles⁴¹. Officers occupying PD 1400 investigate principally Category C and D crimes;
 - the spreadsheet compiled by Mr Pearce shows work undertaken from May 2014 to May 2016⁴². From May 2014 to May 2015 Mr Pearce completed Category A crimes (homicide) while he was employed as a FIO in FFO. After his transfer to DFIO on 20 April 2015, save for May 2015, he has not completed any Category A crimes. Further, he has not completed any Category B crimes since December 2014 (contrary to Mr Markham's evidence that Mr Pearce's role is working with Category B and C incidents)⁴³. According to Mr Pearce's spreadsheet he mainly completes one type of Category C crime, being manufacturing a prohibited drug, and Category D crimes, which for Category D crimes has been reasonably consistent from May 2014 to May 2016. This is consistent with Senior Sergeant Wells' evidence in respect of the role of the DFIOs with PD 1400.
- 91 It is not the IMC's function in this claim to review the difference between the work carried out by a FFO (PD 1005) and compare it to the work carried out by a DFIO or Mr Pearce in his role as a DFIO (PD 1400) and comment on the merits of whether PD 1400 or Mr Pearce as a DFIO ought to be eligible for the FQA. Additionally, the claim is not a vehicle for review of PDs and commentary on whether a position within forensics should be classed as eligible for the FQA along with other positions.
- 92 For this reason, it is not open to the IMC to order the Commissioner to assess PD 1400 as a position eligible for the FQA. Subclause 17(12)(b) of the Agreement provides that it is for the Commissioner to assess the field as eligible for the FQA. In this instance the Commissioner has assessed the field, being DFIO with PD 1400, as ineligible for payment of the FQA and it is not open to the IMC to assess the merits of this decision.
- 93 However, when regard is had to the evidence there is a distinction between the role under PD 1005 and the role under PD 1400 in the forensic area such that it is open to the Commissioner to assess and view each role differently.
- Can the IMC order the Commissioner to exercise his discretion in favour of Mr Pearce?
- 94 Section 83 of the Act does not enable the IMC to order the Commissioner to exercise his discretion to regarding determination and assessment for eligibility of the FQA in favour of Mr Pearce.
- 95 Section 83 of the Act merely enables the IMC to make orders where the Commissioner is found to have contravened cl 17(12) of the Agreement. The onus of proving the contravention is on Mr Pearce and he must prove the contravention on the balance of probabilities.
- 96 While I accept that until the revised PDs were formally adopted in November 2017 both PD 1005 and PD 1400 contained very similar essential forensic qualifications, it is apparent from the surrounding evidence that from approximately May 2014 it was no longer considered mandatory for PD 1400 to hold the same essential forensic qualification as PD 1005 and this information was conveyed to Mr Pearce in August 2014.
- 97 It is not open to the IMC to review the merits of the Commissioner's decision to include a mandatory forensic qualification for PD 1005 and not PD 1400. This is entirely a matter for the Commissioner.
- 98 However, given the explanation provided by Senior Sergeant Wells and Superintendent Hatch, which is in part supported by the evidence of Ms Freegard and Mr Markham, there is a difference between the complexity of work undertaken by a FIO and a metropolitan DFIO. True enough the work may overlap from time to time and work processes between the two roles may be the same. This is hardly surprising considering Sergeant Tubman's review recommended similar and consistent work processes in FFO and CFIO.
- 99 Further, as previously stated, the evidence demonstrates that in May 2014 the forensic qualification essential requirement in PD 1400 was not a mandatory requirement for the position consistent with the PDs being reviewed and updated and Mr Pearce was informed of this in August 2014. The revised PD 1400 was not formally adopted until November 2017 but, in my view, little turns on this, because the Commissioner identified since at least May 2014 those positions which were subject to mandatory forensic qualifications.

100 This may mean there are employees occupying positions within the WA Police whose qualifications exceed the role and the Commissioner may indirectly receive the benefit of this. Again, this is not a matter for the IMC.

101 For the purposes of this claim, Mr Pearce has not demonstrated to the requisite standard that a qualification at diploma level was a mandatory requirement for a metropolitan DFIO with PD 1400 for the period April 2015 to November 2017. The fact that he personally holds that qualification is not to the point.

102 The Commissioner assessed the metropolitan DFIO as ineligible to receive the FQA. True enough a metropolitan DFIO may work in the broader forensic area, but for reasons already stated it is not sufficient for Mr Pearce to say working in the forensics field or area, of itself, meets the requirement of subclause 12(b). If that were the case, then it was open for the cl 17(12) of the Agreement to provide the FQA to any employee working in the forensic area in the same way as an employee in Internal Affairs Unit or the Tactical Response Group.

103 While Mr Pearce may attend majority Category C crimes in addition to Category D crimes, it is apparent from his evidence that he does not attend Category A and B crimes, and, in particular, the attendance at Category A crimes is a significant distinction in respect of PD 1005 and its eligibility for the FQA.

104 The Commissioner determined that PD 1400 was not within a field in which he assessed the role to be eligible for the FQA, notwithstanding the role is within the forensic area.

105 Again the Commissioner's retains the discretion of assessment for eligibility of the FQA.

FQA – Guidelines of Acceptable Practice

106 The FQA Guidelines⁴⁴ updated in March 2015 outlines the process for applications for the FQA. Four business areas are identified where if an applicant holds a position in one of five specialised forensic fields he or she is eligible to apply [my emphasis] for the FQA (the five areas being firearms investigations, crime scene investigation, fingerprint analysis, blood pattern analysis and technology crime)⁴⁵.

107 One of the business areas is CFIO, but the five specialised forensic fields does not incorporate a DFIO position and Crime Scene Investigation is within FFO and the positions occupied are referable to a FIO (PD 1005) (amongst others)⁴⁶.

108 Mr Pearce says that he should continue to be eligible for the FQA because he has transferred to, or within, an approved business area and it is a mandatory requirement for PD 1400 to hold a forensic qualification in the PD⁴⁷.

109 There are four reasons why Mr Pearce is not eligible for continuance of the FQA under the Guidelines:

1. employees continue to receive the FQA while they remain in the position they held at the time they were assessed to be eligible, thereafter if transferred to another position they may no longer be eligible. Mr Pearce was assessed as eligible for payment of the FQA while a FIO in FFO, but when he transferred to CFIO as a DFIO in April 2015 (PD 1400) he was no longer eligible to for payment of the FQA;
2. the eligibility to apply for payment of the FQA is not limited to the employee's approved business area but also includes positions that specialise in one or more identified forensic fields, as set out on page 179;
3. for reasons already stated as at May 2014 and April 2015 PD 1400 did not have a mandatory forensic qualification requirement and Mr Pearce was aware of this in August 2014; and
4. Mr Pearce submitted a grievance in which he detailed, amongst other things, why he considered he was eligible for the FQA. The grievance was processed through the chain of command to the Commissioner, and he did not uphold the grievance⁴⁸.

110 Therefore, Mr Pearce is not entitled to continuance of payment of the FQA under the FQA Guidelines and submitted a request for the payment of the FQA to continue, broadly speaking, on the basis that he merits continued payment in the DFIO position. This request was denied.

111 For all of the reasons, and notwithstanding Mr Pearce's qualification, experience and skill, there was nothing manifestly unreasonable in the Commissioner's assessment and determination of Mr Pearce's eligibility for payment of the FQA.

Conclusion

112 Mr Pearce was transferred from FFO to CFIO according to the WA Police's tenure policy. The WA Police tenure policy is not under review in this claim. He was clearly upset by this.

113 The resultant effect is the position Mr Pearce transferred to was not a position in the field in which the Commissioner assessed to be eligible for payment of the FQA.

114 This was the case even though Mr Pearce had a relevant forensic qualification, but not for a position which had been assessed as not requiring the forensic qualification as a mandatory requirement for the position.

115 Mr Pearce requested reconsideration of payment of the FQA, which was assessed as part of the grievance process and the grievance was not upheld.

116 It is not for the IMC, pursuant to an application under s 83 of the Act, to consider the merits of the different PDs within the WA Police or whether it would grant Mr Pearce's application for payment of the FQA.

117 The Commissioner has not contravened cl 17(12) of the Agreement in ceasing to pay the FQA to Mr Pearce upon his transfer as a FIO in FFO to a DFIO in CFIO. The IMC cannot interfere with the Commissioner's decision provided the factors considered were rationally and logically linked to the determination and assessment for eligibility of the FQA. There is nothing in the evidence which demonstrates the Commissioner considered extraneous material or, to the extent relevant, inconsistently applied cl 17(12) of the Agreement. To that extent, the Commissioner has acted reasonably in exercising his discretion.

118 For completion, s 83 of the Act does not empower the IMC to order reinstatement or resumption of the FQA.

119 If the Commissioner had failed to exercise his discretion in accordance with cl 17(12) of the Agreement, then at best the IMC could order the Commissioner to exercise his discretion in accordance with the terms of the clause and may impose a penalty under s 83(4)(a) of the Act. In that sense, s 83A(1) of the Act does not apply because it is not open to find that if the Commissioner had exercised his discretion in accordance with cl 17(12) of the Agreement, Mr Pearce would be entitled to payment of the FQA.

120 Accordingly, Mr Pearce has not made out his claim in which he alleges the Commissioner contravened cl 17(12) of the Agreement and further the IMC does not have the power under s 83 of the Act to make the orders sought by Mr Pearce.

121 The claim is dismissed.

D. SCADDAN

INDUSTRIAL MAGISTRATE

¹ Affidavit of Alexander Marius Wells sworn 20 March 2018 at [38] and [39] (exhibit 7)

² Affidavit of Michael William Pearce sworn 27 February 2018 (exhibit 1)

³ Affidavit of Deborah Amelia Freegard sworn 27 February 2018 at [6] and [31] (exhibit 5)

⁴ Exhibit 5 at [30]

⁵ Exhibit 7 at [67] to [72]

⁶ Exhibit 5 at [32]

⁷ Affidavit of Peter Geoffrey Hatch sworn 7 March 2018 at [35] (exhibit 3)

⁸ Affidavit of Helen Joan Mashiah sworn & march 2018 at [34] in relation to the mandatory forensic qualification requirement (exhibit 4)

⁹ Affidavit of Craig Markham affirmed 23 February 2018 (exhibit 6)

¹⁰ Exhibit 7 at 'AMW1'

¹¹ Exhibit 7 at 'AMW1'

¹² Exhibit 7 at 'AMW1'

¹³ Exhibit 7 at [17] to [21]

¹⁴ Exhibit 7 at 'AMW1'

¹⁵ Exhibit 7 at [27] and [28]

¹⁶ Exhibit 7 at 'AMW1'

¹⁷ Exhibit 7 at [22] to [25]

¹⁸ Exhibit 7 at [33] to [36]

¹⁹ Exhibit 1 at [87] to [89]

²⁰ Exhibit 6 at [17] and [18]

²¹ Exhibit 1 at 'MP8'

²² Exhibit 1 at 'MP18'

²³ Respondent's bundle of documents at pages 234 – 236 (exhibit 2) and exhibit 4 at [22]

²⁴ Exhibit 7 at [61] to [65]

²⁵ Referred to in exhibit 7 at [62]

²⁶ Exhibit 1 at 'MP51' (cf exhibit 4 at [19] to [21] where Ms Mashiah explains how and when PD 1005 and PD 1400 were revised)

²⁷ Exhibit 4 at [28]

²⁸ Exhibit 4 at 'HJM1'

²⁹ Exhibit 4 at 'HJM2'

³⁰ Exhibit 4 at [31] to [33]

³¹ Exhibit 4 at [33]

³² Exhibit 2 at pages 182 and 183

³³ Exhibit 5 at [14]

³⁴ Exhibit 5 at [18]

³⁵ Exhibit 5 at [31]

³⁶ Exhibit 6 at [9]

³⁷ Exhibit 6 at [13]

38. Exhibit 6 at [17]
 39. Exhibit 6 at [24]
 40. Exhibit 7 at [46]
 41. Exhibit 7 at [69]
 42. Exhibit 1 (second affidavit sworn on 1 June 2018) at 'MP19'
 43. Exhibit 1 at 'MP19'
 44. Exhibit 2 – pages 179 to 181
 45. See also exhibit 1 at 'MP 16', which also refers to PDs being updated
 46. Exhibit 3 at [38] and exhibit 7 at [20], [21], [22] and [28]
 47. Exhibit 2 at page 181
 48. Exhibit 1 at 'MP 15'

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2018 WAIRC 00418

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	RYAN DUNK	APPLICANT
	-v-	
	PHIL REITANO - F AND F CONCRETE ABN 86 087 899 505	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 13 JULY 2018	
FILE NO/S	B 153 OF 2017	
CITATION NO.	2018 WAIRC 00418	
<hr/>		
Result	Discontinued	
Representation		
Applicant	In person	
Respondent	In person	

Order

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

THAT the application be and is hereby discontinued.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00306

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	DEAN EVENSEN	APPLICANT
	-v-	
	LIVE CHURCH INC	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	MONDAY, 14 MAY 2018	
FILE NO.	U 22 OF 2018	
CITATION NO.	2018 WAIRC 00306	

Result	Direction issued
Representation	
Applicant	Mr D Smart of counsel
Respondent	Mr S Heathcote of counsel

Direction

HAVING heard Mr D Smart of counsel on behalf of the applicant and Mr S Heathcote of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the applicant file and serve any further and better particulars of claim by 21 May 2018.
- (2) THAT the respondent file and serve any further and better particulars of answer by 28 May 2018.
- (3) THAT each party shall give an informal discovery by serving its list of documents by 11 June 2018.
- (4) THAT inspection of documents shall be completed by 18 June 2018.
- (5) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.
- (6) THAT the matter be listed for hearing for five days on a date to be fixed.
- (7) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.**2018 WAIRC 00403**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DEAN EVENSEN	APPLICANT
	-v-	
	LIVE CHURCH INC	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	TUESDAY, 10 JULY 2018	
FILE NO/S	U 22 OF 2018	
CITATION NO.	2018 WAIRC 00403	

Result	Discontinued by leave
Representation	
Applicant	Mr D Smart of counsel
Respondent	Mr S Heathcote of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00676

