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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Industrial Magistrate—

2018 WAIRC 00746

APPEAL AGAINST A ORDER OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 123 OF 2018 GIVEN ON 9 AUGUST 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2018 WAIRC 00746
CORAM : THE HONOURABLE J H SMITH, ACTING PRESIDENT
 SENIOR COMMISSIONER S J KENNER
 COMMISSIONER D J MATTHEWS
HEARD : FRIDAY, 31 AUGUST 2018
DELIVERED : MONDAY, 17 SEPTEMBER 2018
FILE NO. : FBA 8 OF 2018
BETWEEN : THE GOVERNING COUNCIL OF NORTH METROPOLITAN TAFE
 Appellant
 AND
 STATE SCHOOL TEACHERS' UNION OF WA
 Respondent

ON APPEAL FROM:

Jurisdiction : Western Australian Industrial Magistrate's Court
Coram : Industrial Magistrate M Flynn
File No : M 123 of 2018

CatchWords : Industrial Law (WA) - Appeal against interim order made by Industrial Magistrate's Court - Appeal incompetent - Interim order made pursuant to s 83(5) and s 83(7) of the *Industrial Relations Act 1979* (WA) a 'finding' - An appeal against a finding not a 'decision' from which an appeal will lie under s 84 - Observation made that power to make an interim order for purpose of preventing further contravention of an industrial agreement did not extend to an order of reinstatement or to restart disciplinary process

Legislation : *Industrial Relations Act 1979* (WA), s 7, s 7(1), s 23, s 23(1), s 23A s 29(1)(a)(ii), s 29(1)(b)(i), s 44(6)(bb)(ii), s 45, s 49, s 49(2), s 49(2a), s 82, s 83, s 83(1), s 83(2), s 83(4), s 83(4)(a)(ii), s 83(5), s 83(7), s 83A, s 83C, s 84, s 84(1), s 84(2), s 84(5)
Surveillance Devices Act 1998 (WA), s 5(1)(b), s 9(1)
Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984 (WA), s 6, s 30(b)
Labour Relations Reform Act 2002 (WA), s 155(1)
Justices Act 1902 (WA)

Result : Appeal dismissed

Representation:

Counsel:

Appellant	:	Mr D Anderson, of counsel
Respondent	:	Mr D Scaife, of counsel
Solicitors:		
Appellant	:	State Solicitor for Western Australia
Respondent	:	Eureka Lawyers

Case(s) referred to in reasons:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) [2009] HCA 41; (2009) 239 CLR 27
 Anderson v Pope (1986) 66 WAIG 1563
 Brennan v Williams (1951) 53 WALR 30
 Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410
 Carr v Finance Corporation of Australia Ltd (1980) 147 CLR 246
 Computer Edge Pty Ltd v Apple Computer Inc (1984) 54 ALR 767
 Director General of Department of Transport v McKenzie [2016] WASCA 147
 G&R Rossen Pty Ltd v Buchanan [2018] WAIRC 00334; (2018) 98 WAIG 305
 Metcalf v Permanent Building Society (in liq) (1993) 10 WAR 145
 Nabeel Ashraf v Ms Michelle Hoad Managing Director North Metropolitan TAFE 2018 WAIRC 00699
 National Tertiary Education Union v Le Trobe University (2015) 254 IR 238
 O'Toole v Charles David Pty Ltd (1990) 171 CLR 232
 Penniel v Drifill (1980) WAR 30
 Pooley v Commissioner of Police [2009] WASCA 67; (2009) 89 WAIG 479
 Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
 Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia (1987) 68 WAIG 11
 The Chief Secretary for the State of Western Australia v Western Australian Prison Officers' Union of Workers (1981) 61 WAIG 1911
 The Commissioner of Police of Western Australia v AM [2010] WASCA 163(S); (2011) 91 WAIG 6
 The Director General, Department of Education v The State School Teachers' Union of WA (Inc) [2011] WAIRC 00058; (2011) 91 WAIG 166
 TVW Limited v Robinson and Cant (1964) WAR 33
 WA Pines Pty Ltd v Hamilton (1980) WAR 29

*Reasons for Decision***SMITH AP:****Background**

- 1 This is an appeal against an interim order made by the Industrial Magistrate's Court on 9 August 2018 in M 123 of 2018.
- 2 M 123 of 2018 was instituted as an originating claim in the Industrial Magistrate's Court on 23 July 2018 by The State School Teachers' Union of WA (Incorporated) (the union) against the appellant claiming a failure to comply with cl 23.1 of the Western Australian TAFE Lecturers' General Agreement 2014 (the 2014 Agreement).
- 3 Clause 23 of the 2014 Agreement provides:

23. BREACHES OF DISCIPLINE

- 23.1 No employee shall be subject to the penalties of sub-clause 23.2 of this clause unless a fair procedure is applied and decision and processes incorporate the principles of natural justice and are free from bias.
- 23.2 If, in accordance with the College's disciplinary policy, an employee is found by the College to have committed a breach of discipline, the College may:
 - (a) reprimand the employee;
 - (b) transfer the employee to another public sector agency, with the consent of that agency or transfer the employee to another position at the College at which the employee is currently employed;
 - (c) impose on the employee a fine not exceeding the equivalent of five (5) days pay that the employee would have received immediately prior to the breach of discipline finding;
 - (d) reduce the monetary remuneration of that employee;

- (e) reduce the level of classification of the employee;
 - (f) dismiss the employee; or
 - (g) except where the employee is dismissed under sub-clause 23.2 (f) of this clause, take action under any two or more of the above sub-clauses.
- 23.3 Other than in the case of termination in accordance with sub-clause 23.2 (f) of this clause, which is subject to other provisions under the *Industrial Relations Act 1979*, an employee aggrieved by a decision resulting from the disciplinary process may appeal against that decision by referring the matter to the Commission for determination.
- 4 The proceedings arose out of the appellant instituting disciplinary proceedings against a member of the union, Mr CS. During a disciplinary process the appellant had regard to an audio recording of a conversation between Mr CS and two other employees of the appellant. The union claims the use of the recording by the appellant in the disciplinary process is in breach of cl 23.1.
- 5 In particular, the union claims the recording of the conversation was made in contravention of s 5(1)(b) of the *Surveillance Devices Act 1998* (WA) and s 9(1) of the *Surveillance Devices Act* prohibits the communication or publishing of an audio recording to officers, employees or agents of the appellant and others.
- 6 In the statement of claim annexed to the originating claim in M 123 of 2018, the union seeks a finding that the appellant contravened or failed to comply with cl 23.1 of the 2014 Agreement and seeks the following (final orders):
- (2) An order pursuant to s 83(4)(a)(ii) of the IR Act imposing a penalty on the Respondent for its contravention or failure to comply with cl 23.1 of the Agreement.
 - (3) An order pursuant to s 83F(2)(b) that the Respondent pay to the Claimant any penalty imposed upon it.
 - (4) An order pursuant to s 83(5) of the IR Act that the Respondent (whether by its officers, delegates, agents, employees or other representatives) shall:
 - (a) destroy all copies in its possession or control of an audio recording of a conversation between CS, ER and JD recorded on 8 August 2017 (**Audio Recording**);
 - (b) recommence any disciplinary inquiry or process in relation to the conduct of CS on 25 July 2017;
 - (c) be restrained from:
 - (i) having regard to the Audio Recording in any disciplinary inquiry or process in relation to the conduct of CS on 25 July 2017 recommenced pursuant to this order;
 - (ii) permitting MH, or any of its officers, employees or agents who are aware of the Audio Recording, from having any involvement in any disciplinary inquiry or process, including the making of any decision, in relation to the conduct of CS on 25 July 2017 recommenced pursuant to this order.
 - (5) Such further or other orders as the Court considers appropriate.
- 7 On 27 July 2018, the union filed an application in M 123 of 2018 seeking:
- 1. An interim order pursuant to ss 83(5) and (7) of the *Industrial Relations Act 1979* (WA) that, until the hearing and determination of the Claimant's claim for relief or further order, the Respondent (whether by its officers, delegates, agents, employee or other representatives) be restrained from:
 - a. using, publishing or communicating an audio recording of a conversation between CS, ER and JD recorded on 8 August 2017 (**Audio Recording**);
 - b. conducting (or continuing to conduct) or taking any further steps in any disciplinary inquiry or process in relation to the conduct of CS on 25 July 2017 based upon the Audio Recording or otherwise;
 - c. dismissing from employment, or taking any other disciplinary action against, CS based upon the Audio Recording or otherwise;
 - d. permitting MH, or any of its officers, employees or agents who have knowledge of the contents of the Audio Recording, from having any involvement in any disciplinary inquiry or process, including the making of any decision, in relation to the conduct of CS.
 - 2. An order that the affidavit of CS sworn on 26 July 2018 and the annexures thereto be sealed on the Court file and not be disclosed to any person without further order.
- 8 The application for an interim order was listed to be heard on 9 August 2018.
- 9 On 8 August 2018, the appellant dismissed Mr CS.
- 10 At the hearing on 9 August 2018, the union made an oral application to amend its application for an interim order and sought, among other orders, an order for reinstatement of Mr CS.
- 11 The Industrial Magistrate rejected a submission made on behalf of the appellant that the *Industrial Relations Act 1979* (WA) (the IR Act) confers exclusive jurisdiction on the Commission to deal with disputes about unfair dismissal and interim reinstatement orders.

- 12 In oral reasons given by the Industrial Magistrate on 9 August 2018, his Honour stated that he was required to consider whether there was a serious issue to be tried in respect of (AB 79 - 81):
- (a) whether the making of the recording by Mr D and the use of the recording by the appellant was lawful;
 - (b) whether or not the use of the recording will be found to contravene cl 23(1) of the 2014 Agreement; and
 - (c) whether or not the final relief before the Industrial Magistrate's Court is likely to involve reinstatement as an appropriate form of relief.
- 13 The Industrial Magistrate formed the opinion that there was a prima facie case in respect of each of these matters. In particular, his Honour appeared to accept that an order for reinstatement was an order within the power of the Industrial Magistrate's Court to make. His Honour observed that such an order may well be the same as the final order (albeit on a temporary basis) and that was an unavoidable consequence of the power conferred on the Industrial Magistrate's Court by s 83(5) and s 83(7).
- 14 The Industrial Magistrate then found that the balance of convenience favoured the making of an interim order when regard was had to the following matters:
- (a) If the union is (ultimately) successful then in six to 12 months' time there would be an order that Mr CS's wages and entitlements be paid from when he was otherwise terminated, assuming there was an order for his reinstatement.
 - (b) If an interim order is not made Mr CS would not be receiving any salary for that period.
 - (c) If an interim order is not made then Mr CS's reputation may be affected and that may affect his ability to earn an income pending a final hearing.
- 15 Following regard to these matters, the Industrial Magistrate made an order on 9 August 2018 (the subject of this appeal) as follows:
- The court makes an interim order pursuant to sections 83(5) and 83(7) of the *Industrial Relations Act 1979* (WA) that, until the hearing and determination of the claimant's claim for relief or further order:
1. The respondent must reinstate CS to his employment with immediate effect.
 2. The respondent must not use any audio recording (or transcript of the same) of a conversation on 8 August 2017 involving CS.
 3. The respondent must not initiate or take any steps for a breach of discipline in reliance on anything said or done by CS on 8 August 2017.
 4. The respondent must not rely upon anything said or done by CS on 8 August 2017 in connection with any allegation of a breach of discipline against CS.
 5. The following employees of the respondent must not be involved in any breach of discipline process concerning CS: MH.
 6. The claim be listed for a pre-trial conference before the Clerk of the Court at 11.00 am on 15 August 2018.
 7. The parties have liberty to apply.
 8. Costs, if any, be reserved.
 9. The claim is adjourned to 5 September 2018 at 10.00 am for trial.

Grounds of appeal

- 16 Ground 1 of the amended grounds of appeal raises the issue whether the Industrial Magistrate's Court has power to make an interim order of reinstatement. Ground 1 alleges the Industrial Magistrate erred in law in making order 1 of the interim order when there was no power to do so. In the particulars to ground 1, the appellant alleges:
- Section 83(5) of the *Industrial Relations Act 1979* (WA) only provides power for the Court to make an order for the purpose of preventing any further contravention or failure to comply with an instrument.
- (i) There is no power for the Court to make an order to undo a contravention or failure to comply with an instrument.
 - (ii) If the appellant contravened the *Western Australian TAFE Lecturer's General Agreement 2014 (Agreement)* when terminating Mr CS's employment, any contravention is already complete, and an order for reinstatement does not amount to an order for the purpose of preventing any further contravention or failure to comply with an instrument.
- 17 In ground 2(a) of the amended grounds of appeal the appellant alleges the Industrial Magistrate erred in law in finding there was a serious question to be tried on grounds that any failure to afford a fair disciplinary process is not actionable by way of enforcement under s 83 of the IR Act and is only actionable by way of a claim to the Commission.
- 18 Grounds 2(b), 3 and 4 raise issues whether the Industrial Magistrate's Court erred in law which go to the factual matters considered by the Industrial Magistrate:
- (a) when considering whether there was a serious question to be tried; or
 - (b) resulted in a decision that was manifestly unreasonable.
- 19 For reasons that follow, I am of the opinion that the appeal must fail on grounds the interim order made by the Industrial Magistrate's Court is not a 'decision' within the meaning of s 84 of the IR Act from which an appeal will lie.

20 However, if I am wrong in respect of this point, I would uphold ground 1 and ground 2(a) of the grounds of appeal.

Is Jurisdiction conferred on the Full Bench to hear and determine an appeal against an interim order made by the Industrial Magistrate's Court?

- 21 Section 84 of the IR Act creates a statutory right of appeal to the Full Bench against a 'decision' of the Industrial Magistrate's Court.
- 22 Section 84(1) of the IR Act provides:
- In this section *decision* includes a penalty, order, order of dismissal, and any other determination of an industrial magistrate's court, but does not include a decision made by such a court in the exercise of the jurisdiction conferred on it by section 96J.
- 23 The union filed an application in this appeal on 28 August 2018 seeking orders that the appeal be struck out on grounds that the appeal is incompetent, as the appeal is against an order of the Industrial Magistrate's Court that has not finally determined the application before it and therefore is not a 'decision' for the purposes of s 84 of the IR Act.
- 24 The first question raised in this appeal is whether the interim order made by the Industrial Magistrate's Court on 9 August 2018 is a 'finding' within the meaning of s 7(1) of the IR Act and whether a 'decision' in s 84(1) includes a decision that is a 'finding' as defined.
- 25 A 'finding' is defined in s 7(1) of the IR Act to mean a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate.
- 26 In *Anderson v Pope* (1986) 66 WAIG 1563, the Industrial Appeal Court found a decision of the Industrial Magistrate that does not finally determine the application before it does not constitute 'a decision' from which an appeal will lie under s 84(1). In that matter, the Industrial Magistrate at first instance heard argument on 52 separate complaints against several defendants as to whether there was a case to answer. The Industrial Magistrate, after reserving his decision, delivered reasons for decision and found that there was no case to answer for three defendants but found there was a case to answer by others. The defendants against whom a finding was made that there was a case to answer filed an appeal. The Full Bench subsequently dismissed the appeal as incompetent and a further appeal was instituted to the Industrial Appeal Court under s 90(1) of the IR Act.
- 27 The Industrial Appeal Court in *Anderson v Pope* unanimously dismissed the appeal. In doing so, their Honours determined that the meaning of 'decision' in s 84(1) did not extend to a finding, ruling or other expression of opinion or direction that fell short of a final determination of the application. In particular, their Honours found that a 'decision' within the meaning of s 84(1) did not extend to a 'finding' as defined in s 7(1) of the IR Act.
- 28 In determining whether a 'decision' in s 84(1) should be construed as only a final decision or to also include a 'finding', the members of the Industrial Appeal Court had regard to the history of amendments to the IR Act in 1984 and to a previous decision of the Industrial Appeal Court which led to the amendments to the IR Act in 1984 to insert the definition of 'finding' in s 7(1) of the IR Act and amended the power of the Full Bench to hear appeals under s 49 of the IR Act against the decisions of the Commission that are 'findings' (s 6 and s 30(b) of the *Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984 (WA)*).
- 29 The decision which led to amendments in 1984 and referred to by the members of the Industrial Appeal Court in *Anderson v Pope* is the decision in *The Chief Secretary for the State of Western Australia v Western Australian Prison Officers' Union of Workers* (1981) 61 WAIG 1911 (*Prison Officers' Sick Leave Case*).
- 30 In the *Prison Officers' Sick Leave Case*, the parties were in dispute following industrial action by prison officers about the taking of sick leave without a medical certificate. Following a conference convened by the Senior Commissioner, an interim order was made, pursuant to s 45 of the IR Act, which required until further order the prison officers to return to work, and entitling the prison officers to take five days' leave per annum without deduction of pay. The Full Bench found an appeal was incompetent against the interim order as the order did not constitute a 'decision' within the meaning of s 49 of the IR Act. The Industrial Appeal Court agreed. At the time that appeal was heard the IR Act did not contain a definition of the term 'decision'. However, their Honours found that for an order to constitute a 'decision' within the meaning of s 49 (and from which an appeal would lie) the ordinary and natural meaning of 'decision' in s 84(1) was an order that finally determined the rights between the parties; that is an order that constitutes a final determination of a matter.
- 31 In the judgement of Olney J in *Anderson v Pope*, his Honour had regard to the findings made in the *Prison Officers' Sick Leave Case* and to the amendments in 1984 to the IR Act that followed that decision. His Honour set out this history of legislative amendment as follows (1564 - 1565):

Apart from resorting to the ordinary meaning of the language used it is sometimes helpful in the construction of a statute to look to its history and in the present case it is appropriate that this should be done. Section 6 of the Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984 (the 1984 Act) repealed the whole of section 7 of the then Industrial Arbitration Act 1979 (renamed the Industrial Relations Act 1979) and substituted the now current section. The repealed section did not contain any definition of either 'decision' or 'finding'. Prior to the 1984 Act section 49(2) provided for an appeal to the Full Bench from any decision of the Commission. That provision was not amended but an additional subsection was inserted:

- (2) (a) An appeal does not lie under this section from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.