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2018 WAIRC 00676
CORAM : COMMISSIONER D J MATTHEWS
HEARD : THURSDAY, 5 JULY 2018
DELIVERED : TUESDAY, 31 JULY 2018
FILE NO. : U 40 OF 2018
BETWEEN : TYSON JAMES HAYTER
 Applicant
 AND
 DJ & PN BUTCHER T/A ECLIPSE DRIVING SCHOOL
 Respondent

Catchwords : Industrial law (WA) – Unfair dismissal claim – Complicated background but applicant ultimately dismissed for leaving employer's business unattended – In all of the circumstances dismissal not unfair
Legislation : Nil
Result : Application dismissed
Representation:
Applicant : In person
Respondent : Mr D Butcher and with him Mrs P Butcher

Reasons for Decision

- 1 The respondents, a husband and wife team, run a small business which matches customers with driving instructors and raises its revenue by payments made to it by the instructors.
- 2 Mrs Patricia Butcher is the mother of the applicant.
- 3 From time to time the respondents employed the applicant to assist in office-based administrative tasks. The applicant demonstrated that he could be quite effective in that role. However, a range of issues produced an outcome where that level of performance, and the applicant's employment with the respondents, was sporadic in nature.
- 4 The period of employment relevant here commenced in November 2017. The applicant moved into the home of the respondents around this time. The applicant was offered employment because his mother was suffering from multiple sclerosis and it was thought the applicant may be able to assist her with her administrative tasks in the business.
- 5 The respondents were hesitant to re-employ the applicant because of his track record but took a chance on him.
- 6 Initially, the applicant performed well but a few problems emerged with the applicant not being ready for work on occasions and also with the applicant's personal habits which put a strain on domestic relations and, inevitably, given that the applicant was living and working in the respondents' house, his employment.
- 7 By mid-February the strain on domestic relations had become too much for Mr Butcher and he sent a text to the applicant on 17 February 2018 to the effect that the applicant would have to move out, but that his employment was "safe" if the applicant wanted it to continue.
- 8 Things took a dramatic turn for the worse, however, on 18 February 2018 when Mr Butcher assaulted the applicant. This led to criminal charges and bail conditions which had the result that Mr Butcher, rather than the applicant, moved out of the house.
- 9 The applicant gave evidence that he did not expect his employment to continue after the incident on 18 February 2018. Mr Butcher gave evidence that he regretted what happened on 18 February 2018 but that "after that obviously [the applicant and himself] couldn't work together".
- 10 Nonetheless an employment relationship of sorts continued. Although the applicant did no work he continued to be paid wages by the respondent. The applicant started looking for alternative accommodation and Mrs Butcher represented to real estate agencies through which the applicant was trying to obtain that accommodation that the applicant was employed and there was the likelihood of his employment becoming full-time in the near future.
- 11 Mr Butcher was aware wages were being paid to the applicant and indeed he says the business was assisting in paying various costs associated with the applicant moving out of the house Mr Butcher owned with Mrs Butcher. However, Mr Butcher says that he had "no idea" about any plan that the applicant would continue to work in the business and that the evidence he heard from the applicant about that was a "surprise".
- 12 It is unclear exactly what was going on with the applicant's employment at this time. The applicant said he did not expect to continue in employment after 18 February 2018. Mr Butcher thought it "obvious" that he and the applicant could not work together after that date.

- 13 It may be that the applicant continued to be paid and that Mrs Butcher fostered the belief that he would continue in employment to assist the applicant in obtaining rental accommodation or because she thought she could later talk Mr Butcher into this occurring. It is clear that, as Mrs Butcher said in evidence, her actions after 18 February 2018 were “50 per cent mother, 50 per cent business”.
- 14 Ultimately, it does not matter what the plans for the future were because the employment relationship clearly continued, as evidenced by the payment of wages to the applicant throughout this period, and because that relationship ended, and fairly so, because of a supervening event.
- 15 On 12 March 2018 Mrs Butcher planned to go on a rare social outing with friends. She suggested, and Mr Butcher agreed, that the applicant should cover her absence by being in the home office for the duration of that outing.
- 16 Here was the applicant’s chance to shine. Against all the odds, and indeed his own expectations, he had continued to be paid and remained in an employment relationship with the respondents and was now being given an opportunity to show he could make it work.
- 17 The applicant failed dismally. At around 11.00 am on 12 March 2018 the applicant abandoned his post. Mr Butcher then started receiving calls to the effect that the office was unstaffed. He called Mrs Butcher about it. Mrs Butcher’s outing was ruined.
- 18 The applicant gave evidence that he had to attend a scheduled appointment on 12 March 2018 and that Mrs Butcher knew he would be absent from the office for a period of time. Mrs Butcher says she told the applicant “I won’t be back until 4 o’clock” and that until then the applicant should “stay here”, meaning at home covering her absence. Mrs Butcher says she was not made aware beforehand that the applicant would be leaving before 4.00 pm or at the time the applicant did leave, which was around 11.00 am.
- 19 I believe Mrs Butcher. Given that she would have ordinarily been at home all day taking calls and that she had arranged for the applicant to perform her role on that day, it is inconceivable that she knew that the applicant would be absent for a time during that day. It is even more inconceivable that she would have left the applicant in charge of the office knowing that he would be absent given the background of problems with the applicant’s employment which she knew were wearing her husband’s patience thin.
- 20 Mrs Butcher fully expected the applicant to be at home all day and so did Mr Butcher.
- 21 The applicant abandoning his post for a period of time without telling anyone, and without giving them the opportunity to make alternative arrangements, was an act, in all of the circumstances, which shows a complete lack of insight and, it must be said, breathtaking arrogance. At the hearing the applicant alleged that Mrs Butcher knew in advance that it would be happening and attempted to lay blame at her feet by pointing to her lack of familiarity with the break and “roster change notification” provision of an Award. This only adds to my unfavourable impression of him. I find, agreeing with Mr Butcher, that the applicant was only ever employed, and indeed indulged, because he was Mrs Butcher’s son. For the applicant to then, at the hearing, cross-examine Mrs Butcher to effect that he was not treated in accordance with Award provisions, as though he was an employee whom the respondent had held to Award standards, was extremely unimpressive.
- 22 The applicant was given one final chance by the respondents. He blew it in spectacular fashion.
- 23 The respondents were perfectly entitled to bring the applicant’s employment to an end at this time. The applicant’s work history with the respondent was chequered and complex. It had interwoven through it domestic and personal issues that the respondents had been very patient and generous in disentangling to the extent they could to maintain the applicant’s employment. However, by 12 March 2018, the applicant had clearly run out of chances. There is no way his employment could have feasibly continued beyond that date. That the respondents paid the applicant a further two weeks of pay by way of notice is to their credit.
- 24 The ending of the applicant’s employment for abandoning his post on 12 March 2018 with payment of two weeks’ notice was not in any way unfair. The application is dismissed.

2018 WAIRC 00677

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 TYSON JAMES HAYTER

APPLICANT

-v-

DJ & PN BUTCHER T/A ECLIPSE DRIVING SCHOOL

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE TUESDAY, 31 JULY 2018
FILE NO/S U 40 OF 2018
CITATION NO. 2018 WAIRC 00677

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr D Butcher and with him Mrs P Butcher

Order

HAVING HEARD Mr T Hayter on his own behalf and Mr D Butcher and with him Mrs P Butcher on behalf of the respondent the Commission pursuant to the power conferred under the *Industrial Relations Act 1979* hereby orders that the application be and is hereby dismissed.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2018 WAIRC 00672

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2018 WAIRC 00672
CORAM	:	COMMISSIONER D J MATTHEWS
HEARD	:	WEDNESDAY, 11 JULY 2018, THURSDAY, 12 JULY 2018
DELIVERED	:	FRIDAY, 27 JULY 2018
FILE NO.	:	U 23 OF 2018
BETWEEN	:	SARAH MURRAY
		Applicant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
		Respondent

CatchWords	:	Unfair dismissal claim – “Job share” arrangement – Applicant’s employment was from year to year – No ongoing employment – Employment ended without action from respondent – No dismissal
Legislation	:	(Nil)
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	Mr S Murray as agent
Respondent	:	Mr J Carroll of counsel and with him Ms N Sanders
Solicitors:		
Respondent	:	State Solicitor's Office

Reasons for Decision

- 1 Mr Stephen Murray was employed as a permanent full-time teacher at Albany Primary School.
- 2 There is a system within the respondent’s organisation that a full-time teacher can request to work for less than full-time without surrendering their permanent full-time status.
- 3 For many years now Mr Murray has, normally at or soon after the commencement of a school year, made a request to work part-time for that school year. Such a request by him has invariably been granted. The matter of employing someone to fill the gap left by Mr Murray not working full-time has then arisen. From 2005 until the beginning of 2018 the relevant administrator at Albany Primary School had agreed to employ Mrs Murray, Mr Murray’s wife, to fill the gap.
- 4 The aspects to emphasise from the above brief facts are that the agreements that Mr Murray work part-time were end-dated with the end date typically being the end of the school year. Mr Murray’s employment as a full-time permanent employee never changed. Once the period for which there was agreement that he would work part-time ended Mr Murray would, as is inarguably appropriate, automatically revert to his full-time status. Mr Murray would then have to make a new request in or for the new school year if he wished his workload to again be less than full-time. Only if he made such a request would the need to consider employing someone to make up his full-time load arise.

- 5 It is true that in reality it was generally known at Albany Primary School that Mr Murray would ask to work part-time, with the expectation that the request would be granted, and that his wife would be employed by the school to fill the gap.
- 6 That is, the “stepped” process that I have described – decision to request part-time employment, request to work part-time, approval of request, consideration of who to employ to fill the gap, employment of Mrs Murray – may not have seemed to have been occurring to those involved but those steps were occurring, as a matter of fact, practice and law.
- 7 Mrs Murray says she was dismissed, that is sent away from her employment, because the above “steps” occurred in 2018 but the last step, one which had occurred for the previous 13 years, did not occur. That is, Mr Murray decided to work part-time, had his request to do so approved, the school considered who to appoint to fill the gap but did not appoint Mrs Murray.
- 8 Despite the surprise and consternation which the appointment of someone else has caused Mr and Mrs Murray, and despite the admirable job Mr Murray has done in representing Mrs Murray’s interests in the hearing of this matter, Mrs Murray’s argument is fundamentally flawed.
- 9 Her employment with the respondent ended when the outer limit of the agreement between Mr Murray and Albany Primary School that he work part-time ended, that is the end of the school year in 2017. She was not dismissed or sent away from her employment on this date. This was simply the end date of the period nominated by Mr Murray as that for which he wished to work part-time and the end date of the period in relation to which Mr Murray’s request had been approved by Albany Primary School.
- 10 The respondent took no action in relation to Mrs Murray. Her employment simply ended.
- 11 That Mr Murray was approved to work part-time in 2018 and that Mrs Murray was not employed to fill the gap is, in the context of an unfair dismissal claim, irrelevant.
- 12 There is no need for a wider enquiry in this matter into such matters as whether Mrs Murray had an expectation of further work in 2018 and beyond. Even if I were to turn to consider such matters, which were relied upon heavily by Mrs Murray, I would have found that even if she had such an expectation, and that it was understandable given the long history shown by the evidence, it could not possibly have been objectively reasonable. Too many things actually happened before she was employed in each year, even if Mrs Murray did not, and did not need to, turn her mind to them, for it to be said that it could reasonably be expected by her that they would happen every year.
- 13 The application will be dismissed.
- 14 I ordered at the hearing that the name of the respondent be amended and that will be reflected in the orders made herein.

2018 WAIRC 00670

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	SARAH MURRAY	APPLICANT
	-v-	
	DEPARTMENT OF EDUCATION WESTERN AUSTRALIA	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	FRIDAY, 27 JULY 2018	
FILE NO/S	U 23 OF 2018	
CITATION NO.	2018 WAIRC 00670	
Result	Application dismissed	
Representation		
Applicant	Mr S Murray as agent	
Respondent	Mr J Carroll of counsel and with him Ms N Sanders	

Order

HAVING HEARD Mr S Murray as agent for the applicant and Mr J Carroll of counsel and with him Ms N Sanders for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

- (1) THAT the respondent's name be amended to become 'Director General, Department of Education'.
- (2) THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2018 WAIRC 00417

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 PHILIPPA PORTEUS **APPLICANT**

-v-
 NORTH METROPOLITAN HEALTH SERVICES **RESPONDENT**

CORAM SENIOR COMMISSIONER S J KENNER
DATE FRIDAY, 13 JULY 2018
FILE NO/S U 32 OF 2018
CITATION NO. 2018 WAIRC 00417

Result Discontinued
Representation
Applicant In person
Respondent Ms J Symons and with her Ms R Richardson and Ms A Mann

Order

HAVING heard the applicant on her own behalf and Ms J Symons and with her Ms R Richardson and Ms A Mann on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –
 THAT the application be and is hereby discontinued.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.**2018 WAIRC 00663****WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2018 WAIRC 00663
CORAM : COMMISSIONER D J MATTHEWS
HEARD : WEDNESDAY, 9 MAY 2018, THURSDAY, 10 MAY 2018, FRIDAY, 15 JUNE 2018
DELIVERED : MONDAY, 23 JULY 2018
FILE NO. : U 145 OF 2017
BETWEEN : MS SHERYL REARDON
 Applicant
 AND
 MR GAETANO ANTHONY LAGANA
 STRATTON PARK PHARMACY
 Respondent

CatchWords : Industrial law (WA) – Claim of unfair dismissal – Application accepted out of time – Dismissal by small business – Denial of procedural fairness – Applicant unfairly dismissed – Reinstatement impracticable – Applicant would have been dismissed anyway – Clash of personalities in a small business – Applicant destroyed trust and confidence – Compensation for time it would have taken to dismiss fairly

Legislation : *Industrial Relations Act 1979* s 23A(8), s 29(3)

Result : Application upheld in part

Representation:

Applicant : Mr D Rafferty, of counsel

Respondent : Mr R Jones, as agent

Reasons for Decision

- 1 As at 13 October 2017 the applicant had been employed by the respondent as a Pharmacy Assistant for 14 and a half years. On that date the respondent handed the applicant a letter terminating her employment. The letter said that the applicant was "no longer required to attend the workplace" but concluded "in view of your service I am prepared to provide you with the equivalent of 4 weeks pay."
- 2 Although there had been some problems in the workplace involving the applicant, and at this time I use the term "involving" in the most neutral sense possible, she had not been warned at any time that her employment was in jeopardy nor had the matters referred to in the letter been properly investigated by the respondent, or at least they had not been investigated in any way which involved getting the applicant's side of the story with her knowing them to have, potentially, an effect on her employment.
- 3 To dismiss an employee who has given over 14 years' service in this way was, in my view, plainly unfair.
- 4 The applicant may have been a casual employee but she was an employee of long standing and an employee who had developed a reasonable expectation of ongoing employment, unless that employment ended for good reason and after a proper process. An employer cannot, without warning and without a process involving hearing the employee's side of the story, dismiss an employee in such circumstances. Even if there were, in the employer's mind, grounds for summary dismissal (and I find that none of the matters upon which the respondent relied fell into such a category) there was still a need for some basic process preceding dismissal.
- 5 Here the respondent simply formulated a basis for dismissal in his own mind and, without warning the applicant about it or even sharing it with her, dismissed her.
- 6 This, in my view, is unfair and I have no hesitation in finding that the applicant was dismissed and that the dismissal was unfair.
- 7 This leaves the question of remedy. The applicant says that she intended to work at the respondent's business for several years more until retirement. She also claims that, if the respondent had conducted himself fairly and properly in relation to her, there is no reason why this would not have occurred.
- 8 The applicant does not wish to be reinstated or re-employed by the respondent and asks me to accept that those options are impracticable and order that she be paid compensation.
- 9 The applicant says that she has attempted to mitigate her loss without success. The applicant says that the compensation to be paid to her would, but for section 23A(8) *Industrial Relations Act 1979*, be more than six months' remuneration and, taking into account that subsection, she seeks six months' remuneration.
- 10 I find the applicant's argument that her employment could not have, and would not have, been brought fairly to an end within six months of the date upon which she was dismissed to be, taking into account all of the circumstances, unrealistic and ultimately flawed.
- 11 The respondent ran two very small businesses, the Stratton Park Pharmacy, at which the applicant worked, and the Amelia Heights Pharmacy. At the Stratton Park Pharmacy there were three people on site at any given time and the respondent had, at any given time, six employees available to ensure this happened.
- 12 Problems had arisen in relation to interpersonal relationships at the Stratton Park Pharmacy. Reza Azhdari, one of the pharmacists at the Stratton Park Pharmacy, and the applicant did not get along.
- 13 This had been the case since Mr Azhdari commenced working at the Stratton Park Pharmacy in 2011. The applicant said that after this the pharmacy "was not a happy place" because of changes Mr Azhdari introduced and that from when he commenced "there was no friendship or laughing or anything like that." The applicant said she did not like this.
- 14 My assessment of the evidence I heard leads me to conclude that there ended up being a serious personality clash between the applicant and Mr Azhdari.
- 15 My observations of the applicant and Mr Azhdari in the witness box reinforce that conclusion.
- 16 Both the applicant and Mr Azhdari have very strong egos, in the sense that term is in common usage.
- 17 In the applicant's case this manifested itself in generally good ways for an employer, such as having a take charge attitude, taking her role seriously and being able to deal with people confidently. On the other hand, it meant the applicant did not suffer fools gladly and was prone to expressing herself too directly, or even rudely, at times. An example of this is when she escalated a disagreement with another Pharmacy Assistant, Ms Phuong Anne Nguyen, by calling her a "psycho".
- 18 In Mr Azhdari's case his strong ego manifested itself in different ways. Mr Azhdari was a remote figure in the Stratton Park Pharmacy, who did not expect or want to deal with the minutiae of running a small business. He was not interested in, or able to create, a "fun" environment in the workplace through things like humour, small talk and socialising. He was a poor listener whose obvious preference was to dispense medicine and hope that other aspects of the business took care of themselves, becoming frustrated when he had to intervene.
- 19 The applicant appears to have come across to Mr Azhdari as pushy and having an overblown sense of self-importance. Mr Azhdari appears to have come across to the applicant as cold, severe and uncommunicative.
- 20 By the middle of 2017 these differences in style and personality were causing real problems, although the respondent said the differences had been a source of friction for a long time.
- 21 There had been words between the applicant and Mr Azhdari in March 2017 relating to, according to the applicant, Mr Azhdari directing another Pharmacy Assistant to wash an external window on a hot day.

- 22 In the aftermath of that incident the applicant played a role in sending Mr Azhdari a "message" relevant to the dispute by a page from the applicable Award being placed where Mr Azhdari was bound to see it without telling him. The applicant then denied involvement when questioned about it by him.
- 23 Also in March 2017 there were words between the two after the respondent instructed Mr Azhdari to calculate the applicant's pay in a slightly different way, resulting in a small loss to her, with the applicant reacting angrily to Mr Azhdari.
- 24 In April 2017 the applicant challenged Mr Azhdari in relation to a job advertisement that had been brought to her attention saying "Who's getting fired?" when she knew nothing about the circumstances which had prompted the advertisement's placement.
- 25 In June 2017 there was a further, and heated, clash between the two relating to Mr Azhdari's intervention in an argument between the applicant and Phuong Anne Nguyen.
- 26 The June incident gave rise to a formal letter of complaint from the applicant and then, on the respondent's instructions, an investigation, conducted by a human resource consultant, which pitted the applicant's version of events against that of Mr Azhdari (and, it would seem, Ms Nguyen).
- 27 The applicant herself gave evidence that by this stage the work environment at the Stratton Park Pharmacy was "toxic."
- 28 In July 2017 the applicant took time on a day off to go to the respondent with a catalogue of mistakes she said Mr Azhdari had made, most of which, I should note, Mr Azhdari denies having made.
- 29 I have no hesitation in agreeing with the applicant when she describes the work environment at the Stratton Park Pharmacy when she and Mr Azhdari were there as toxic.
- 30 The respondent was well aware of the unhappy state of affairs at his business.
- 31 The problem was such that the respondent evidently decided he had to do something about it. As a first measure the respondent separated the applicant and Mr Azhdari as much as he could. Neither worked full time so this could be achieved up to a point. The respondent changed the roster so that whereas previously the applicant and Mr Azhdari had worked together on two days, they ended up working together on only one day.
- 32 That was an understandable approach so far as it goes but it was by no means a complete solution. Every day of operation was important to this business, which was not a spectacularly successful one, and even one day where two important staff members were on bad terms, as these two inarguably were, was one day too many.
- 33 The respondent decided that he would try to remove the applicant entirely from contact with Mr Azhdari by exploring whether she would be prepared to do some hours at his other pharmacy, the Amelia Heights Pharmacy. He communicated this idea to the applicant.
- 34 It is from this point on that the applicant's actions bring her unstuck in relation to her assertion that she should be awarded six month's compensation for being unfairly dismissed.
- 35 The applicant gave evidence that she did not believe the respondent was serious about giving her hours at the Amelia Park Pharmacy, and, for this reason, when he asked her "would you like to work at Amelia Heights?" she simply answered "No".
- 36 Despite this the applicant then decided to investigate the respondent's idea about her doing some work at the Amelia Heights Pharmacy, and his sincerity in raising this as a solution to the problems at the Stratton Park Pharmacy. She did not explain in evidence why she would do such a thing given that she had told the respondent she did not want to work at the Amelia Heights Pharmacy.
- 37 The applicant rang the Amelia Heights Pharmacy and spoke to "Vivian" who had "been there for years" and asked her whether any hours were available there. Vivian responded "No, not unless I'm getting fired and don't know about it."
- 38 The applicant's investigation reinforced in her mind her initial thought that the respondent was not being honest or sincere when he raised the possibility of her working at the Amelia Heights Pharmacy.
- 39 This shows, to my mind, and resoundingly so, that the necessary trust which an employee must have in their employer for an employment relationship had broken down and that the applicant had become too wilful and combative in her dealings with her boss for her to have a long term future in his employment.
- 40 The applicant had said she was not interested in working at the Amelia Heights Pharmacy when the respondent asked her about it. Nothing of any moment happened immediately afterwards in terms of her employment. Despite this she decided to launch an enquiry into her employer's honesty and sincerity.
- 41 The applicant had no absolutely no business going behind the respondent's back in the way she did by calling the Amelia Heights Pharmacy.
- 42 Such a call could easily have caused problems at that pharmacy. So much is clear from the evident direction in which Vivian's mind wandered having been asked the question even if the applicant thought it was in jest.
- 43 Further, the applicant had no basis whatever to come to the conclusion that her employer was lying to her on what she had been told.
- 44 The applicant could not know the mind of her employer and what he had planned. Her actions show that she had lost confidence in the respondent's honesty and that she was completely unconcerned about the consequences for his business of her trying to establish this.
- 45 The applicant also tellingly demonstrated her wilfulness and combative attitude around this time in another phone call to the Amelia Heights Pharmacy.

- 46 The applicant was told by the respondent that she would no longer be working Saturdays and that she, and another Pharmacy Assistant at Stratton Park Pharmacy, were being replaced by a single person on that day.
- 47 The applicant rang the Amelia Heights Pharmacy, where that person worked, and was told by the person she spoke to, Danielle Schwartz, a Pharmacy Assistant at the Amelia Heights Pharmacy, that Cliff Roberts, a Pharmacist at the Amelia Heights Pharmacy, had directed that the new person come to the Stratton Park Pharmacy on a Friday, when the applicant worked, to be trained prior to her commencing on Saturday.
- 48 The applicant gave evidence that she said in response "Well, Cliff can get stuffed". She said this because she considered it "a bit rude that I have to train her if she's taking my hours."
- 49 The applicant told me that when she said those words she was joking and that she had also said in that conversation, and maintained, that the respondent was the boss and could, in relation to staffing arrangements and directions to train, do as he pleased.
- 50 In terms of the applicant's work hours being changed this had happened several times over the course of her employment. The applicant had also seen it happen to other Pharmacy Assistants. It was an unusual but by no means unprecedented event.
- 51 If part of the applicant's case was that I should read something relevant to this matter into the respondent's decision to turn the two Saturday shifts into one shift and to give it to another person she has failed in this endeavour.
- 52 The respondent gave evidence that he made the decision for financial reasons and in the future interests of the business as the new person was studying pharmacy. I accept his explanation. It was not undermined by cross-examination of him. Further, changes to hours for one reason or another was by no means unheard of in the respondent's businesses. The respondent gave a good reason for the change on this occasion.
- 53 It was inappropriate for the applicant to say what she did to Ms Schwarzer because it showed a lack of respect for Mr Roberts, regardless of whether the applicant and Mr Roberts were on friendly terms, and because it did indicate a lack of willingness to assist the respondent in relation to matters the applicant accepts were within his prerogative.
- 54 The phone calls were clearly on the respondent's mind when he dismissed the applicant.
- 55 The first paragraph of his letter of dismissal, as elaborated upon by the respondent in his evidence, reference them.
- 56 I consider that the respondent could have, as at 13 October 2017, put to the applicant that she had misconducted herself by:
- (1) going behind his back by ringing the Amelia Heights Pharmacy to investigate his plan to give her hours at that business;
 - (2) by ringing the Amelia Heights Pharmacy about the new employee and expressing herself in the way she did to Ms Schwarzer.
- 57 I consider that had he done so, and had he gathered all the relevant evidence including comment from the applicant, the respondent could have, and would have, decided to dismiss her at that point and fairly so.
- 58 I consider that the respondent would have reasonably found that the applicant responded completely inappropriately by independently investigating his plan to give her hours at the Amelia Heights Pharmacy and did so in a way that revealed she had no confidence in, or respect for, him and his role as her employer and a small business owner.
- 59 I consider also that the respondent would have reasonably found that the contents of the call to Ms Schwartz were completely inappropriate in terms of expression and content and that the defence that the comment about Mr Roberts was a "joke" to be unconvincing and no good excuse.
- 60 That is, I consider the phone calls constitute evidence that the applicant had lost trust in the respondent and was now behaving without regard to his proper interests. That is a breakdown in the employment relationship that could reasonably occasion an employer bringing it to an end.
- 61 I disagree with the applicant's submission that the appropriate response to her conduct could not have gone beyond counselling and a warning. While not enough to result in summary dismissal the conduct was serious enough to warrant dismissal. It showed a sufficiently great lack of respect for the respondent and his legitimate business interests, in the context of a tiny business, to put the employment relationship in jeopardy and for a decision to bring it to an end by the respondent to be a reasonable one.
- 62 What is more, I consider that the respondent would have reasonably weighed the phone calls in a balance which also had in it the interpersonal problems between the applicant and other staff at the Stratton Park Pharmacy.
- 63 I consider that the applicant's more recent behaviour would reasonably have tipped the balance in favour of a finding by the respondent that the applicant was at least a big part of the problems at that pharmacy as others, if not a greater part of the problems than others. Here were examples of combativeness and disruptiveness directly toward the respondent. He could have reasonably concluded that this attitude may have been on display at the Stratton Park Pharmacy.
- 64 The problems at the Stratton Park Pharmacy would have made a decision by the respondent to dismiss the applicant after enquiry into the October conduct even more understandable and reasonable.
- 65 The applicant asserts, I think, that the respondent should have, in relation to what happened at the Stratton Park Pharmacy, investigated all of the incidents and exchanges that I heard evidence about and carefully apportioned blame and that, if he had done so as the incidents and exchanges arose, he would have found that Mr Adzhari was mainly at fault.
- 66 Alternatively, the applicant asserts that had the respondent investigated the problems early and well he would have, even without apportioning blame, determined that the problems at the Stratton Park Pharmacy were not so great, at an early stage at least, that they could not have been successfully managed. The applicant says the respondent should have dealt with the problems earlier and better and if he had done so none of what happened later would have occurred.