The effect of these amendments was to permit an appeal in cases involving the public interest from a 'finding' of the Commission. Relevantly the 1984 Act did not affect section 84. It is true that the definition in section 84(1) was amended by the deletion of the word 'conviction' as one of the things included in the meaning of 'decision' but that change has no

bearing on the question of whether the section demonstrates a 'contrary intention' sufficient to displace the operation of section 7(1).

It is worthwhile to pause for a moment to consider and compare the position prevailing both before and after the 1984 Act. Prior to the amendment an appeal lay to the Full Bench from any decision of the Commission [Section 94(2)]. There was no general definition of the term 'decision' and accordingly that term would have borne its ordinary and natural meaning. In section 84 provision was made for an appeal to the Full Bench from any decision of an Industrial Magistrate but for the purpose of that section the term 'decision' was defined to include certain specific matters. It is beyond doubt that prior to the 1984 Act 'decision' in section 84 meant something different from the same term when used in section 49. The choice of language used in the definition of 'decision' in section 7(1) is significant. The term is said to include 'award, order, declaration or finding'. All of those terms are appropriate in the context of the exercise of the arbitral jurisdiction of the Industrial Relations Commission. With the exception of the word 'order' they are not appropriate to the exercise of jurisdiction by the Industrial Magistrate. Such amendments as were made following the incorporation into the Act of the concept of a 'finding' can be seen to have applied only in relation to the functions of the Commission itself. Reference has already been made to section 49(2)(a) but there is another amendment which supports the view I have just expressed and that is the inclusion of the word 'finding' in section 34(4) so as to read as follows:

- (4) Except as provided by this Act, no award, declaration, finding, or proceeding of the President, the Full Bench, or the Commission shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any court on any account whatsoever.

In the absence of any relevant change to section 84(1) it is fair to conclude that the legislature's intention was to leave unaffected the right of appeal in respect of proceedings before an Industrial Magistrate but to expand the circumstances when an appeal may be had from the Commission to the Full Bench. The reason for this expansion of the right of appeal from decisions of the Commission which do not finally decide, determine or dispose of the matter to which the proceedings relate can be found in the decision of this Court in *The Chief Secretary for Western Australia v. WA Prison Officers' Union* 61 WAIG 1911 where it was held that the Act as it then stood (in 1981) did not provide a right of appeal from an interim order of the Commission. The effect of the amendments made in 1984 has been to overrule by legislation the decision in the Chief Secretary's case but it is not possible to extract from the legislation as amended any intention to affect the right of appeal from an Industrial Magistrate.

32 In *Anderson v Pope*, each of the members of the Industrial Appeal Court considered whether a ruling by the Industrial Magistrate that there was a case to answer came within the meaning of 'decision' in s 84(1) of the IR Act.

33 Olney J went on to observe (1565):

When one has regard to the role of the Industrial Magistrate to hear and determine applications under section 83 (1) and the limited nature of the functions that may be performed by him I think that there is every reason to believe that the definition in section 84 (1) was intended to refer only to the exercise of the particular powers referred to in the preceding section. I do not think there is any scope within the definition in section 84 (1) to extend the meaning of that term to a finding or ruling or other expression of opinion or direction given in the course of proceedings which falls short of a final determination of the application.

34 It was clear that the first sentence of his Honour's reasoning must be read in context of the sentence that follows in this passage and to the previous paragraph of his Honour's reasons where his Honour said (1565):

By section 82 (1) an Industrial Magistrate has jurisdiction to hear and determine any application made to him under section 83 (1). The types of application provided for in the latter subsection relate to the enforcement of an award, industrial agreement or order in circumstances where a person is said to have contravened or failed to comply with any provision thereof. Upon the hearing of such an application the Industrial Magistrate may by order issue a caution, impose a penalty or dismiss the application with or without costs. In addition if it appears to the Industrial Magistrate that an employee has not been paid by an employer against whom the proceedings have been taken his entitlement under an award or order he may order the employer to pay the amount of the underpayment which is deemed to be a penalty. Furthermore, when an Industrial Magistrate makes an order for the payment of a penalty or costs he must state in the order the name of the person liable to pay the penalty or costs and the name of the person same are payable.

35 In *Anderson v Pope*, Rowland J importantly pointed out it should be remembered that an appeal is entirely a creature of statute (1566). His Honour also observed:

By section 84 (2):

Subject to this section an appeal lies to the Full Bench in the manner prescribed from any decision of an Industrial Magistrate.

...

By section 84 (2):

Decision — includes a penalty, order, order of dismissal and any other determination of an Industrial Magistrate.

Provisions of that nature in substantially that form have been dealt with by the courts in the past and it has been invariably held that determination, when used in relation to the civil courts, in which description I include courts exercising criminal as well as civil jurisdiction, means final determination. Section 4 Justices Act, *WA Pines Pty Ltd v. Hamilton* (1980) WAR 29 and *Penniel v. Driffil* (1980) WAR 30.

As I understand the appellants' argument it is that the definition in section 84(1) uses the word 'includes' so that 'decision' is not limited in its scope and it can in fact incorporate its dictionary meaning and the definition of the word within section 7 of the Industrial Relations Act. By the definition: 'In this Act, unless the contrary intention appears ...' —

"decision": includes award, order, declaration or finding.' Finding' is also defined in section 7 – 'means a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate'.

Counsel for the appellants notes that these definitions apply 'in this Act'. They are not limited to parts of the Act. Accordingly, as the definition in section 84 uses the word 'includes', then, unless a contrary intention appears, full force should be given to the section 7 definitions.

In my view, it is abundantly clear that a contrary intention does appear.

In the Act, provision is made for different tribunals to undertake different functions. On the one hand, one has the traditional Industrial Tribunal that is concerned with awards as defined and declarations as defined. Those tribunals have express power to make orders and findings as well as awards and declarations. An Industrial Magistrate has no power to make awards or declarations. The powers and functions of the Industrial Magistrate are set out in Part III. Those powers are more akin to a civil court exercising civil or criminal jurisdiction. By section 83(6) and (7), however, standards of proof and practice and procedure in civil proceedings will be observed by the Industrial Magistrates. The Commission is not so limited — see, for example, section 26.

One can see immediately that there is a great difference between the two tribunals. Their functions and powers are totally dissimilar. It is not at all surprising that one would find a narrower definition of 'decision' within Part III.

- 36 Importantly, the decision of the Industrial Appeal Court in *Anderson v Pope* is a decision binding upon the Full Bench.
- 37 The subsequent enactment of s 83(5) and s 83(7) (by s 155(1) of the *Labour Relations Reform Act 2002* (WA)) conferring the power to make orders for the purpose of preventing any further (future) contravention or failure to comply with a provision of an instrument does not, in my respectful opinion, materially affect the role of the Industrial Magistrate's Court from the role of the Industrial Magistrate considered in *Anderson v Pope* in 1986. The role of the Industrial Magistrate's Court in 2018 continues as a court vested with the power to enforce instruments by making limited coercive orders.
- 38 Section 83 confers jurisdiction on the Industrial Magistrate's Court to enforce instruments, including an industrial agreement. The power to enforce under s 83 is not a power at large to resolve disputes between parties. It is notable that proceedings instituted by way of an originating claim are penal in nature; that is they are claims for civil enforcement of provisions of instruments by primarily the imposition of a penalty.
- 39 The mere filing of a discrete application for an interim order does not have the effect at law of the creation of a substantive application. An application for an interim order under s 83(7) cannot be made unless a substantive application has been instituted under s 83(1).
- 40 Although the interim order in this matter was made following a separate application made by the union in M 123 of 2018 and the Industrial Magistrate's Court determined the application by making an interim order on 9 August 2018, it cannot be said that the interim order does not constitute a 'finding' within the meaning of s 7(1) of the IR Act:
- (a) Firstly, pursuant to s 83(7) an interim order can only be made pending final determination of an application made under s 83(1) (that is the substantive application for enforcement). A decision on an application for an interim order by operation of s 83(7) made in the course of proceedings does not and cannot operate to finally decide the matter in s 83(1). Consequently, it follows therefore that an interim order made pursuant to s 83(7) is a 'finding' within the meaning of s 7(1) of the IR Act.
 - (b) Secondly, the primary function of the Industrial Magistrate's Court under s 83 is to decide and determine the substantive application by making final orders. An interim order made under s 83(7) cannot operate as a final order.
- 41 The test for determining whether an order is final is whether an order finally determines the rights of the parties and requires a court or tribunal in determining this question to have regard to the legal rather than the practical effect of the order: *Carr v Finance Corporation of Australia Ltd* (1980) 147 CLR 246, 248 (Gibbs, J); *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767; *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232.
- 42 In *Metcalf v Permanent Building Society (in liq)* (1993) 10 WAR 145, Murray J, with whom Rowland and Seaman JJ agreed, observed in relation to the distinction between final and interlocutory orders (149):
- It is clear I think, that such an order is not final, but merely interlocutory, because it is not such as to finally determine the rights of the parties in a principal, rather than subsidiary, cause pending between them. It is clear that more remains to be done before the final resolution of the issues between the parties is achieved. This is not a case which requires attention to any fine distinctions or which requires any refinement of the test broadly formulated above. Expressed in those terms the test has been accepted as flowing from decisions of the High Court in a number of recent decisions in this Court: see *Ex parte Stiles* (1989) 2 WAR 270 at 274-275; *Biala Pty Ltd v Mallina Holdings Ltd* (1989) 2 WAR 381 at 387-388; *Michael v Freehill Hollingdale & Page* (1990) 3 WAR 223 at 228; *Lewandowski v Lovell* (1991) 4 WAR 311 at 312-314.
- 43 Thus, it is immaterial that whilst an interim order is in force it has force and effect which if steps are required to be taken to comply with an order could result in expense to be paid by a person, such as the payment of wages to an employee.
- 44 As the respondent points out in its supplementary submissions filed on 7 September 2018, the order made by the Industrial Magistrate was plainly not an order to finally determine the rights of the parties. The orders:
- (a) were expressed to apply only 'until the hearing and determination of the claimant's claim for relief or further order';
 - (b) provided the parties with liberty to apply;

- (c) were made pursuant to the power in s 83(7) to make interim orders 'pending the final determination of the application';
- (d) included procedural orders programming the matter to a final hearing, such as by listing the matter for a pre-trial conference and a final hearing.