- 67 Again alternatively, the applicant asserts that even if the respondent did conclude that there were problems with the applicant's conduct he should have been warned her about a continuation and given her a chance to show she could work consistently with the requirements of an ongoing employment relationship.
- 68 The applicant says that the failure to do any of the above makes her dismissal unfair.
- 69 I disagree with all of these assertions.
- 70 The Stratton Park Pharmacy was a tiny business, with three employees present on the premises at any one time. The respondent was entitled to employ people and hope that they could work together productively and harmoniously. On the basis of what he knew about relationships at the pharmacy before he received the applicant's formal letter of complaint in June 2017 he was entitled to think that the problems at the pharmacy could work themselves out without much intervention on his part.
- 71 When he got the letter of complaint from the applicant he did come to the conclusion that the problem may be more serious than he had thought and so, to his credit given the size of his business, he had that incident investigated.
- 72 It is clear that whatever emerged from the investigation it did not reveal outrageous conduct on the part of anyone which required disciplinary action. I cannot see any relevant omission on the part of the respondent in response to the investigation.
- 73 The respondent was, however, entitled to come to the view on the basis of all he knew at this stage that Mr Adzhari and the applicant simply did not get along and that "they would never work out their differences". I have to say that based on my observations of the two I agree entirely with the respondent's opinion to this effect given in evidence.
- 74 There was no relevant failure on the respondent's part to intervene earlier or to take different action or to arrange mediation or anything like that. There was simply a personality clash between Mr Azhdari and the applicant that was exhibiting itself in various ways, with no allegation being of such a serious nature that the respondent failed in not "getting to the bottom of it."
- 75 The respondent was entitled to deal with the clash by separating Mr Azhdari and the applicant to the extent he could by changing the roster and then to explore with the applicant whether she might be prepared to work at his other business.
- 76 Ultimately, it was the applicant's actions and the attitude they revealed after the respondent made sensible attempts to manage the situation that brings her undone in terms of her claim that her employment would have and should have continued to retirement.
- 77 I think, taking into account the misconduct and the attitude toward the respondent demonstrated by the applicant in October 2017, and the problems at the Stratton Park Pharmacy, the attempted management of which had, at least in part, led to wilfulness and disruptiveness by the applicant, the respondent could have and would have reasonably brought the applicant's employment to an end if he had, rather than dismissing her on 13 October 2017, conducted an appropriate process.
- 78 I consider that that process would have taken no longer than two weeks. They would not have been difficult to investigate.
- 79 Assuming that the applicant would have continued to work during those two weeks I consider, consistent with the respondent's offer to pay the applicant four weeks of pay when he thought he could summarily dismiss her, that the respondent would have given her four weeks' notice after the enquiry had concluded. I think that that is the reasonable period of notice. The applicant was a casual employee but had been employed, and given predominantly good service, for many years.
- 80 I consider that the submission that a longer period of notice was called for to be over the top and especially so given that the applicant would have, if the respondent had done things better, have been fairly dismissed for misconduct. The applicant took the good from being a casual for many years, by which I mean the 20% loading on her pay, and must accept that the nature of the relationship, as accepted by both parties, would have had consequences if she was to be let go at some stage, and by this I mean that any expectation of a period of notice beyond four weeks has to be accepted by her as unrealistic.
- 81 I find that the respondent should pay the applicant an amount of compensation equating to six weeks of her regular salary. I accept the applicant's submission that she had received an average of \$666.52 per week in the six months prior to termination of her employment in October 2017 and while that average may have been slightly affected if the applicant had earned less than this in the two weeks I say it would have taken to fairly dismiss her (if she had not worked the Saturdays in that fortnight) I will calculate compensation on the basis of \$666.52 per week so that the total amount ordered to be paid will be \$3,999.12 (minus tax).
- 82 I make no award for humiliation or distress as there was no convincing evidence that the applicant was anything other than angry when she was terminated.
- 83 It perhaps goes without saying in light of the above but, for the sake of completeness, I agree with the applicant that both reinstatement and re-employment are impracticable.
- 84 Finally, I note that the application was technically filed one day out of time, although an unsuccessful attempt was made to file it electronically in time. Nothing was made of this by the respondent, quite appropriately in my view, and I have no hesitation in finding that given the length of the delay, the merits of the applicant's case, now fully exposed, and the lack of any prejudice arising out of the late filing to the respondent that it would be unfair not to accept the referral out of time as section 29(3) *Industrial Relations Act 1979* empowers me to do.
-

2018 WAIRC 00665

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MS SHERYL REARDON **APPLICANT**

-v-

MR GAETANO ANTHONY LAGANA
STRATTON PARK PHARMACY **RESPONDENT**

CORAM COMMISSIONER D J MATTHEWS
DATE THURSDAY, 26 JULY 2018
FILE NO/S U 145 OF 2017
CITATION NO. 2018 WAIRC 00665

Result Application upheld in part
Representation
Applicant Mr D Rafferty of counsel
Respondent Mr R Jones as agent

Order

HAVING HEARD Mr D Rafferty of counsel on behalf of the applicant and Mr R Jones as agent for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders the respondent to pay the applicant \$3,999.12 minus tax within 28 days of the date of this order.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2018 WAIRC 00395

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2018 WAIRC 00395
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : THURSDAY, 31 MAY 2018
DELIVERED : MONDAY, 2 JULY 2018
FILE NO. : U 41 OF 2018
BETWEEN : JARED WAYNE SMITH
Applicant
AND
KEVIN ANDREW SHEEHAN AS TRUSTEES FOR THE MASHEEHEN FAMILY
TRUST TRADING AS SHEEHAN LOCKSMITHS
Respondent

Catchwords : *Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal - Whether it would be unfair not to accept the application out of time - Principles applied - Application dismissed*

Legislation : *Industrial Relations Act 1979 (WA)*
Fair Work Act 2009 (Cth)

Result : Application dismissed

Representation:
Counsel:
Applicant : Ms S Michaelson as agent
Respondent : In person by written submissions

Case(s) referred to in reasons:

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

Reasons for Decision

Background and brief facts

- 1 The applicant was employed by the respondent as a locksmith on 3 May 2016 and the employment came to an end on 18 January 2018 in circumstances which are now controversial. The applicant's employment was terminated by the respondent on the grounds of alleged misconduct. The applicant was employed on a full-time basis and was paid the rate of \$27.83 per hour. In his position as a locksmith, the applicant was involved in a range of duties including the installation, repair and maintenance on locks, both residential and commercial, and other duties.
- 2 Despite the applicant's employment being terminated on 18 January 2018, the present application complaining of unfair dismissal was not filed until 23 April 2018. This is because the applicant initially commenced proceedings in the Fair Work Commission under the *Fair Work Act 2009* (Cth). The applicant commenced those proceedings within one week after the termination of his employment. Following a conciliation conference before the Fair Work Commission, the applicant's claim was not resolved and it was listed for hearing on 30 April, 1 May and 2 May 2018. The applicant said that it was only after the respondent subsequently lodged its response in the Fair Work Commission proceedings, that he became aware that the Fair Work Commission may not have jurisdiction to hear the matter. This seemed to be confirmed by about 4 April 2018.
- 3 The applicant said that his wife, who has been acting as his agent, contacted the State's "Wageline". She was informed that this Commission was the proper jurisdiction to hear the claim. Also, the applicant's agent was informed that for this Commission to hear the applicant's claim, the proceedings before the Fair Work Commission must first be discontinued. This also occurred on 4 April 2018. Documents tendered in these proceedings, as exhibit A1, referred to and confirmed these various events.
- 4 The applicant maintained that his dismissal by the respondent was unfair on a range of grounds including that the applicant was not given a written warning prior to his dismissal, and was not provided with reasons for his dismissal until a conciliation conference was listed in the Fair Work Commission. The applicant stated he was consistently awarded employee of the month and was dismissed by the respondent for reasons including the applicant's request made on 15 January 2018 to change his on-call hours; the applicant raising the issue of an employment contract with the respondent; the applicant taking two weeks' sick leave immediately prior to being dismissed; the respondent disapproving of the applicant's then upcoming wedding; and the respondent being unable to afford to pay its staff. The applicant does not seek reinstatement, rather compensation for his loss.
- 5 The respondent filed an answer in opposition to the applicant's claim on 23 May 2018 and opposed the applicant seeking an extension of time to bring these proceedings. The matter was listed for hearing by a notice of hearing dated 24 May 2018. The Commission considered the availability of the parties, but due to the Commission's commitments and the need for matters such as the present to be dealt with expeditiously, the matter was listed for hearing on 31 May 2018. The respondent's advised availability was very limited for May, June and July 2018. The respondent was informed that he could appoint an agent to appear on his behalf, or a solicitor, but he elected not to do so.
- 6 Furthermore, and in any event, by letter dated 7 June 2018 from my Associate, the respondent was provided with a copy of the transcript of proceedings of the hearing of 31 May 2018 and a copy of the exhibits tendered by the applicant. The respondent was invited to file any further written submission in response to the applicant's claim, should he wish to do so, by no later than 18 June 2018 and did so on 15 June 2018. Accordingly, the respondent has had a reasonable opportunity to respond to the applicant's extension of time application. The Commission has had regard to this material. It is also important to note, that for the purposes of these proceedings, the Commission is only considering whether the applicant's claim should be accepted out of time, and not the hearing of the claim on its merits.
- 7 Apart from maintaining that the applicant's version of events should not be believed, the respondent contended that there was no apparent explanation for the applicant's delay between 4 April 2018, when the Fair Work Commission proceedings were discontinued, and when these proceedings were commenced on 23 April 2018, a period just under three weeks. Further, the respondent submitted that when it became apparent that the Fair Work Commission proceedings could not continue for jurisdictional reasons, on about 26 March 2018, it was not until 4 April 2018 that those proceedings were discontinued. The respondent also maintained that contrary to the matters raised by the applicant in his claim, the applicant was given repeated warnings as to his conduct; he superglued a customer's locks because of a cancelled job in December 2017; he exhibited poor customer service and unruly behaviour to clients in December 2017; he tampered with safety cameras and GPS tracking devices in the respondent's vehicles; and engaged in threatening behaviour towards the respondent, which prompted the respondent to take out an interim Violence Restraining Order on 19 January 2018, the day after the applicant's dismissal.

Consideration

- 8 The relevant principles in relation to extension of time proceedings under s 29(3) of the *Industrial Relations Act 1979* (WA) are well settled. (See *Malik v Paul Albert, Director General, Department of Education* (2004) 84 WAIG 683 per Heenan J at pars 73-74.) The time limit of 28 days set out in s 29(2) of the Act, is to be complied with unless good reason is shown why a claim should be accepted out of time. I accept that an error as to the proper jurisdiction in which to commence a claim, whether it be before this Commission or the Fair Work Commission, may occur in cases where the identity of an employer may be problematic as for example in the present case, where the employer is structured as a family trust. This is a common structure for small businesses. The issue in these cases is whether the trustee of the family trust is a corporation or an individual. In this case it is the latter.
- 9 However, it should be emphasised that there is an onus on an applicant to ensure the proper identity of the employer, whether it be a corporation or a natural person. These matters should be investigated by an applicant seeking to invoke the Commission's jurisdiction. Business name searches may be conducted online through the Australian Securities and Investments Commission relatively easily. These will reveal in most cases, the entity, whether it be corporate or individual, behind a business name.

- 10 Notwithstanding this, whilst it may be said that there may be at least some matters warranting a hearing of the applicant's claim on the merits, the delay in the applicant discontinuing the Fair Work Commission proceedings and the lodging of his claim in this jurisdiction was considerable. As at 4 April 2018, the applicant was well outside the 28-day time limit to commence an unfair dismissal claim in this Commission. He was on notice and plainly understood the need to act quickly to bring his claim in this jurisdiction, as was clear from the terms of exhibit A2. Whilst it was said that the applicant's initial attempts to lodge an online application in the Registry, at a time not clear on what is before the Commission, encountered difficulties, that was no barrier to a claim being brought immediately after 4 April 2018. The applicant had all the material from the Fair Work Commission claim and could simply have prepared and lodged a paper application in the Registry. It is a simple process.
- 11 The only real explanation given by the applicant was that he and his then partner were getting married and they did not want the commencement of these proceedings to disrupt their marriage and honeymoon plans. Whilst this explanation for the delay may be understandable from the point of view of the applicant and his wife in personal terms, in my view it is not an adequate explanation for the delay for the purposes of s 29(3) of the Act. Time limits are prescribed by the legislation and are to be observed. Parliament has given the Commission a wide discretion to accept a claim outside of the 28-day time limit, if it would be unfair not to do so. Had the application been lodged at the soonest possible time after 4 April 2018, I would have been inclined to exercise my discretion under s 29(3) of the Act and accept it out of time. This being on the basis that the applicant had challenged his dismissal but in the wrong jurisdiction and on this becoming apparent, took immediate steps to commence proceedings in the correct jurisdiction.
- 12 However, in this case, on becoming aware of the jurisdictional issue, the applicant, no doubt in consultation with his now wife, took the conscious decision to delay the lodgement of the current claim in the proper jurisdiction. Having made that decision, knowing the need to act "immediately" (see exhibit A2), the applicant cannot now maintain that it would be unfair for the Commission to not accept his claim outside the time limit prescribed by s 29(2) of the Act. The Commission is required to consider fairness not just from the point of view of the applicant, but also for the respondent too. Accordingly, the application is dismissed.

2018 WAIRC 00396

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JARED WAYNE SMITH

APPLICANT

-v-

KEVIN ANDREW SHEEHAN AS TRUSTEES FOR THE MASHEEHEN FAMILY TRUST
TRADING AS SHEEHAN LOCKSMITHS**RESPONDENT**

CORAM SENIOR COMMISSIONER S J KENNER
DATE MONDAY, 2 JULY 2018
FILE NO/S U 41 OF 2018
CITATION NO. 2018 WAIRC 00396

Result Application dismissed
Representation
Applicant Ms S Michaelson as agent
Respondent In person by written submissions

Order

HAVING heard Ms S Michaelson on behalf of the applicant and the respondent in person by written submissions the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.**SECTION 29(1)(b)—Notation of—**

Parties		Number	Commissioner	Result
Jo-ann D'Cress	Yorgum Aboriginal Corporation	U 42/2018	Commissioner D J Matthews	Discontinued
Sally Maslen	Linda Leach	U 24/2018	Commissioner T Emmanuel	Discontinued

CONFERENCES—Matters arising out of—

2018 WAIRC 00674

DISPUTE RE TRANSFER OF EMPLOYEES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

PARTIES**APPLICANT**

-v-

THE CHIEF EXECUTIVE
HEALTH SUPPORT SERVICES

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE TUESDAY, 31 JULY 2018
FILE NO/S PSAC 7 OF 2018
CITATION NO. 2018 WAIRC 00674

Result Application discontinued**Representation (by correspondence)****Applicant** Mr C Panizza (as agent)**Respondent** N/A*Order*

WHEREAS this is an application under s 44 of the *Industrial Relations Act 1979* (WA);
AND WHEREAS on 11 July 2018, the applicant filed a Form 14 – Notice of withdrawal or discontinuance;
NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –
THAT this application be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

CONFERENCES—Matters referred—

2018 WAIRC 00264

DISPUTE RE UNION MEMBERS PERSONAL LEAVE ENTITLEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CIVIL SERVICE ASSOCIATION OF WA INC.

PARTIES**APPLICANT**

-v-

COMMISSIONER OF POLICE, WA POLICE SERVICE

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE MONDAY, 23 APRIL 2018
FILE NO. PSACR 5 OF 2018
CITATION NO. 2018 WAIRC 00264

Result Directions issued**Representation****Applicant** Mr B Cusack**Respondent** Mr A Chapple and with him Ms N Pyne

Direction

HAVING heard Mr B Cusack on behalf of the applicant and Mr A Chapple and with him Ms N Pyne on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

- (1) THAT each party shall give an informal discovery by serving its list of documents by no later than 7 May 2018.
- (2) THAT the parties file an agreed statement of facts no later than seven days prior to the date of hearing.
- (3) THAT the parties file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.
- (4) THAT the matter be listed for hearing for one day.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00414

DISPUTE RE UNION MEMBERS PERSONAL LEAVE ENTITLEMENTS
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2018 WAIRC 00414
CORAM	:	PUBLIC SERVICE ARBITRATOR SENIOR COMMISSIONER S J KENNER
HEARD	:	MONDAY, 23 APRIL 2018, MONDAY, 21 MAY 2018
DELIVERED	:	THURSDAY, 12 JULY 2018
FILE NO.	:	PSACR 5 OF 2018
BETWEEN	:	CIVIL SERVICE ASSOCIATION OF WA INC. Applicant AND COMMISSIONER OF POLICE, WA POLICE SERVICE Respondent

Catchwords	:	<i>Industrial Law (WA) – Dispute regarding union members personal leave entitlements – Interaction of Public Service and Government Officers CSA General Agreement 2017, Administrative Instruction 601 and HR – 11.05 Retirement on the Grounds of Ill Health, Police staff Policy – Whether Commissioner of Police entitled to direct applicant to take unpaid personal leave based on medical report - Whether applicant entitled to remuneration for entire duration of directed leave - Principles applied - Commissioner of Police entitled to direct applicant to take personal leave – Applicant not entitled to remuneration prior to disputed medical reports being received - Application dismissed.</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA), s 44(9)</i> <i>Administrative Instruction 601, cl's 1, 6</i> <i>Public Sector Management Act 1994 (WA), ss 22A, 39, 64(1), 108, Sch 5 cl 5</i> <i>Public Service and Government Officers CSA General Agreement 2017, cl's 5, 22.24, 22.25, 22.26, 22.27, 22.28 22.33, 22.36, 52, 52.3</i> <i>Public Service Award 1992 (WA), ss 23(9), 25(8), 26(4)</i> <i>Public Service Regulations 1988 (WA)</i>
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	Mr B Cusack
Respondent	:	Mr A Chapple and with him Ms N Pyne

Case(s) referred to in reasons:

Amcor Ltd v Construction, Forestry, Mining & Energy Union [2005] HCA 10; (2005) 222 CLR 241
Automatic Fire Sprinklers v Watson (1946) 72 CLR 435
City of Wanneroo v Holmes [1989] FCA 369; (1989) 30 IR 362
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337
Director General, Department of Education v United Voice WA [2013] WASCA 287
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; (2014) 251 CLR 640
George A Bond & Co Ltd (in liq) v McKenzie [1929] AR (NSW) 498
Kidd v The State of Western Australia [2014] WASC 99
Martin Fedec v The Minister for Corrective Services [2017] WAIRC 00828; (2017) 97 WAIG 1595
McCourt v Cranston [2012] WASCA 60
Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451
Peninsula Group Ltd v Kintsu Co Ltd (1988) 44 NSWLR 534
Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd [2014] WASCA 28
Red Hill Iron Ltd v API Management Pty Ltd [2012] WASC 323
Re Harrison; Ex parte Hames [2015] WASC 247
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165

Case(s) also cited:

Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights' Union (1987) 67 WAIG 1097

Reasons for Decision

- 1 This matter was referred for hearing and determination under s 44(9) of the *Industrial Relations Act 1979*. The dispute between the parties relates to a member of the Union, Ms Richardson, who is employed by the Commissioner of Police as a Fingerprint Processing Officer, which is a Level 2 position in the Forensic Fingerprint Bureau.
- 2 Ms Richardson suffered significant periods of ill health beginning in April 2017. She used all her accrued paid personal leave under the *Public Service and Government Officers CSA General Agreement 2017* (the Agreement) by 7 December 2017. There was a further dispute between the parties as to whether, as a result of various medical reports regarding Ms Richardson's state of health, she should be called upon to retire under s 39 of the *Public Sector Management Act 1994* (WA) (PSM Act). That dispute has now been resolved and Ms Richardson returned to full time employment in her position with the Commissioner of Police on 11 May 2018.
- 3 However, as Ms Richardson was directed by the Commissioner of Police to proceed on unpaid personal leave from 22 December 2017 up to and including 31 January 2018, a dispute remains as to the Commissioner of Police's direction to Ms Richardson that she be on unpaid personal leave and what should occur, if anything, in relation to relevant entitlements over this period.
- 4 In short, whilst both parties provided quite detailed written outlines of submissions, the Union's contention was that it was not open to the Commissioner of Police to unilaterally require Ms Richardson to proceed on unpaid personal leave. This was said to be contrary to the terms of both the Agreement and the employer's own policy entitled "HR – 11.05 Retirement on the Grounds of Ill Health – Police Staff".
- 5 On the other hand, again in short, the Commissioner of Police maintained that at all material times it has acted in accordance with the terms of its obligations under the Agreement, the relevant policies and Administrative Instruction 601 (AI 601) dealing with sick leave. The latter instrument was made under the repealed *Public Service Act 1978* (WA) which, by Schedule 5 of the PSM Act, continues in force and effect.
- 6 The Union seeks orders that the Commissioner of Police's decision in these matters be reversed.

Factual background

- 7 The parties have agreed on a statement of facts. It is convenient to set it out at this point and it is as follows:
 1. The Applicant's member, Ms Tara-Jayne Richardson, is employed by the Respondent in the position of Fingerprint Processing Officer, an unsworn position.
 2. The *Public Service Award 1992* (the Award) and the *Public Service and Government Officers CSA General Agreement 2017* (the General Agreement) apply to the employment of Ms Richardson.
 3. The Respondent's policy, *HR-11.05 Retirement on the Grounds of Ill Health - Police Staff* (the Ill Health Policy), applies to Ms Richardson within the scope of that policy.
 4. Ms Richardson commenced employment with the Respondent on 11 April 2011.
 5. Ms Richardson has had a series of health issues that have resulted in her having significant absences from work on Personal Leave and other forms of leave from April 2017.
 6. On 29th November 2017, at the instruction of the Respondent, Ms Richardson undertook a medical assessment with WA Police Consultant Occupational Physician Dr Karina Powers.

7. At this assessment Dr Powers verbally advised Ms Richardson that her assessment would recommend to the Respondent that retirement on the grounds of ill health should be considered.
8. Dr Powers' written report from the 29 November 2017 assessment was provided to Ms Richardson's treating doctor shortly thereafter.
9. On 6th December 2017 Ms Richardson met with Dr Powers and Ms Michelle Bryant, a Vocational Rehabilitation Consultant employed by the Respondent, to discuss the retirement on the grounds of ill health processes. Dr Powers also produced a supplementary medical report on this date.
10. On 7th December 2017 Ms Richardson obtained a medical certificate from Dr Hui Tan, General Practitioner, which indicated that Ms Richardson was fit to resume her normal full -time duties with immediate effect.
11. On 13th December 2017 Dr Powers wrote a supplementary medical report which again recommended that retirement on the grounds of ill health (medical retirement) be considered.
12. On 14th December 2017 Dr Robert Liddell, General Practitioner, wrote to Ms Bryant stating that he was opposed to any consideration of medical retirement for Ms Richardson, and set out his reasons.
13. On 22nd December 2017 Senior Sergeant Chris Hoath from the Respondent's Forensic Fingerprint Bureau wrote to Ms Richardson informing her that Dr Powers had assessed her as being unfit for work and offered the opinion that medical retirement be considered for Ms Richardson.
14. The letter of Senior Sergeant Hoath also stated “ ... *you are to be placed on personal (sick) leave effective immediately*”.
15. On 8th January 2018 Ms Renae Lavell, the Respondent's Director Human Resources, wrote to Ms Richardson and called upon her to retire on the grounds of ill-health. The letter instructed Ms Richardson to advise Ms Lavell, in writing within 7 days, whether Ms Richardson accepted or rejected the call to retire, and 28 days from the date of receipt of the letter to provide her own medical evidence in the event that she did not accept the Respondent's medical evidence.
16. On 15th January 2018 Ms Richardson wrote to Ms Nerroli Pyne, the Respondent's Acting Senior Employee Relations Officer, advising her that Ms Richardson rejected the call to retire on medical grounds, and advising that she would provide her own medical evidence.
17. On 19th January 2018 the Applicant wrote to Ms Lavell to re-iterate that Ms Richardson rejected the medical evidence and informed her that Ms Richardson had arranged an appointment with Dr Brian Dare, Occupational Physician for 23rd January 2018.
18. The letter to Ms Lavell dated 19th January 2018 also initiated the Dispute Settlement Procedure set out in Clause 52 of the General Agreement in respect to the decision of the Respondent to 'place' Ms Richardson on Personal Leave.
19. On 29th January 2018, Ms Pyne sent an e-mail to the Applicant which responded to the letter dated 19th January 2018. That e-mail stated, inter alia, that the Respondent maintains the position that Ms Richardson remains on Personal Leave while further medical considerations occur.
20. On 31st January 2018 the Applicant wrote to Ms Lavell to escalate the Dispute in accordance with sub-clause 52.3 of the General Agreement. Attached to that letter was a copy of the report by Dr Dare dated 24th January 2018 in which he concluded that Ms Richardson was fit to perform her full duties and that there were no grounds for retirement on the grounds of ill-health.
21. At 9:26am on 7th February 2018 the Applicant sent an e-mail to Ms Pyne containing a copy of a further letter to Ms Lavell. That letter noted that the Dispute was not resolved and sought to escalate the Dispute in accordance with sub-clause 52.4 of the Agreement.
22. At 4:02pm on 7th February 2018 Ms Pyne sent an e-mail to the Applicant responding to the letters dated 31st January 2018 and 7th February 2018. The e-mail advised that the Respondent would reinstate the payment of Ms Richardson's salary effective from 31st January 2018, being the date that Dr Dare's report was provided to the Respondent. The e-mail did not indicate agreement to reinstate Ms Richardson's salary for the period between 7th December 2017 and 31st January 2018. Ms Pyne further advised that as there was now a dispute about the medical assessment, the Respondent would now seek a further report from an independent medical expert in accordance with the Ill Health Policy.
23. On 12th February 2018 the Applicant sent an e-mail to Ms Pyne raising the issue of the effect of the Respondent's Ill Health Policy on the situation subject to the Dispute.
24. On 14th February 2018 Ms Pyne responded to the e-mail dated 12th February 2018 advising that the Respondent does not agree with the Applicant's interpretation of the Agreement provisions and does not propose to change its position.
25. On 16th February 2018 the Applicant filed Application PSAC 5 of 2018.
26. On 11th April 2018 Ms Richardson attended a medical assessment with independent Consultant Occupational Physician Dr Phillip Meyerkort.
27. On 30th April 2018 the Respondent received and provided the Applicant with Dr Meyerkort's independent report (dated 26th April 2018) of his assessment of Ms Richardson. Dr Meyerkort's report concludes that Ms Richardson is fit to perform the full range of duties within her position description on a full time basis without restriction.

28. Ms Richardson returned to the workplace in a full-time capacity on 11th May 2018.
 29. Clause 22.33 of the General Agreement provides an ability for the Respondent to seek a medical report if the Respondent has reason to believe that an employee is in such a state of health as to render a danger to themselves, fellow employees or the public.
 30. The Respondent is entitled to act upon medical evidence, which may involve directing the employee to not attend the workplace.
 31. The provisions, and any associated entitlements, upon which the employee is directed to not attend the workplace is the central issue of dispute between the Applicant and the Respondent.
- 8 Additionally, Ms Richardson gave some brief evidence that she did not wish to take personal leave when directed by the Commissioner of Police over the period 22 December 2017 up to and including 31 January 2018. Furthermore, Ms Richardson maintained that it was her opinion, and that of her treating doctors, that she was fit for work over this time.

The issue in dispute

- 9 It was common ground between the parties that the question to be determined in these proceedings is whether the Commissioner of Police was correct to act as it did by directing Ms Richardson to proceed on unpaid personal leave, having regard to the relevant provisions of the Agreement, the Commissioner of Police's policies and the terms of AI 601.