45 It would be an odd result if an appeal to the Full Bench would lie as of right to the Full Bench of the Commission against an interim order made by the Industrial Magistrate's Court, pursuant to s 83(7) of the IR Act, whereas an appeal against an interim order against a decision of the Commission does not lie as of right under s 49 of the IR Act. This is because pursuant to s 49(2a) an appeal does not lie to the Full Bench from a decision of the Commission that is a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.

46 For these reasons, I am of the opinion that the appeal is incompetent and an order should be made that the appeal be dismissed.

47 If, however, I am wrong and because of the amendment to s 83 of the IR Act subsequent to the decision in *Anderson v Pope* is distinguishable on grounds that the enactment of the specific power of the Industrial Magistrate's Court to make an interim order pursuant to s 83(7) of the IR Act is a power to make a decision that is final and is not a 'finding', I am of the opinion that the Industrial Magistrate erred in making orders 1 to 5 of the interim order. My reasons for making this finding are as follows.

The nature of the power conferred on the Industrial Magistrate's Court under s 83 of the IR Act

48 The primary object of statutory construction is to construe a statutory provision so that it is consistent with the language and purpose of all provisions of the statute. The meaning of the text may require consideration of the context, which includes the general purpose and policy of the provision, in particular the mischief it is seeking to remedy: *Director General of Department of Transport v McKenzie* [2016] WASCA 147 [46] (Buss P); applying *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

49 The scheme of the IR Act in respect of the creation of employer and employee's rights, duties and obligations where unions enter into negotiations with employers is that industrial instruments come into force and effect either by the Commission:

- (a) exercising arbitral power in enquiring into and dealing with an industrial matter to make an award under Div 2A of Pt II or enterprise order under Div 2B of Pt II of the IR Act; or
- (b) exercising administrative power to register an industrial agreement, the terms of which are agreed to by an organisation or organisations and an employer or employers under Div 2B of Pt II.

50 Section 83 of the IR Act provides:

83. Enforcing awards etc.

(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 —

- (a) the Registrar or a deputy registrar;
- (b) an industrial inspector;
- (c) in the case of an award or industrial agreement, any organisation or association named as a party to it;
- (d) in the case of an award, industrial agreement or order, an employer bound by it;
- (e) any person on his or her own behalf who is a party to the instrument or to whom it applies;
- (f) 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.

- 51 The power conferred by s 83 is not a power to resolve industrial disputes arising out of an industrial matter. The power to do so is conferred on the Commission pursuant to its powers and s 23(1) to enquire into and deal with any industrial matter.
- 52 The primary purpose of s 83 is two-fold. Firstly, its function is to coerce and ensure compliance with an instrument by providing for the imposition of penalties as a means of deterrence. Secondly, s 83 provides the means by which sanctions can be imposed on a person who contravenes or fails to comply with an instrument.
- 53 It is only where the Industrial Magistrate's Court imposes a penalty under s 83(4) that the Industrial Magistrate's Court is conferred with the power to make an order under s 83(5). Any order the Industrial Magistrate's Court makes under s 83(5) is required by the express statutory text to be an order against a person (who has contravened or failed to comply with an instrument) 'for the purpose of preventing any further contravention or failure to comply' with the provision of the instrument. Unless an order can be properly characterised for such a purpose, the power to make any order, other than an order imposing a penalty under s 83(4) of the IR Act, cannot be invoked.
- 54 The Industrial Magistrate's Court is empowered to make an interim order under s 83(5) pending final determination of an application under s 83(1) (s 83(7)). The power to make an interim order is, however, also not a power at large. Any interim order must be an order under s 83(5); that is it must be an order for the requisite purpose of preventing any further contravention or failure to comply with the provision claimed to be contravened or not complied with in the substantive application, that is the application made under s 83(1).

Was the interim order made by the Industrial Magistrate's Court within the power conferred by s 83(5) and s 83(7) of the IR Act?

- 55 It is clear that the power of the Industrial Magistrate's Court to make an interim order is subject to the preconditions in s 83(5) of the IR Act. When this principle is applied, it follows that in this matter the Industrial Magistrate's Court was required to be satisfied that there is a serious question to be tried as to whether:
 - (a) the union had made out a prima facie case of a contravention or a failure to comply with an instrument (to which s 83 applies); that is was there a prima facie case that the appellant had failed to comply with cl 23(1) of the 2014 Agreement, when applying a disciplinary process for breach of discipline against Mr CS; and
 - (b) there is a prima facie case that the interim orders sought by the union (or the terms of an interim order the Industrial Magistrate's Court was considering whether to make) were orders that could properly be characterised as orders for the purpose of preventing any further contravention or failure to comply with cl 23(1).
- 56 It is only in the circumstances where the Industrial Magistrate's Court can be satisfied that a final order could be made and there is prima facie evidence or material before the Industrial Magistrate's Court taken at its highest which establishes that such an order is for the requisite purpose that an interim order can be made under s 83(7).
- 57 In this matter, the only clause of the 2014 Agreement claimed to be breached by the union was cl 23(1). In light of the fact that Mr CS had ceased to be an employee of the appellant, it is difficult to contemplate that any interim order could be made against the appellant for the purpose of preventing any further contravention or failure to comply with cl 23(1). Nor would there be power conferred on the Industrial Magistrate's Court to make such a final order under s 83(5).
- 58 There is no power conferred upon the Industrial Magistrate's Court to reinstate an employee following a finding made under s 83(1) that the employer has breached an award or an industrial agreement provision.
- 59 Once an existing relationship of employer and employee ceases, the Industrial Magistrate's Court has no power to reactivate or recreate the relationship. Industrial agreements cease to apply to an employee on the termination of employment: see the discussion in *Pooley v Commissioner of Police* [2009] WASCA 67; (2009) 89 WAIG 479. This does not mean that a provision of an industrial agreement contravened or not complied with whilst the employment relationship was in existence cannot be enforced.
- 60 There is nothing in the 2014 Agreement that provides for the re-employment or reinstatement of an employee.

- 61 To the contrary, cl 23.3 expressly contemplates that where an employee is dismissed, the dismissal of the employee is subject to the provisions of the IR Act; that is an application can be made by an employee pursuant to s 29(1)(b)(i) or by an organisation of employees pursuant to s 29(1)(a)(ii) of the IR Act. The words in cl 23.1 '[n]o employee shall be subject to the penalties of sub-clause 23.2 of this clause unless a fair procedure is applied' do not provide an adjunct to a power to re-establish an employment relationship. Such a construction is contrary to intention expressed in cl 23.3. Nor can cl 23.1 be construed to have effect that if cl 23.1 is not complied with, the dismissal of an employee will be void and of no effect. Clause 23.1 simply creates a procedure to be applied in a disciplinary process. If breached, cl 23 does not provide for consequences that follow other than the processes available under the IR Act.
- 62 In this matter, in the absence of any power in the Industrial Magistrate's Court to make a final order for reinstatement of an employee, the union was unable to demonstrate a prima facie case for an order of reinstatement or to restart the disciplinary process. In these circumstances, the Industrial Magistrate's discretion to make orders 1 to 5 of the interim order could not be validly invoked. These orders were beyond power and in excess of the jurisdiction conferred on the Industrial Magistrate's Court in s 83 of the IR Act.
- 63 In this matter, the only final order that could be prima facie open on the material before the Industrial Magistrate's Court on 9 August 2018 is a finding that the appellant contravened cl 23(1) and an order made pursuant to s 83(4), by issuing a caution or imposing a penalty on the appellant (after hearing evidence on the merit of the claim). However, as the employment relationship had ceased, no order could be made under s 83(5) to reinstate an employee and in effect restart a disciplinary process, as the precondition for making such an order would not be met.
- 64 In the absence of any contractual right for an employee whose employment is terminated to claim reinstatement there is no right at common law to make a claim for unfair dismissal. Such a right is conferred solely by statute: *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410.
- 65 A right to make a claim of unfair dismissal or the right to reinstatement of an employee whose employment is terminated is expressly conferred by s 23 (by the definition of 'industrial matter') of the IR Act. Pursuant to s 23A of the IR Act, the Commission has power to make final orders in respect of a claim of unfair dismissal. In the absence of the power conferred upon the Commission in s 23(1) of the IR Act to enquire into and deal with any 'industrial matter' (which include among other matters 'conditions which are to take effect after the termination of employment'), the Commission would have no jurisdiction to reinstate an employee as the relationship of employer and employee upon which the Commission's jurisdiction is founded would not exist: see the discussion in *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia* (1987) 68 WAIG 11, 15 (Kennedy J) (*Pepler's Case*).
- 66 The only power to reinstate an employee is expressly conferred on the Commission under s 23A of the IR Act.
- 67 Pursuant to s 44(6)(bb)(ii), the Commission has power when dealing with an industrial dispute referred by an organisation (under s 29(1)(a)(ii)) to make an interim order for reinstatement of an employee. The preconditions for making such an order were considered by the Full Bench in *The Director General, Department of Education v The State School Teachers' Union of WA (Inc)* [2011] WAIRC 00058; (2011) 91 WAIG 166.
- 68 For these reasons, if the appeal is not incompetent, I am of the opinion that the Industrial Magistrate's Court erred in making orders 1 to 5 of the interim order and an order should be made by the Full Bench to quash orders 1 to 5 of the interim order.