Consideration

The Agreement

- 10 The first point to be considered is whether the terms of the Agreement in relation to personal leave supported the Commissioner of Police's decision in relation to Ms Richardson. This is relevant because as noted above, on 22 December 2017 the Commissioner of Police, by letter from Senior Sergeant Hoath of the Forensic Fingerprint Bureau, informed Ms Richardson that based on advice from the Commissioner of Police's human resources staff, Ms Richardson, due to the health risks of her remaining in the workplace, was "to be placed on personal (sick) leave effective immediately". Ms Richardson was directed not to attend work, unless informed otherwise. The letter from Senior Sergeant Hoath went on to say "You remain able to access any relevant leave entitlements available to you in line with [sic] the Public Service and Government Officers CSA General Agreement 2017 and the Public Service Award 1992 ..." As Ms Richardson did not have any paid leave available, she was effectively on unpaid leave from 22 December 2017.
- 11 The Agreement deals with sick leave entitlements in the personal leave clause. It is contained in Part 5: Leave, and is a lengthy clause. This clause replaced the Short Leave, Carers' Leave and Sick Leave provisions of the Award, and combined them into one entitlement as "Personal Leave". Each year an employee receives personal leave "credits". Relevantly for present purposes, is that part of the clause headed "Application for Personal Leave" which is in the following terms:
- 22.24 Reasonable and legitimate requests for personal leave will be approved subject to available credits. Subject to clause 22.8 the Employer may grant personal leave in the following circumstances:
 - (a) where the Employee is ill or injured;
 - (b) to provide care or support to a member of the Employee's family or household who requires care or support because of an illness or injury to the member; or an unexpected emergency affecting the member;
 - (c) for unanticipated matters of a compassionate or pressing nature which arise without notice and require immediate attention;
 - (d) by prior approval of the Employer having regard for Agency requirements and the needs of the Employee, planned matters where arrangements cannot be organised outside of normal working hours or be accommodated by the utilisation of flexi time credits by Employees working according to approved flexible working hours arrangements or other leave. Planned personal leave will not be approved for regular ongoing situations.
 - 22.25 An Employer may grant two days unpaid personal leave per occasion to an Employee to provide care and support to a member of the Employee's family or household due to the birth of a child to the member. This entitlement does not of itself limit an Employee's access to paid personal leave as provided by clause 22.24 or partner leave as provided for by clause 28 - Partner Leave of this General Agreement. This leave may also be substituted with accrued annual leave, long service leave, time off in lieu of overtime, flexi leave and/or banked hours to which the Employee is entitled.
 - 22.26 Employees must complete the necessary application and clearly identify which of the above circumstances apply to their personal leave request.
 - 22.27 The definition of family shall be 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.
 - 22.28 Where practicable, the Employee must give reasonable notice prior to taking leave. Where prior notice cannot be given, notice must be provided as early as possible on the day of absence. Where possible, an estimate of the period of absence from work shall be provided.

- 12 Clauses 22.33 and 22.36 are also relevant, they provide:
- 22.33 If the Employer has reason to believe that an Employee is in such a state of health as to render a danger to themselves, fellow Employees or the public, the Employee may be required to obtain and furnish a report as to the Employee's condition from a registered medical practitioner nominated by the Employer. The Employer shall pay the fee for any such examination.
- ...
- 22.36 Employees who have exhausted all of their personal leave entitlements and are ill or injured may apply for personal leave without pay. Employees are required to complete the necessary application and provide evidence to satisfy a reasonable person. The Employer shall not unreasonably withhold this leave.
- 13 To the extent that cl 22.33 is inconsistent with cl 26(4) of the Award, insofar as the latter does not include reference to an officer being a danger to themselves, cl 22.33 of the Agreement prevails.
- 14 The Union made several submissions. It was contended that these provisions of the Agreement do not contemplate that the employer may initiate a period of personal leave on behalf of an employee. It was submitted that the plain language of the provisions, in cl 22.24 and cl 22.26, make it clear that personal leave is at the initiative of the employee and the employee must satisfy certain requirements to establish the entitlement, including that the employee must make an application for sick leave. It was contended that if the Agreement was to enable the employer to place an employee on personal leave at its initiative, then the language of the clause would have made this clear.
- 15 Furthermore, whilst it was accepted by the Union that cl 22.33 enables the employer to require an employee to obtain a medical report, it does not then provide the ability of the employer to direct an employee to proceed on sick leave. The Union contrasted the terms of the Agreement with the Award in relation to both annual leave and long service leave. The latter contains express provisions enabling an employer to direct an employee to take leave and the dates on which such leave is to commence.
- 16 Thus, the Union did not dispute the Commissioner of Police's capacity to direct an employee, in accordance with cl 22.33 of the Agreement, to obtain a medical report if the circumstances of this clause had application. Also, it appeared to not be disputed that the Commissioner of Police may act upon such a medical report and to direct an employee to remain away from the workplace. What the employer could not do, however, is to deem such absence as sick leave.
- 17 As to the terms of cl 22.33, it was the Commissioner of Police's contention that if a medical report does satisfy the requirements of the subclause, then he would be obliged to act to require an employee to not attend the workplace, in accordance with his common law and statutory duty in relation to the health and safety of the employee concerned and other employees.
- 18 The approach to the interpretation of industrial instruments, such as awards and industrial agreements, is well settled in this jurisdiction. These principles were recently set out by the Full Bench in *Martin Fedec v The Minister for Corrective Services* [2017] WAIRC 00828; (2017) 97 WAIG 1595. In this case Smith AP and Scott CC observed at pars 21-23 as follows:
- 21 The approach that is to be applied when interpreting an industrial agreement is well established. This is:
- (a) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.
 - (b) The task of construction of an industrial agreement is to be approached in a way that allows for a generous construction: *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362.
 - (c) Industrial agreements are made for industries in light of the customs and working conditions of each industry and must not be interpreted in a vacuum divorced from industrial realities: *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498; *City of Wanneroo v Holmes* (378 - 379) (French J).
- 22 The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement. In *Re Harrison; Ex parte Hames* [2015] WASC 247, Beech J said [50] - [51]:
- The general principles relevant to the proper construction of instruments are well-known. In summary:
- (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
 - (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
 - (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
 - (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
 - (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
 - (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (*Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014)

251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); *Kidd v The State of Western Australia* [2014] WASC 99 [122]; *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 [106] - [112]; *Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd* [2014] WASCA 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).

These general principles apply in the construction of an industrial agreement (*Director General, Department of Education v United Voice WA* [2013] WASCA 287 [18] - [20] (Pullin J, Le Miere J agreeing), [83] (Buss J)). The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed (*Amtcor Ltd v Construction, Forestry, Mining & Energy Union* [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ and McHugh J); *Director General v United Voice* [81]; see also *Amtcor v CFMEU* 66 (Kirby J), 129 - 130 (Callinan J)).

- 23 To these principles, the following observations made by Pullin J in *Director General, Department of Education v United Voice WA* [2013] WASCA 287; (2013) 94 WAIG 1 [18] - [19] should be added:

The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22]. Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337, 352; *McCourt v Cranston* [2012] WASCA 60 [23].

- 19 In the application of these principles to the relevant provisions of the Agreement set out above, in the context of the terms of the Agreement when read as a whole, I prefer the contentions advanced by the Union as to interpretation to those advanced by the Commissioner of Police. In my view, the provisions of the Agreement as to personal leave do not enable an employer to “place” or to direct an employee to proceed on personal leave. To do so would require express provision which is absent. Even in cases where an employee has exhausted his or her entitlement to paid leave, by cl 22.36, the employee may apply to the employer for personal leave without pay. Again, nothing on the ordinary and natural meaning of the provisions in cl 22, taken on their own, empowers the employer to unilaterally place or to direct an employee to take personal leave without pay.
- 20 As noted by the Union in its submissions, the terms of the personal leave clause in the Agreement stand in contrast to the provisions of the Award, which is to be read in conjunction with the terms of the Agreement in relation to annual leave and long service leave. By cl 23(9) of the Award, in the case of accrued annual leave, the employer has the right to direct an employee to take accrued annual leave and to specify the date on which such leave is to commence. The failure by an employee to comply with such a direction constitutes a disciplinary matter. The same provision exists for long service leave in cl 25(8).
- 21 Given that by cl 5 of the Agreement the terms of the Agreement and the Award are to be read together, both form part of the scheme as to the terms and conditions of employment for public servants in this State. The presence of an express right of an employer to direct an employee to take annual leave and long service leave, with the sanction of disciplinary action if not complied with, reinforces in my view, the need for a corresponding express provision in either the Agreement or the Award, or other instrument, for an employer to direct an employee to take personal leave.
- 22 The Commissioner of Police contended that the fact that an employer may direct an employee to obtain a medical report from a medical practitioner under cl 22.33, if the conditions of this subclause were satisfied, means that the employer must be able to act upon it. It was submitted that because this provision is in the personal leave clause of the Agreement, this must mean as a matter of logic, that the employer is able to take steps to invoke the personal leave clause, because nothing in the clause provides that it may not do so. In my view, it is a large step to read into the Agreement a right of the employer of this kind, not conferred by the express language of its terms. There is no ambiguity in the language of cl 22. Even adopting the most generous approach to the interpretation of the terms of the Agreement, it is a step too far to construe its terms as contended by the Commissioner of Police.
- 23 Whilst the Commissioner of Police made much of the fact that as a matter of logic and common sense, the obtaining of a medical report under cl 22.33 of the Agreement must be able to be acted upon, the absence of a right of the employer to place an employee on sick leave by the terms of the Agreement itself, does not mean the employer may not take steps. The facts of this case show that the employer may use the report to, for example, require a public service officer to retire on the grounds of ill health under s 39 of the PSM Act or act in accordance with AI 601, which I will turn to consider now.
- 24 I am not therefore persuaded that the terms of the Agreement by itself, enabled the Commissioner of Police to direct or place Ms Richardson on sick leave.

AI 601

- 25 It was not in dispute and the parties accepted that this Administrative Instruction remains in effect. Having regard to cl 5 of Schedule 5 of the PSM Act, I consider this position to be correct. The relevant part of AI 601 is cl 6 which provides as follows:

6. Officer Considered to be a Danger to Others

- a) Where a chief executive officer has reason to believe that an officer is in such state of health as to be or to become a danger to colleagues or members of the public, the chief executive officer shall, in accordance with Award provisions, require the officer to obtain and provide a report as to his/her condition from a registered medical practitioner, or by a registered medical practitioner nominated by the chief executive officer. The fee for any such examination shall be paid by the department.

- b) Upon receipt of the medical report, the chief executive officer may direct the officer to be absent from duty for a specified period, or if already absent on leave, the officer may be directed to continue on leave for a specified period. Such absence shall be regarded as sick leave.
- 26 Whilst this provision is in similar terms to cl 22.33 of the Agreement, with one qualification, which I will deal with below, unlike cl 22.33 of the Agreement, it expressly empowers an employer to direct an employee to be absent from duty and such absence to be regarded as sick leave.
- 27 The Union disputed the Commissioner of Police could rely on this instrument in Ms Richardson's case. It submitted that cl 6(a) of AI 601 only extends to situations where the medical report supports the conclusion that an employee's ill health poses a danger to colleagues or the public, and does not extend to a risk to the health of the employee concerned. Based upon the letter from Senior Sergeant Hoath directing Ms Richardson to commence leave and the medical reports of Dr Powers, the Union submitted that the medical reports only identify the risks to the health of Ms Richardson by her remaining in the workplace. They do not identify any risks posed by her presence in the workplace to her colleagues or members of the public.
- 28 Therefore, on this basis, the Union submitted that the Commissioner of Police could not rely upon cl 6 of AI 601 in this case.
- 29 The Union further contended that there was, in any event, a conflict between the terms of the Agreement and AI 601. The Union referred to s 64(1) of the PSM Act, which provides that employment of a person in accordance with Commissioner's Instructions as a public service officer is subject to any binding award, order or industrial agreement made under the Act. Any conflict must be resolved in favour of the Agreement. This was based on the contention that as a transitional instrument continued by the PSM Act, AI 601 should be regarded as having the same character as a Commissioner's Instruction. Thus, to the extent that AI 601 purported to allow an employer to direct the taking of sick leave, such a direction would conflict with the Agreement and not be valid. Alternatively, it was further submitted that the terms of the Agreement, being a later expression of the relevant law in relation to personal leave than AI 601, should prevail.
- 30 On the other hand, the Commissioner of Police submitted that the terms of cl 22.33 of the Agreement essentially replicate the terms of cl 6(a) of AI 601. The only difference being that AI 601 does not provide a right for the employer to direct an employee to obtain a medical report in circumstances where the employer's concern relates to the employee being or becoming a danger to themselves. Despite this, the Commissioner of Police submitted that the terms of AI 601 should be construed as if it did apply to this circumstance. It was contended that it would be nonsensical to effectively create a two-tiered approach to these matters, depending on whether the employee's ill health is such as to constitute a danger to work colleagues or the public generally on the one hand, or only to themselves, on the other.
- 31 Furthermore, the Commissioner of Police contended that contrary to the submission of the Union, there was no conflict between the terms of cl 22.33 of the Agreement and AI 601, because the former is silent as to what steps the employer may take, having obtained a medical report from an employee at the employer's direction.
- 32 For the purposes of s 64 of the PSM Act, Administrative Instructions are not Commissioner's Instructions as made under s 22A of the PSM Act. However, Commissioner's Instructions were plainly intended to replace Administrative Instructions as instruments issued by the Public Sector Commissioner to manage the public service under the PSM Act. Therefore, I consider that s 64(1) of the PSM Act should be construed as a reference to both Commissioner's Instructions and Administrative Instructions, as both instruments have the same character and effect. Thus, any inconsistency between a prior Administrative Instruction made under the former public service legislation and preserved by the PSM Act, must give way to the terms of any award or agreement made under the Act.
- 33 From the material before me, AI 601 was made in March 1993. It appears to have been last reviewed in September 2012. In clause 1, reference is made to the terms of the *Public Service Regulations 1988* (now repealed) and the *Public Service Award 1992*. From their terms, both AI 601 and the Award in relation to sick leave, were plainly intended to be read together and to operate as part of a scheme. Clause 6(b) of AI 601 refers to the ability of a CEO of a government department or agency to direct an employee to obtain a medical report, if the circumstances set out in cl 6(a) are in existence.
- 34 Both the terms of cl 26(4) of the Award and cl 6 of AI 601 were intended to operate and be read together in a complementary fashion. Both covered the circumstances of an employee being in such a state of ill health as to render themselves a danger to fellow officers and the public at large. Both refer to the employer's right to direct the employee to obtain a medical report. AI 601 in cl 6(b) however, goes a step further. Whilst not expressed as such, cl 6(b) must be construed as meaning if cl 6(a) is satisfied, a CEO has the authority to direct an employee to remain away from the workplace and such absence is to be regarded as sick leave. The entitlement to sick leave of course, was derived from the Award and not AI 601. This reinforces the point that both instruments were intended to operate as part of a scheme in relation to illness and sick leave.
- 35 The question which arises for consideration therefore is what impact did the making of the Agreement as to personal leave and its predecessors, have on the intended operation of this prior scheme? The only change introduced by the Agreement in cl 22.33 compared to the provisions of the Award and of AI 601, which are both of very long standing, is to enable the employer to direct a medical report to be obtained in circumstances where the employer considers the employee's state of ill health to be a danger to themselves, in addition to any danger to fellow employees or the public. The form of the provision now found in cl 22.33 of the Agreement, with the additional words in it, seems to have been in successive industrial agreements since at least 2006, if not earlier.
- 36 As a matter of common sense and logic, it is highly likely that if someone is so ill as to constitute a danger to fellow employees or the public, their own well being would be placed at risk. It is difficult to imagine a situation where this would not be so.