KENNER SC:

- 69 The interim orders the subject of this appeal, made under ss 83(5) and (7) of the *Industrial Relations Act 1979* (WA) on 9 August 2018, arose out of proceedings commenced by the respondent in the Industrial Magistrate's Court against the appellant, alleging that the appellant failed to comply with cl 23.1 of the Western Australian TAFE Lecturer's General Agreement 2014. This clause requires that before any employee is subject to a disciplinary penalty, they must be afforded procedural fairness and the disciplinary process and decision must be free from bias. It is contended at first instance by the respondent, that the appellant failed to comply with cl 23.1 of the Agreement, in that the appellant, in disciplinary proceedings in relation to a member of the respondent, had regard to and relied upon an audio recording made on 8 August 2017, which recording contravened the *Surveillance Devices Act 1998* (WA).
- 70 The interim orders, amongst other things, required the reinstatement of the respondent's member in his employment with the appellant with immediate effect. Other orders were made in relation to a prohibition on the use of the audio recording of a conversation with the respondent's member and others on 8 August 2017, in any disciplinary proceedings against him. Also, the orders prohibited a manager of the appellant from being involved in any breach of discipline process involving the respondent's member. The respondent at first instance in the substantive application under s 83(1) of the Act, seeks orders imposing a penalty on the appellant for its contravention or failure to comply with cl 23.1 of the Agreement, under s 83(4)(a)(ii) of the Act. Furthermore, the respondent also seeks orders under s 83(5) of the Act that the appellant destroy copies of the audio recording; recommence any disciplinary enquiry or process in relation to its member; that the appellant be restrained from having regard to the audio recording in any recommenced disciplinary proceedings in relation to its member; and prohibiting the appellant's manager and others with knowledge of the audio recording, from having any involvement in such further disciplinary proceedings.
- 71 The appellant appeals against the interim orders made by the learned Industrial Magistrate on several grounds. A preliminary issue is taken by the respondent, however, as to the competency of the appeal. The respondent maintained that the interim orders issued by the learned Industrial Magistrate on 9 August 2018, are not orders that may be the subject of an appeal to the Full Bench under s 84(2) of the Act, as the orders do not constitute a "decision" under s 84(1) of the Act. In this respect, reliance is placed by the respondent on the decision of the Industrial Appeal Court in *Anderson and Ors v Pope* (1986) 66 WAIG 1563. The appellant contends the appeal is competent.

Is the appeal competent?

72 An appeal is a statutory right and it is the relevant statute that governs the nature of an appeal and the decisions or orders that may be the subject of an appeal. The present appeal to the Full Bench is made under ss 84(1) and (2) of the Act which are in the following terms:

84. Appeal from industrial magistrate's court to Full Bench

- (1) In this section *decision* includes a penalty, order, order of dismissal, and any other determination of an industrial magistrate's court, but does not include a decision made by such a court in the exercise of the jurisdiction conferred on it by section 96J.
- (2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of an industrial magistrate's court.

73 An appeal to the Full Bench from a decision of the Industrial Magistrate's Court is different to an appeal to the Full Bench from a decision of the Commission under s 49(2) of the Act. Under that subsection, an appeal lies to the Full Bench from any "decision" of the Commission. "Decision" is defined in s 7 of the Act as "includes award, order, declaration or finding". A "finding" is defined as:

finding means a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate;

- 74 In the case of a "finding", the Full Bench must, under s 49(2a) of the Act, be satisfied that the matter is of such importance that in the public interest, an appeal should lie. In effect, in practical terms, leave of the Full Bench is required for such an appeal to be brought.
- 75 The issue arising in *Anderson* was whether the reference in s 84(1) of the Act to "decision" included the extended definition of "decision" in s 7(1), in relation to a "finding". This was because the subject matter of the appeal from the Industrial Magistrate's Court in that case, was a decision by the Court that there was no case to answer against several defendants in the proceedings. On appeal to the Full Bench, it was contended that the appeal was incompetent because the Industrial Magistrate's decision in relation to the no case to answer issue, was not a final determination for the purposes of s 84(1). It was argued that s 7(1), containing the extended definition of "finding", did not apply to s 84(1) of the Act. The Full Bench found that this was so. The issue then went on further appeal to the Industrial Appeal Court.
- 76 In the decision of the Court, Olney J concluded that the Full Bench was correct in coming to the opinion that s 7(1) does not apply to an appeal to the Full Bench from a decision of the Industrial Magistrate's Court under s 84 of the Act. His Honour was of the view that for the purposes of s 7(1) of the Act, which is prefaced with the words "In this Act, unless the contrary intention appears", the terms of s 84(1) did disclose a contrary intention. Thus, s 7 did not apply to and extend the meaning of s 84(1), properly construed. Furthermore, Olney J considered the legislative history of provisions of the Act dealing with appeals to the Full Bench. His Honour referred to the insertion of s 49(2a), in relation to an appeal from a decision of the Commission which was a "finding", and that the Parliament did not at the same time, amend s 84(1), to extend the meaning of "decision" in similar terms. Olney J considered that the expansion of the right of appeal from Commission decisions, which did not finally decide or determine a matter, arose from an earlier decision of the Industrial Appeal Court in *The Chief Secretary for Western Australia v WA Prison Officers Union* (1981) 61 WAIG 1911, which held that at the material time, there was no right of appeal from an interim order of the Commission.
- 77 In further consideration of the point, Olney J had regard to earlier decisions of the Full Court of the Supreme Court when considering the corresponding definition of "decision" in the then *Justices Act 1902* (WA). These included *Brennan v Williams* (1951) 53 WALR 30, *WA Pines Pty Ltd v Hamilton* (1980) WAR 29 and *Penniel v Driffill* (1980) WAR 30. His Honour referred to the observations of Brinsden J in *Chief Secretary* to the effect that s 84(1) of the Act at that time, was sufficiently like the corresponding definition in the *Justices Act*, to warrant the conclusion that a "decision" means a final determination of the whole case at hand and not a ruling given during the proceedings. Olney J was not however, persuaded by these obiter observations of Brinsden J and at 1565, expressed the view that the difference in wording between the definition in the then *Justices Act* and s 84(1) of the Act, meant that the earlier cases such as *Brennan*, *Penniel*, and *WA Pines*, did not mean that the definition in s 84(1) was exhaustive. His Honour preferred to examine the question considering the terms of ss 82 and 83 of the Act.
- 78 Accordingly, at 1565 Olney J said:

In the present context I think that the answer to the question lies in a consideration of sections 82 and 83 of the Act. By section 82(1) an Industrial Magistrate has jurisdiction to hear and determine any application made to him under section 83(1). The types of application provided for in the latter subsection relate to the enforcement of an award, industrial agreement or order in circumstances where a person is said to have contravened or failed to comply with any provision thereof. Upon the hearing of such an application the Industrial Magistrate may by order issue a caution, impose a penalty or dismiss the application with or without costs. In addition if it appears to the Industrial Magistrate that an employee has not been paid by an employer against whom the proceedings have been taken his entitlement under an award or order he may order the employer to pay the amount of the underpayment which is deemed to be a penalty ...

When one has regard to the role of the Industrial Magistrate to hear and determine applications under s 83(1) and the limited nature of the functions that may be performed by him I think there is every reason to believe that the definition in section 84(1) was intended to refer only to the exercise of the particular powers referred to in the preceding section. I do not think there is any scope within the definition in section 84(1) to extend the meaning of that term to a finding or ruling or other expression of opinion or direction given in the course of proceedings which fall short of a final determination of the application.

79 Rowland J after considering the arguments also came to the view that s 7 did not extend to the terms of s 84(1). His Honour noted that, as did Olney J, at the time that s 7 was introduced into the Act in 1984, there was no corresponding change to the terms of s 84(1), except in relation to a matter not relevant for present purposes. In reaching these views, his Honour said at 1567:

In my view the draftsman has, by retaining section 84(1), moved completely away from any other "decision" which is referred to in the Act and he has used decision advisedly as it is used in civil courts, using language that is traditionally used for that purpose and reinforcing that traditional use by the use of the words "and other determinations". The words in that subsection follow similar words which have been given a certain meaning by decisions of the Full Court of the Supreme Court of this State, which I have already cited, as in the *Chief Secretary for Western Australia v. WA Prison Officers Union* 61 WAIG 1911. Brinsden J., at 1913 in *obiter dicta*, considered that these decisions seemed applicable.