- 37 Construed in accordance with their tenor, it appears that both the Award, the AI 601 provisions and cl 22.33 of the Agreement, are directed towards the purpose of discharging the employer's duty of care to its employees and to the public at large. If this is correct, and I consider that it must be, is it consistent with such a purpose or object for the employer not to be able to avail itself of this approach if the medical evidence of an employee's state of ill health shows them to be a danger to themselves? I do not think that it is.
- 38 Whilst it is not clear, it may well be that the parties to the Agreement in cl 22.33 added the words to the clause covering the circumstance where an employee may be a danger to themselves, in cases where an employee may have little or no public interaction or works largely unsupervised, for example, in a remote location. I say this because as I have already mentioned, the other two circumstances of danger, that is to fellow employees or the public at large, must axiomatically mean and include, that an employee would also be a danger to themselves. The serious nature of the state of ill health is underscored by reference to there being a "danger". The ordinary and natural meaning of "danger" is "1. liability or exposure to harm, risk, peril (of one's life, of death) or other evil...": *The Concise Oxford Dictionary*. That is, in ordinary parlance, the situation must be serious and not trifling or minor.
- 39 When the terms of the Agreement and the Award are so construed, in my view the terms of AI 601 should be interpreted in accordance with the scheme as it was clearly intended to operate. By cl 5(1) of Schedule 5 to the PSM Act, the terms of AI 601 are preserved as a transitional instrument, until it is repealed by a Commissioner's Instruction or by regulations under s 108 of the PSM Act. As I have already mentioned, it is common ground that Administrative instructions made under the former public service legislation were of the same general nature as Commissioner's instructions now made under s 22A of the PSM Act. However, whilst under s 19 of the former Public Service Act 1978, the former Public Service Commissioner issued Administrative instructions for the "performance of his or her functions", s 22A of the PSM Act is far more expansive. It expressly refers to the "management and administration of public sector bodies" and "human resources management".
- 40 Importantly for present purposes, Administrative instructions, as continued in effect by cl 5(1), will continue to apply, subject to "such modifications as are necessary". Phrases such as "with such modifications as are necessary" and "with such adaptations as are necessary" in legislation, extend beyond matters of mere nomenclature and description and may embrace substantive provisions: *Peninsula Group Ltd v Kintsu Co Ltd* (1988) 44 NSWLR 534. The Parliament clearly contemplated by cl 5(1) of Schedule 5 to the PSM Act, that some modification to the preserved terms of AI 601 may be necessary. In my view, and particularly having regard to the broader scope of s 22A of the PSM Act, when compared to the former Public Service Act, this is such a circumstance.
- 41 Having regard to the previous discussion set out above and the evident purpose and intent of the terms of AI 601, when read with the relevant provisions of the Award and the Agreement, cl 6(a) of AI 601 should be read as modified by cl 22.33 of the Agreement, to include the situation where an employee is in such a state of ill health as to constitute a danger to themselves, as well as to fellow employees or the public. To so construe AI 601, would be to preserve and maintain the scheme initially established by the terms of the Award read with AI 601, as now extended by the terms of the Agreement and remain consistent with the discharge of the employer's duty of care to its employees and the public, which was the scheme's evident purpose.
- 42 For this not to be so, there would be the odd result of a separate scheme applying to the circumstance where an employee's ill health is regarded as a danger to fellow employees and the public, which has been the case for many years, to that where the evidence is that the employee's ill health is only a danger to themselves. In my view such a distinction, given the clear purpose and object of the scheme, would lack common sense. I do not think that looking at the language of the instruments and construing their terms objectively, as a reasonable person in the position of the parties, it could have been intended that such a differential scheme was to apply. Put differently, by the simple inclusion in cl 22.33 of the Agreement and its predecessors, of additional reference to an employee's state of ill health being a danger to themselves, which as I have said would logically apply in many cases anyway, I do not think it could be concluded, from the perspective of reasonable person in the position of the parties at the time the Agreement was made, that the parties to the Agreement intended to create a new and separate entitlement for an employee in such cases, to continue to be paid their full remuneration, potentially for a lengthy period of time and not have to use their own sick leave entitlement, whilst under direction to remain away from the workplace. In my view, if this was the intended effect of such a relatively minor change to the clause, one would expect to see words inserted into the Agreement to make this clear.

The Policy

- 43 The next matter raised by the parties in their submissions was the effect of the Commissioner of Police's policy in relation to retirement on the grounds of ill health. This policy is entitled "HR-11.05 Retirement on the Grounds of Ill Health - Police Staff". The Policy seems to be comprised of three components: the "Policy", "Procedures" and "Guidelines". Under the first part, under the heading "Procedures", WA Police may obtain a medical opinion where it has concerns about an employee's state of ill health impacting on the performance of their duties or posing a risk to themselves or other staff. If the medical opinion supports the retirement of the employee on the grounds of ill health, WA Police may act under s 39 of the PSM Act. Where the employee disputes this assessment based on their own medical advice, the employee is to remain away from work on full pay. The provisions of the policy dealing with these matters are as follows:
- If the employee does not agree with the medical evidence, the employee may provide the agency with his or her own medical evidence. The medical evidence must be supplied within 28 days of being called upon to retire. Consideration may be given to extend the 28 day period upon application by the employee. If the employee's own medical evidence contradicts the agency's advice that the employee should retire on the grounds of ill health, a dispute will be recorded and the employee will be directed not to attend work. During this period the employee will remain on the same pay as they would have received had they not been directed to not attend work. The employee will not be required to attend work until revoked or until the medical advice supports the employee's safe return to work.

- If a dispute arises regarding the advice as to whether an employee should retire on the grounds of ill health, both the agency and employee must agree to a medical report being sought from an independent medical expert. That report will be commissioned and paid for by WA Police. The employee must attend any medical appointment arranged as part of this process.
- 44 Under the heading “Guidelines” of the Policy there appear further provisions in similar terms to those set out above. Clauses 1 to 5 are in the following terms:
1. At any time should WA Police deem there is sufficient evidence to suggest that an employee’s sustained poor health poses a significant risk to the welfare of themselves and/or other staff, the agency may direct the employee not to attend work. During this period the employee will remain on the same pay as they would have received had they not been directed to not attend work. The employee will not be required to attend work until revoked or until the medical advice supports the employee’s safe return to work.
 2. At any point in the process, an employee can be required to attend medical appointment(s).
 3. If a dispute is recorded, the independent medical expert may require the employee to attend a medical examination. Should the employee not attend such an appointment without good cause, the independent medical expert will be required to provide a medical opinion on the information available at that time.
 4. Ill health should not be used as the reason for offering voluntary severance. An offer of voluntary severance should only be considered when an employee’s office, post or position is, or is to be, abolished and the employee will become surplus to the requirements of WA Police.
 5. The employee should be advised to seek advice from their superannuation fund and be given appropriate time to obtain that advice and to consider their intention to withdraw or progress any request related to ill health retirement. The agency will supply any information required to the appropriate superannuation fund if requested.
- 45 The Union relied on cl 1 of the Guidelines in support of its argument that the Commissioner of Police had acted contrary to its own policies in the case of Ms Richardson. It maintained that on this basis she should have continued to be paid over the period in dispute. On the other hand, the Commissioner of Police contended that it is clear from the terms of the Policy read as a whole, that it deals with retirement on the grounds of ill health and not just sick leave generally. In this case, when Ms Richardson disputed the assessment that she be considered for medical retirement, and provided her own medical report, in terms of the provisions set out above under “Procedures”, she was paid her remuneration from 31 January 2018 while the procedure was followed.
- 46 Whilst the terms of the Policy in relation to “Procedures” and “Guidelines” are somewhat confusing, I do not think the Policy assists the Union in this case. The relevant headings refer to “Retirement on the Grounds of Ill Health”. When the payment provision was triggered in this case, following the disputed medical reports being received, Ms Richardson was paid accordingly. I do not consider the Policy, construed as a whole in accordance with its evident intention, which it must be, supports the payment of Ms Richardson at any point prior to the dispute arising on the medical reports.

Common law

- 47 In the alternative, the parties made submissions about the impact of the “no work no pay” principle of the common law of employment, as established by the decision of the High Court in *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435. This case is authority for the common law principle that under contracts of employment, it is service that earns wages or salary. If a person is precluded from performing service, even by the wrongful act of an employer, the employee’s remedy is damages and there is no entitlement to be paid wages.
- 48 Given my conclusions above, it is unnecessary for me to reach any view about the application of this principle in this case.

Conclusion

- 49 Accordingly, I consider that it was open for the Commissioner of Police to rely upon the terms of the Agreement read with AI 601 in this case. The application for relief sought by the Union must be dismissed.

2018 WAIRC 00415

DISPUTE RE UNION MEMBERS PERSONAL LEAVE ENTITLEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CIVIL SERVICE ASSOCIATION OF WA INC.

APPLICANT

-v-

COMMISSIONER OF POLICE, WA POLICE SERVICE

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR

SENIOR COMMISSIONER S J KENNER

DATE

THURSDAY, 12 JULY 2018

FILE NO

PSACR 5 OF 2018

CITATION NO.

2018 WAIRC 00415

2018 WAIRC 00660

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MISS ELSA FRANCOISE AGNES DUPONT	APPLICANT
	-v- MONTE FIORE CAFE RESTAURANT (G AND J UNIT TRUST)	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 20 JULY 2018	
FILE NO/S	B 80 OF 2017	
CITATION NO.	2018 WAIRC 00660	
Result	Application adjourned	
Representation (by correspondence)		
Applicant	In person	
Respondent	N/A	

Order

WHEREAS this is an application filed on 31 May 2017 under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 27 June 2017 the Commission was informed that the respondent had gone into liquidation and that an external administrator had been appointed;

AND WHEREAS on 8 August 2017 the external administrator informed the applicant that liquidation could take up to twelve months to complete and the applicant requested that her matter be adjourned for that period;

AND WHEREAS on 1 September 2017 the Commission wrote to the applicant confirming her matter was adjourned until 1 September 2018;

AND WHEREAS on 20 June 2018 the external administrator informed the applicant that investigations were ongoing and the report to creditors would not be finalised until late September 2018;

AND WHEREAS on 17 July 2018 the applicant requested her matter be adjourned until 31 October 2018;

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

THAT this application be, and hereby is, adjourned until 31 October 2018.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2018 WAIRC 00669

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 31 JANUARY 2018

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION LYNDA NEETER	APPELLANT
	-v- COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE DEPARTMENT	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MR J LAMB - BOARD MEMBER MR D STEWART - BOARD MEMBER	
DATE	FRIDAY, 27 JULY 2018	
FILE NO.	PSAB 4 OF 2018	
CITATION NO.	2018 WAIRC 00669	

Result	Direction issued
Representation	
Applicant	Mr S Neeter (as agent)
Respondent	Mr T Pontre (of counsel)

Direction

HAVING heard Mr S Neeter (as agent) on behalf of the appellant and Mr T Pontre (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT appeals PSAB 4 of 2018 and PSAB 5 of 2018 be heard together.
2. THAT the parties file a statement of agreed facts and bundle of agreed documents by 15 August 2018.
3. THAT the appellant file and serve outlines of evidence and documents, other than the agreed documents, on which she intends to rely by 5 September 2018.
4. THAT the respondent file and serve outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 26 September 2018.
5. THAT the appellant file and serve outlines of written submissions by 17 October 2018.
6. THAT the respondent file and serve outlines of written submissions by 7 November 2018.
7. THAT discovery be informal.
8. THAT this matter be listed for hearing not less than seven days after respondent's outlines of written submissions are filed and served.

(Sgd.) T EMMANUEL,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2018 WAIRC 00680

DISPUTE RE RETURN TO WORK AND USE OF LEAVE ENTITLEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER T EMMANUEL

DATE

FRIDAY, 3 AUGUST 2018

FILE NO

PSAC 6 OF 2018

CITATION NO.

2018 WAIRC 00680

Result	Application adjourned
Representation (by correspondence)	
Applicant	Ms D Larson (as agent)
Respondent	Ms A Gillespie (as agent)

Order

HAVING heard Ms D Larson (as agent) on behalf of the applicant and Ms A Gillespie (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT this application be, and hereby is, adjourned until 3 February 2019.

(Sgd.) T EMMANUEL,
Commissioner,
Public Service Arbitrator.

[L.S.]