80 The other member of the Court in *Anderson*, Franklyn J, agreed with the reasons of both Olney and Rowland JJ.

81 The appellant's argument was essentially that the ratio of *Anderson* is that s 84 of the Act provides for a party to bring an appeal against a decision of an Industrial Magistrate exercising a power under s 83. As the interim order power under ss 83(5) and (7) of the Act was introduced into s 83 after the decision in *Anderson*, it logically follows that the observations of Olney J in his judgement to the effect "the particular powers referred to in the preceding section" must be now read to extend to the powers in ss 83(5) and (7) to make an interim order. Furthermore, the observations of Olney J in relation to a "final determination of the application", set out above, were consistent with the terms of s 83 as it then was, which only empowered an Industrial Magistrate to make orders for final relief. In further written submissions, the appellant therefore maintained that *Anderson* is not binding on the Full Bench, for these reasons.

82 Additionally, in its further written submissions, the appellant referred to another earlier decision of the Full Court in *TVW Limited v Robinson and Cant* (1964) WAR 33. This case concerned an appeal from the decision of a Justice of the Peace under the *Justices Act* to grant a search warrant. It was held by the Court that this decision was an "other determination" for the purposes of the meaning of "decision" in the *Justices Act*. It was said that this case provides support for the appellant's contention because it is an example of a determination that directly affected or interfered with the rights of a party to the proceedings. I am not persuaded that *TVW* assists the appellant in the way contended. Reliance on *TVW* does not address the fundamental point made in *Anderson*, that properly construed, it is the final determination of an application made under s 83(1), that constitutes a "decision" for the purposes of s 84(1) of the Act.

83 On the other hand, the respondent submitted that the focus of Olney J's reasons in *Anderson* included not just the terms of s 83 of the Act as it was at that time, but rather also, focused on the effect of any order, as being a final determination of the application. The respondent also noted the observations of Rowland J, referring to the more limited functions and powers of the Industrial Magistrate's Court and the fact that s 84(1) was retained in the same terms, despite the amendment to the Act to insert the expanded scope for an appeal to the Full Bench from a decision of the Commission that is a "finding", as defined in s 7.

84 The respondent in its submissions, also referred to the amendments to s 83 effected by the *Labour Relations Reform Act 2002* (WA), which repealed and replaced s 83 and introduced new provisions in ss 83A to 83C. Despite these amendments, the respondent noted that s 84, in relation to appeals to the Full Bench from the Industrial Magistrates Court, remained largely unchanged. In further support of its submissions, the respondent referred to the terms of s 83(7) itself, which empowers an Industrial Magistrate to make an interim order under s 83(5) "pending final determination of an application under subsection (1)". It was submitted that Parliament, in introducing this provision, should be regarded as having adopted the language used by Olney J in *Anderson*, referred to above. The respondent in its further written submissions, reiterated the oral submissions it made at the hearing of the appeal. Also, the respondent focussed on the language of the orders made by the learned Industrial Magistrate, particularly those parts of the orders that supported their legal effect as interim in nature and not a final determination of the matters before the court.

85 It is not without some oscillation that I consider the approach of the respondent to this matter should be preferred to that of the appellant. I do not think the amendments to s 83 of the Act to introduce subsections (5) and (7), has fundamentally altered the principle stated by the Court in *Anderson*. I consider that an appeal to the Full Bench under s 84(2), lies from an order or determination of an Industrial Magistrate which finally determines the application brought to the Industrial Magistrates Court under s 83(1). Whilst it is the case that the interim orders have the effect of reinstating the respondent's member, it does not finally determine the issue as to whether, if there is found ultimately to have been a contravention of cl 23.1 of the Agreement, final relief of the kind claimed by the respondent at first instance could or should be made.

86 Furthermore, I think there is something to be said for the fact that the language of s 83(7) of the Act, when read in its ordinary sense, emphasises the nature of an interim order and that such an order can only be made "pending the final determination" by an Industrial Magistrate of a substantive application brought under s 83(1) of the Act. This is consistent with the tenor of the reasons of the Court in *Anderson*. If it was intended by Parliament that amendments to the Act given effect by the *Labour Relations Reform Act* were to be accompanied by an expanded right of appeal to the Full Bench, then, given the conclusions of the Court in *Anderson*, one would have thought, consistent with the approach taken to appeals from decisions of the Commission in relation to "findings" as defined in s 7, that an appropriate amendment to s 84(1) of the Act would have also been made at the same time, to make this clear.

87 Additionally, consistent with the circumstances dealt with in *Anderson*, the functions and powers of the Industrial Magistrates Court remain, respectfully, within a relatively narrow compass in relation to the enforcement of industrial instruments as defined in s 83(2) of the Act. The powers of the Industrial Magistrates Court, on the hearing of an application to enforce an industrial instrument, in s 83(4) of the Act, to issue a caution or to impose a penalty, remain largely the same as those in existence when *Anderson* was decided. The additional powers conferred by ss 83(5) and (7) are in aid of the jurisdiction to

enforce industrial instruments and do not confer powers on an Industrial Magistrate to enquire into and determine industrial disputes generally, which is the role of the Commission under Parts II and IIA of the Act.

88 Accordingly, I am of the view that the appeal is incompetent and it must be dismissed.

The appeal

89 If I am incorrect in reaching the view that the appeal is incompetent, then for the reasons expressed by Smith AP, which I have had the benefit of reading in draft form and with which I am in general agreement, the interim orders made by the learned Industrial Magistrate were beyond the powers conferred on the court under ss 83(5) and (7) of the Act.

MATTHEWS C:

90 Clause 23 of the Western Australian TAFE Lecturers' General Agreement 2014 provides as follows:

23. BREACHES OF DISCIPLINE

23.1 No employee shall be subject to the penalties of sub-clause 23.2 of this clause unless a fair procedure is applied and decision and processes incorporate the principles of natural justice and are free from bias.

23.2 If, in accordance with the College's disciplinary policy, an employee is found by the College to have committed a breach of discipline, the College may:

- (a) reprimand the employee;
- (b) transfer the employee to another public sector agency, with the consent of that agency or transfer the employee to another position at the College at which the employee is currently employed;
- (c) impose on the employee a fine not exceeding the equivalent of five (5) days pay that the employee would have received immediately prior to the breach of discipline finding;
- (d) reduce the monetary remuneration of that employee;
- (e) reduce the level of classification of the employee;
- (f) dismiss the employee; or
- (g) except where the employee is dismissed under sub-clause 23.2 (f) of this clause, take action under any two or more of the above sub-clauses.

23.3 Other than in the case of termination in accordance with sub-clause 23.2 (f) of this clause, which is subject to other provisions under the *Industrial Relations Act 1979*, an employee aggrieved by a decision resulting from the disciplinary process may appeal against that decision by referring the matter to the Commission for determination.

91 The respondent to this appeal argued before the industrial magistrate that clause 23.1 of the agreement was an enforceable obligation as against the appellant to the appeal.

92 In circumstances where the respondent's member had been dismissed from his employment, the respondent said in contravention of clause 23.1 of the agreement, the respondent argued that, pursuant to section 83(7) *Industrial Relations Act 1979*, its member could and should be reinstated to it until the application for relief from the appellant's contravention of clause 23.1 of the agreement could be dealt with.

93 The industrial magistrate made an order under section 83(7) *Industrial Relations Act 1979* accepting that:

- (a) clause 23.1 imposed an enforceable obligation on the appellant;
- (b) there was a serious question to be tried as to whether the appellant had breached clause 23.1 of the agreement in dismissing the respondent's member; and
- (c) the balance of convenience favoured the making of such an order.

94 The appellant appeals that order seeking that the appeal be upheld and the interim order quashed.

95 The respondent says the appeal is incompetent because the industrial magistrate's order did not finally determine the substantive application and cited authorities to the effect that the *Industrial Relations Act 1979* does not allow appeals from such orders, being *Anderson and Ors v Pope and Ors* (1986) 66 WAIG 1563 and cases which have applied it (set out helpfully in *G & R Rossen Pty Ltd v Peta Buchanan* 2018 WAIRC 334, a decision which itself followed *Anderson and Ors v Pope and Ors* (1986) 66 WAIG 1563).

96 It may be noted that *Anderson and Ors v Pope and Ors* (1986) 66 WAIG 1563 did not deal with a similar circumstance to that in this appeal as at the time of that decision there was no provision for the industrial magistrate to make interim orders under section 83, that provision only being inserted in 2002. The case is not, therefore, directly on point.

97 The key to the reasoning in *Anderson and Ors v Pope and Ors* (1986) 66 WAIG 1563, for mine, appears in the following from Olney J at 1565:

"When one has regard to the role of the Industrial Magistrate to hear and determine applications under section 83(1) and the limited nature of the functions that may be performed by him I think that there is every reason to believe that the definition [of "decision"] in section 84(1) was intended to refer only to the exercise of the particular powers referred to in the preceding section."

98 As I say, there has been, since 2002, a power for the industrial magistrate to make interim orders.

99 The making of an interim order is now one of the functions an industrial magistrate may perform under section 83 *Industrial Relations Act 1979*.