2018 WAIRC 00422

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
COLIN R DIXON **APPLICANT**

-v-
DEPARTMENT OF EDUCATION WA **RESPONDENT**

CORAM COMMISSIONER D J MATTHEWS
DATE MONDAY, 16 JULY 2018
FILE NO/S U 36 OF 2018
CITATION NO. 2018 WAIRC 00422

Result Respondent's name amended
Representation
Applicant Mr C Dixon
Respondent Mr W Fitt of counsel

Order

HAVING HEARD Mr C Dixon on his own behalf and Mr W Fitt of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders –

THAT the name of the respondent be amended to be 'Director General, Department of Education'.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2018 WAIRC 00256

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
COLIN R DIXON **APPLICANT**

-v-
DEPARTMENT OF EDUCATION WA **RESPONDENT**

CORAM COMMISSIONER D J MATTHEWS
DATE WEDNESDAY, 18 APRIL 2018
FILE NO/S U 36 OF 2018
CITATION NO. 2018 WAIRC 00256

Result Orders made
Representation
Applicant In person
Respondent Ms S Young as agent

Orders

HAVING heard the applicant on his own behalf and Ms S Young, as agent, for the respondent on 9 April 2018 in application U 19 of 2018;

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

1. Application U 36 of 2018 is accepted out of time;
2. The Notice of Answer filed in U 19 of 2018 stand as the Notice of Answer in U 36 of 2018;
3. That discovery be informal and occur within one month of the date of this order;

4. The parties exchange lists of witnesses they propose to call at the hearing within one month of the date of this order;
5. The parties exchange outlines of evidence for each of their witnesses with;
 - (i) the applicant to file and serve his outlines of evidence one month before the hearing; and
 - (ii) the respondent to file and serve her outlines of evidence two weeks before the hearing.
6. The matter be listed for a four day hearing on dates to be fixed; and
7. The parties have liberty to apply.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Aboriginal Legal Service of Western Australia Limited Agreement 2018 AG 12/2018	07/23/2018	The Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Aboriginal Legal Service of Western Australia Limited	Commissioner T Emmanuel	Agreement registered
Rangers (National Parks) General Agreement 2018 AG 13/2018	07/18/2018	Mr Mark Webb, Director General Department of Biodiversity, Conservation and Attractions	Ms Caroline Smith, Secretary United Voice-WA Branch	Commissioner D J Matthews	Agreement registered
Shire of Murray (Outside Worlforce) Enterprise Bargaining Agreement 2018 AG 8/2018	07/18/2018	Western Australian Municipal, Road Boards, Parks and Racecourse Employees Union of Workers, Perth	The Shire of Murray	Commissioner D J Matthews	Agreement registered

NOTICES—General Matters—

2018 WAIRC 00681

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

111 St Georges Terrace, Perth

Amendment of awards with 40 hour weeks

Under the *Minimum Conditions of Employment Act 1993* (WA), the minimum conditions of employment set out in that Act are to be taken to be implied into any award, agreement or contract of employment. This includes the State Minimum Wage.

The State Minimum Wage is based on a 38 hour week. The minimum hourly rate of pay is therefore calculated by dividing the State Minimum Wage by 38.

The *Minimum Conditions of Employment Act* further provides that an employee is entitled to be paid at least the minimum hourly rate of pay for each hour worked. In the case of a 40 hour week, the minimum amount payable is therefore 40 multiplied by the minimum hourly rate.

The Western Australian Industrial Relations Commission notes that the awards set out in the following schedule are based on 40 or more hours per week. In some of these awards, the rates of pay have fallen below the State Minimum Wage, based on the hours of duty. In other awards, the rates of pay may fall below the State Minimum Wage in future years without amendments being made to the award.

The Western Australian Industrial Relations Commission proposes to amend the awards set out in the following schedule to clarify the appropriate rates of pay for affected employees.

Schedule

Application No.	Award name
APPL 33/2018	Engine Drivers' Minerals Production (Salt) Industry Award, 1970
APPL 35/2018	Theatrical Employees Entertainment, Sporting and Amusement Facilities (Western Australian Government) Award 1987
APPL 36/2018	Bespoke Bootmakers' and Repairers' Award No. 4 of 1946
APPL 37/2018	Prison Officers' Award
APPL 38/2018	Performers Live Award (WA) 1993
APPL 39/2018	Nurses' (Day Care Centres) Award

Application No.	Award name
APPL 40/2018	Masters, Mates and Engineers Passenger Ferries Award
APPL 41/2018	Building and Engineering Trades (Nickel Mining and Processing) Award, 1968
APPL 42/2018	Theatrical Employees (Perth Theatre Trust) Award No. 9 of 1983
APPL 44/2018	Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006
APPL 45/2018	The Dried Vine Fruits Industry Award, 1951
APPL 46/2018	Engine Drivers' (General) Award
APPL 47/2018	The Iron Ore Production & Processing (Locomotive Drivers) Award 2006
APPL 48/2018	The Fruit Growing and Fruit Packing Industry Award
APPL 49/2018	Fruit and Produce Market Employees Award
APPL 50/2018	Engine Drivers' (Gold Mining) Consolidated Award, 1979
APPL 51/2018	Engine Drivers' (Nickel Mining) Award 1968
APPL 52/2018	Fast Food Outlets Award 1990

If you object to any of these awards being amended or wish to be heard regarding this issue, you should advise the Registrar in writing by no later than 7 September 2018. Written objections can be made:

By post: Registrar

Western Australian Industrial Relations Commission
 Locked Bag 1, Cloisters Square
 PERTH WA 6850

By email: registry@wairc.wa.gov.au

Please quote the application number that corresponds to the above award/s so that we can deal with your objection promptly.

DATED at Perth, 31 July 2018

(Sgd.) S BASTIAN,
 Registrar.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2017 WAIRC 00855

APPEAL AGAINST THE ALLEGED CONSTRUCTIVE DISMISSAL ON 24 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MRS DEBORAH JAMES

APPELLANT

-v-

DEPARTMENT OF TRANSPORT (WA)

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
 SENIOR COMMISSIONER S J KENNER - CHAIRMAN
 MS L KENNEWELL - BOARD MEMBER
 MR A LEE - BOARD MEMBER

DATE

THURSDAY, 5 OCTOBER 2017

FILE NO

PSAB 8 OF 2017

CITATION NO.

2017 WAIRC 00855

Result Order issued

Representation

Appellant Ms M Stewart of counsel

Respondent Mr S Barrett

Order

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

THAT the time for the filing of the notice of appeal in the herein proceedings be and is hereby extended to 29 May 2017.

(Sgd.) S J KENNER,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2017 WAIRC 00884

APPEAL AGAINST THE ALLEGED CONSTRUCTIVE DISMISSAL ON 24 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MRS DEBORAH JAMES

APPLICANT

-v-

DEPARTMENT OF TRANSPORT (WA)

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MS L KENNEWELL - BOARD MEMBER
MR A LEE - BOARD MEMBER

DATE

FRIDAY, 20 OCTOBER 2017

FILE NO.

PSAB 8 OF 2017

CITATION NO.

2017 WAIRC 00884

Result	Directions issued
Representation	
Applicant	Mr N Marouchak of counsel
Respondent	Mr S Barrett

Direction

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

- (1) THAT the appellant file and serve on the respondent any further amendments to its notice of appeal by no later than 23 October 2017.
- (2) THAT the parties confer regarding any documents the appellant seeks from the respondent by no later than 30 October 2017. If the parties cannot agree, the appellant shall file any application for documents it seeks to be discovered by no later than 8 November 2017.
- (3) THAT the respondent file and serve on the appellant a notice of answer in response to any amendments to the appellant's notice of appeal by no later than 6 November 2017.
- (4) THAT the appellant file and serve any witness statements upon which she intends to rely by no later than 20 November 2017.
- (5) THAT the respondent file and serve on the appellant any witness statements upon which it intends to rely by no later than 4 December 2107.
- (6) THAT any witness statements filed will stand as the evidence in chief of the witness unless otherwise ordered.
- (7) THAT the appeal be listed for hearing for one day on a date to be fixed.
- (8) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2017 WAIRC 00985

APPEAL AGAINST THE ALLEGED CONSTRUCTIVE DISMISSAL ON 24 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MRS DEBORAH JAMES

APPELLANT

-v-

DEPARTMENT OF TRANSPORT (WA)

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MS L KENNEWELL - BOARD MEMBER
MR A LEE - BOARD MEMBER**DATE**

TUESDAY, 5 DECEMBER 2017

FILE NO.

PSAB 8 OF 2017

CITATION NO.

2017 WAIRC 00985

Result

Directions issued

Representation**Appellant**

Ms M Stewart of counsel

Respondent

Mr R Andretich of counsel and with him Mr S Barrett

Directions

HAVING heard Ms M Stewart of counsel on behalf of the appellant and Mr R Andretich of counsel and with him Mr S Barrett on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the respondent provide copies of documents requested by the appellant by 8 January 2018. If the parties cannot reach agreement on the provision of documents the appellant shall file any further application for production of documents by 12 January 2018.
- (2) 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. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Appeal Board.
- (3) THAT the appellant file and serve upon the respondent any witness statements upon which she intends to rely by 29 January 2018.
- (4) THAT the respondent file and serve any witness statements upon which it intends to rely by 19 February 2018.
- (5) THAT the appeal be listed for hearing for three days.
- (6) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00988

APPEAL AGAINST THE ALLEGED CONSTRUCTIVE DISMISSAL ON 24 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MRS DEBORAH JAMES

APPELLANT

-v-

DEPARTMENT OF TRANSPORT (WA)

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MR A LEE - BOARD MEMBER
MS L KENNEWELL - BOARD MEMBER**DATE**

THURSDAY, 7 DECEMBER 2017

FILE NO.

PSAB 8 OF 2017

CITATION NO.

2017 WAIRC 00988

Result	Order issued
Representation	
Appellant	Ms M Stewart of counsel
Respondent	Mr R Andretich of counsel and with him Mr S Barrett

Order

HAVING heard Ms M Stewart of counsel on behalf of the appellant and Mr R Andretich of counsel and with him Mr S Barrett on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders -

- (1) THAT the appellant be and is hereby granted leave to amend her notice of appeal in the terms of the proposed amended notice of appeal filed on 24 October 2017.
- (2) THAT the respondent be and is hereby granted leave to amend its notice of answer in the terms as set out in the proposed amended notice of answer filed on 9 November 2017.

(Sgd.) S J KENNER,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2018 WAIRC 00053**APPEAL AGAINST THE ALLEGED CONSTRUCTIVE DISMISSAL ON 24 APRIL 2017**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MRS DEBORAH JAMES

PARTIES**APPELLANT****-v-**

DEPARTMENT OF TRANSPORT (WA)

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MS L KENNEWELL - BOARD MEMBER
MR A LEE - BOARD MEMBER

DATE

WEDNESDAY, 24 JANUARY 2018

FILE NO

PSAB 8 OF 2017

CITATION NO.

2018 WAIRC 00053

Result	Directions issued
Representation	
Appellant	Ms M Stewart of counsel
Respondent	Mr S Barrett

Directions

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

- (1) THAT pars 3 – 4 of the Appeal Board's directions of 5 December 2017 be and are hereby revoked.
- (2) THAT the parties continue to confer and provide all documents for discovery as requested by either party by 28 February 2018.
- (3) THAT both parties confer and agree to the dates to file and serve any witness statements that either party may wish to rely upon.
- (4) THAT should the parties fail to reach an agreement about the dates upon which both parties are required to file and serve any witness statements that they may wish to rely upon, either party may apply to the Appeal Board for further directions.
- (5) THAT the hearing dates of 12 – 14 March 2018 be and are hereby vacated and that a further date not be set until both parties agree that the provision of documents to be discovered is finalised.
- (6) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2018 WAIRC 00188

APPEAL AGAINST THE ALLEGED CONSTRUCTIVE DISMISSAL ON 24 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MRS DEBORAH JAMES

APPLICANT

-v-

DEPARTMENT OF TRANSPORT (WA)

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
 SENIOR COMMISSIONER S J KENNER - CHAIRMAN
 MS L KENNEWELL - BOARD MEMBER
 MR A LEE - BOARD MEMBER

DATE

FRIDAY, 16 MARCH 2018

FILE NO.

PSAB 8 OF 2017

CITATION NO.

2018 WAIRC 00188

Result

Further directions issued

Representation**Applicant**

Ms M Stewart of counsel

Respondent

Mr R Andretich of counsel and with him Mr S Barrett

Further Directions

HAVING heard Ms M Stewart of counsel on behalf of the appellant and Mr R Andretich of counsel and with him Mr S Barrett on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the appellant file and serve upon the respondent any witness statements upon which she intends to rely by 30 April 2018.
- (2) THAT the respondent file and serve any witness statements upon which it intends to rely by 30 May 2018.
- (3) 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 three days prior to the date of hearing.
- (4) THAT the appeal be listed for hearing for three days on dates to be fixed.
- (5) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
 Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2018 WAIRC 00279

APPEAL AGAINST THE ALLEGED CONSTRUCTIVE DISMISSAL ON 24 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MRS DEBORAH JAMES

APPELLANT

-v-

DEPARTMENT OF TRANSPORT (WA)

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
 SENIOR COMMISSIONER S J KENNER - CHAIRMAN
 MR L KENNEWELL - BOARD MEMBER
 MR A LEE - BOARD MEMBER

DATE

WEDNESDAY, 2 MAY 2018

FILE NO

PSAB 8 OF 2017

CITATION NO.

2018 WAIRC 00279

Result	Order issued
Representation	
Appellant	Ms M Stewart of counsel
Respondent	Mr S Barrett

Order

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

- (1) THAT the appeal be and is hereby adjourned sine die.
- (2) THAT the parties have liberty to apply on short notice.

[L.S.]

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

2018 WAIRC 00386**APPEAL AGAINST THE ALLEGED CONSTRUCTIVE DISMISSAL ON 24 APRIL 2017**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MRS DEBORAH JAMES

APPELLANT

-v-

DEPARTMENT OF TRANSPORT (WA)

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MR A LEE – BOARD MEMBER
MRS L KENNEWELL - BOARD MEMBER

DATE

WEDNESDAY, 27 JUNE 2018

FILE NO

PSAB 8 OF 2017

CITATION NO.

2018 WAIRC 00386

Result	Discontinued by leave
Representation	
Appellant	Ms M Stewart of counsel
Respondent	Mr S Barrett

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

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