- 100 Although such a function was not provided for at the time of the decision in *Anderson and Ors v Pope and Ors* (1986) 66 WAIG 1563 there is, in my view, no reason why the reasoning of Olney J as set out above would not apply to particular powers that are, at any time, referred to in "the preceding section", being section 83.
- 101 *Anderson and Ors v Pope and Ors* (1986) 66 WAIG 1563 has come to be understood as allowing appeals only from "final determinations of the substantive application". In my view, this is because the industrial magistrate could only, at that time, make what might be described as a final determination of the "substantive" application.
- 102 Olney J actually used the words that rulings "in the course of proceedings which fall short of a final determination of the application" (my emphasis) were not appellable. At that time the use of the singular reflected that there was only one type of application that could be made under section 83, being an application for the enforcement of an award or industrial agreement.
- 103 There is now, and has been since 2002, another application that may be made under section 83, namely an application for an interim order.
- 104 Parliament must have known when it gave the power to a party to apply for an interim order in 2002 that section 84(1) allowed appeals from applications heard and determined under section 83, as this was what had been decided by *Anderson and Ors v Pope and Ors* (1986) 66 WAIG 1563.
- 105 I consider that had Parliament wished to provide that orders made under section 83(7) were not amenable to appeal it would have so provided.
- 106 The words in section 84(1) "penalty, order, order of dismissal, and any other determination" are extremely broad and I see no reason to limit them beyond requiring that they relate to the exercise of a power under section 83.
- 107 The application for interim orders in this case was an application for the exercise of a power under section 83. It was commenced by a separate application, there was a discrete hearing on the matter, with evidence being admitted on that matter alone, and a decision given, and orders made, on the application.
- 108 In circumstances where an application for the exercise of a power expressly provided for by section 83 was made and section 84(1) is understood as referring to the exercise of a power under section 83, then orders made on such an application must be appellable.
- 109 I find that the appeal is competent.
- 110 I would have upheld the appeal on the basis that the industrial magistrate had no power to make the orders he made and, in that regard, I agree with Acting President Smith's reasoning on this point and have nothing to add to it.
- 111 In my case, given that I find the appeal to be competent, adoption of those reasons would have decided the appeal in favour of the appellant.
- 112 I add that even if the industrial magistrate did have power to make the orders I respectfully consider that his Honour erred in making them for the following reasons:
- (a) there was no serious issue to be tried; and
 - (b) in any event, the balance of convenience did not favour making them.
- 113 In interpreting clause 23.1 of the agreement I consider it determinative that the subclause does not expressly impose an obligation on anyone.
- 114 The subclause simply recites, inelegantly given that freedom from bias is a central tenet of natural justice and not one requiring separate expression, what is well known.
- 115 I note also that what will be required to accord natural justice is not a fixed concept and that it will vary from case to case. That is, there is no precision involved in saying that a person "shall be accorded natural justice."
- 116 The reasonable reader, being aware of the surrounding circumstances, which in this case would include the possibility of enforcement action and the imposition of penalties for breach, would, in my view, quickly note that the subclause does not say that "the employer must accord an employee natural justice" or use a similar formulation of words.
- 117 It may seem like a cute point given that it is only the employer who may impose the penalties under clause 23.1, but the surrounding circumstances must be understood. If the parties wished an enforceable obligation upon the employer to arise out of clause 23.1 it would have been a simple matter to agree language which reflected that. They did not. The parties agreed upon passive language rather than language which imposed a strict and enforceable obligation on any party.
- 118 I have had regard to the analysis of Jessup J of the clause under consideration in *National Tertiary Education Union v Le Trobe University* (2015) 254 IR 238 at [31] and [32].
- 119 While noting that his Honour was in the minority on the point I consider that much of what his Honour said there, with which I agree, may be applied to clause 23.1 of the agreement.
- 120 I consider that clause 23.1 contains a "very high-level statement of intent, concerned with making clear the importance which the parties placed on [fairness in disciplinary proceedings]" and "objectively, that the parties might have intended that the imprecise evaluations and qualitative judgments conveyed by these words should be the source of binding obligations ultimately justiciable in a proceeding [for enforcement] strikes me as a very unlikely circumstance."
- 121 Where the subclause appears in a clause which on its face reminds the reader, or advertises to the reader, the ways in which relief is available in the Western Australian Industrial Relations Commission (or perhaps creates an avenue of relief; see *Nabeel Ashraf v Ms Michelle Hoad Managing Director North Metropolitan TAFE* 2018 WAIRC 00699) I consider the proposition that clause 23.1 intended to create a binding obligation ultimately justiciable in enforcement proceedings before the industrial magistrate to be a very unlikely one.

- 122 I am of the view that clause 23.1 could not possibly be an enforceable obligation against the appellant and that, accordingly, there was no serious issue to be tried.
- 123 In relation to the balance of convenience, I note that the industrial magistrate's first instinct was to wonder out loud whether the entire matter before him belonged elsewhere, which I take to be a reference to unfair dismissal proceedings in the Western Australian Industrial Relations Commission.
- 124 In my view, the matter clearly properly belonged in the Western Australian Industrial Relations Commission, as indeed clause 23.3 of the agreement reminds the reader of the clause. In the exercise of his Honour's discretion the industrial magistrate should have, in my respectful view, declined to deal with the matter, especially by way of interim orders for reinstatement, given that Parliament has established a robust and effective regime for dealing with such matters, including a specific power of reinstatement of dismissed employees, within the Western Australian Industrial Relations Commission.

Conclusion

- 125 As the majority view of the Full Bench (Smith AP and Kenner SC) is that the appeal is incompetent, an order will be made to dismiss the appeal.
- 126 In light of the observations made by Smith AP in respect of the power of the Industrial Magistrate's Court to make an interim order in this matter, we are of the opinion that it would be open to the appellant to exercise the right conferred in order 7 of the interim order to apply to the Industrial Magistrate's Court for an order to revoke orders 1 to 5 of the interim order, on grounds orders 1 to 5 are beyond the power conferred by s 83(5) and s 83(7) of the IR Act on the Industrial Magistrate's Court to make.
- 127 The Full Bench is not of the opinion that it should make an order that the appellant pay the respondent's costs of the appeal, as it is not satisfied that the appeal has been frivolously or vexatiously instituted by the appellant. Clearly, the points put by the appellant in its grounds of appeal could not be characterised as having no reasonable basis. Nor could it be found that the appeal was instituted purely to cause trouble or annoyance to the respondent. In forming this opinion, the Full Bench has had regard to recent observations made about the test to be satisfied for an award of costs to be made under s 84(5) of the IR Act in *G&R Rossen Pty Ltd v Buchanan* [2018] WAIRC 00334; (2018) 98 WAIG 305 (see particularly the observations of Buss J in *The Commissioner of Police of Western Australia v AM* [2010] WASCA 163(S); (2011) 91 WAIG 6 [25] - [30]).

2018 WAIRC 00748

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE GOVERNING COUNCIL OF NORTH METROPOLITAN TAFE	APPELLANT
	-and- STATE SCHOOL TEACHERS' UNION OF WA	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS	
DATE	MONDAY, 17 SEPTEMBER 2018	
FILE NO/S	FBA 8 OF 2018	
CITATION NO.	2018 WAIRC 00748	

Result	Appeal dismissed
Appearances	
Appellant	Mr D Anderson, of counsel
Respondent	Mr D Scaife, of counsel

Order

This appeal having come on for hearing before the Full Bench on 31 August 2018, and having heard Mr D Anderson, of counsel, on behalf of the appellant, and Mr D Scaife, of counsel, on behalf of the respondent, and reasons for decision having been delivered on 17 September 2018, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal be dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Cancellation of registration—

2018 WAIRC 00779

APPLICATION TO CANCEL THE REGISTRATION OF THE DISABLED WORKERS' UNION OF WESTERN AUSTRALIA

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2018 WAIRC 00779
CORAM : THE HONOURABLE J H SMITH, ACTING PRESIDENT
 CHIEF COMMISSIONER P E SCOTT
 COMMISSIONER T EMMANUEL
HEARD : WEDNESDAY, 26 SEPTEMBER 2018
DELIVERED : THURSDAY, 4 OCTOBER 2018
FILE NO. : FBM 5 OF 2018
BETWEEN : THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS
 COMMISSION
 Applicant
 AND
 THE DISABLED WORKERS' UNION OF WESTERN AUSTRALIA
 Respondent

CatchWords : Industrial Law (WA) - Application by the Registrar to cancel the registration of an organisation on grounds the organisation is defunct
Legislation : *Industrial Relations Act 1979* (WA), s 53, s 54, s 73, s 73(12), s 73(12a), s 73(13)
Industrial Relations Commission Regulations 2005 (WA), reg 76, reg 76(3)
Result : Order made
Representation:
Applicant : Mr R J Andretich, of counsel, and with him Ms S Kemp
Respondent : Mr M Braybrook
Solicitors:
Applicant : State Solicitor for Western Australia

Case(s) referred to in reasons:

The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers [2004] WAIRC 11936; (2004) 84 WAIG 2190

Reasons for Decision

THE FULL BENCH:

The application and the requirements of the Act

- 1 This is an application to cancel the registration of The Disabled Workers' Union of Western Australia (the union). The application was brought before the Full Bench by the Registrar pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act).
- 2 After hearing from counsel on behalf of the Registrar on 26 September 2018, the Full Bench was satisfied that an order should be made to cancel the registration of the union. These reasons for decision set out the reasons why the Full Bench made the order.
- 3 Pursuant to s 73(12a) of the Act, the Registrar is required to make an application under s 73(12) in every case where it appears to her that there are sufficient grounds for doing so. Section 73(13) provides that proceedings for the cancellation of the registration of an organisation, or any of its rights under the Act, shall not be instituted otherwise than under s 73.
- 4 Where the Full Bench is satisfied on the application of the Registrar that an organisation is defunct and the application has been brought in the manner prescribed, the Full Bench is required by s 73(12) of the Act to cancel the registration of the organisation. The provision is not discretionary, it is mandatory. Where the Full Bench is satisfied of the requisite matters an order cancelling the registration of the organisation must be made: *The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers* [2004] WAIRC 11936; (2004) 84 WAIG 2190.
- 5 Section 73(12) of the Act requires the Full Bench to cancel the registration of an organisation if it is satisfied on the application of the Registrar that:
 - (a) the number of members of the organisation or, the number of employees of the members of the organisation would not entitle it to registration under s 53 or s 54, as the case may be; or

- (b) the organisation is defunct; or
 - (c) the organisation has, in the manner prescribed, requested that its registration be cancelled.
- 6 Regulation 76 of the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) provides for the procedure that the Registrar must comply with when an application to cancel the registration of an organisation is made under s 73(12) of the Act. Regulation 76 provides:
- (1) Where an application is made by the Registrar under section 73(12) of the Act to cancel the registration of an organisation or association it is to be made in triplicate to the Full Bench in the form of Form 23.
 - (2) The application is to state clearly the grounds on which it is made and the application is to be accompanied by a statutory declaration setting out the facts on which the Registrar relies.
 - (3) The application is to be served on the organisation or association the registration of which is sought to be cancelled.
 - (4) Where the respondent organisation or association intends to oppose the application, it must give notice of that objection in an approved form within 14 days of being served with the application, and otherwise the provisions of regulation 15 apply with respect to any such objection.
 - (5) Where the respondent organisation or association intends to admit the facts (or any of them) on which the Registrar relies, it must, within 14 days of being served with the application, advise the Registrar in writing accordingly.
 - (6) After the expiration of the time prescribed in subregulations (4) and (5) the Registrar is to ascertain from the President a date for hearing the application and, as soon as practicable after setting a hearing date, is to notify the organisation or association of the hearing.
- 7 As required by reg 76, the Registrar filed an application to cancel the registration of the union on 16 May 2018, together with a statutory declaration made by Deputy Registrar Susane Sabrina Hutchinson dated 16 May 2018, which set out the grounds and the facts upon which the application is made.
- 8 Regulation 76(3) of the Regulations requires that the application be served on the organisation the registration of which is sought to be cancelled. Service was effected on the union by serving two officers of the union. Ms Gloria Cassidy was served on 12 June 2018. Ms Cassidy was the interim president of the union having held that position by order of Ritter AP on 3 March 2009 ([2009] WAIRC 00089; (2009) 89 WAIG 378). Service of the application was also effected on Mr Michael Braybrook on 31 May 2018. Mr Braybrook was also appointed a member of the interim committee by order of Ritter AP on 3 March 2009.
- 9 At the hearing of this matter on 26 September 2018, Mr Braybrook appeared on behalf of the union and informed the members of the Full Bench that with some reluctance the union did not oppose an order to deregister the union.
- 10 The grounds upon which the Registrar formed the view that the union is defunct are set out in the statutory declaration of Ms Hutchinson as follows:
- (a) The union has been registered since 1986. Rule 5 of the rules of the union defines the persons eligible to be members as follows:
 - 1. The Union shall consist of an unlimited number of persons who:
 - (i) are employed, or usually employed in a sheltered workshop;
 - (ii) are recipients of the Sheltered Employment Allowance as prescribed by the Social Security Act, 1947; and
 - (iii) are not employed in a professional, administrative supervisory or technical capacity or in a clerical capacity within the administration of a sheltered workshop.
 - 2. In addition to subrule 1. above, the Union may admit to membership any person holding an office within the Union as at the date of registration, together with such other persons as are appointed Officers of the Union; Provided that no person shall be eligible to become a member who is not an employee within the meaning of the Industrial Relations Act, 1979.
 - (b) The union was only able to continue to function over the years based on the extensive goodwill, assistance and support extended by numerous entities and individual people. Its membership of disadvantaged employees on low incomes meant that the usual primary source of a union's funding, the membership fees, were insufficient to adequately support the proper functioning of the union. In addition, membership fees were often waived based on an individual's earning capacity.
 - (c) In PRES 1 of 2009 the Registrar filed an application which was heard and determined by Ritter AP pursuant to s 66 of the Act. This application resulted in the orders being made appointing, among others, Ms Cassidy and Mr Braybrook as members of the interim executive committee. The union had not been conducting itself in a proper and compliant manner having regard to the requirements of its rules and the Act. At that time the union had no current office bearers and had failed over a number of years to file mandatory annual returns with the Registrar in relation to its financial, officers and membership information. Nor did it appear to be keeping adequate financial and membership records, as required by the Act.
 - (d) The s 66 application was not made for punitive purposes, but as a vehicle to try and assist the union to get back on a proper footing to meet its obligations, as well as being able to adequately represent its members.

- (e) From 2009 until 2012, the union reported to the Commission at a number of directions hearings and filed documentation in compliance with the respective orders issued by Ritter AP. There was some progress in relation to the interim executive committee towards improving the union's administration and accountability. There was also some reported progress in reviewing the rules of the union (among other things) to properly reflect the union structure and to allow for the election of office bearers in the future.
- (f) However, by the time a directions hearing was convened by Smith AP on 15 March 2012, it appeared the union had not been able to put itself in a position to be able to comply with the provisions of the Act and its rules.
- (g) On 16 March 2012, Smith AP made orders that the union file a copy of its membership register within 28 days of the date of the order together with audited accounts for the 2010/2011 financial year. An order was also made requiring the interim committee to take steps pursuant to its powers and duties as state council to review and approve proposed changes to the rules by 29 June 2012 ([2012] WAIRC 00154; (2012) 92 WAIG 234).
- (h) These orders were partly complied with.
- (i) Any momentum towards addressing the union's administration and viability issues stalled during 2012 and 2013. Ms Cassidy, who had carriage of the business of the affairs of the union on a day to day basis, was experiencing increasing significant medical issues which forced her to be away from the union for extensive absences. She was then in her eighties and subsequently entered a care facility. At that time, Mr Braybrook who had taken on the role of treasurer found that his various ongoing business commitments made it increasingly difficult to devote the time required to properly manage the affairs of the union.
- (j) Attempts were then made by the Registrar to secure the assistance of UnionsWA and United Voice (WA) to assess whether there was any amalgamation potential between United Voice (WA) and the union or if other support could be provided. However, such arrangements could not be put in place
- 11 On 16 February 2017, Deputy Registrar Hutchinson attended a meeting with Mr Braybrook and Ms Cassidy. In summary, the meeting outcomes were as follows:
- The DWU has consistently not met its annual reporting obligations under the *Industrial Relations Act 1979* and has not conducted itself consistent with its rules or the Act for numerous years.
 - The only remaining members of the interim Executive Committee are Gloria Cassidy and Michael Braybrook, with no other members. Neither Ms Cassidy or Mr Braybrook are able to provide the resourcing necessary to ensure that the DWU can run effectively and meet its obligations under the Act and the DWU's rules.
 - It was confirmed that the DWU has no current or adequate record of its membership (if any) and is unable to identify how many members (if any) it has. There has been no active collection of fees.
 - Mr Braybrook confirmed that there was no adequate or proper keeping of the books of accounts, financial management system or management structures in place.
 - Mr Braybrook confirmed that no further work had been undertaken since 2012 to review the DWU's rules.
 - Mr Braybrook undertook to provide by the end of February 2017, the financial statements for the union, or at the very least, bank statements to assist in establishing the monies currently held by the union (approximate estimation provided by Mr Braybrook was \$30,000).
 - no new evidence had been provided at the 16 February 2017 meeting which would permit the DWU being assessed (or likely to be assessed in the future) as being a viable, compliant and functioning organisation that is effectively representing the interests of its members.
 - there appears no other option than to proceed with deregistration of the DWU.
- 12 On 26 February 2018, Ms Hutchinson wrote to the union stating that the Registrar intended to initiate an application to cancel the registration of the union on grounds that the union is defunct. The union was requested to respond to a number of questions to confirm that there had been no change in its circumstances.
- 13 Mr Braybrook provided a written response dated 7 March 2018 in which he stated:
- (a) the union has no financial members;
 - (b) Ms Cassidy and Mr Braybrook remain as the only members of the union's interim executive committee;
 - (c) the interim executive committee has not met for two years;
 - (d) the union has effectively ceased to operate primarily due to Ms Cassidy's medical condition and inability to find a replacement; and
 - (e) the union's only asset is \$33,508.54 (as at 11 January 2018) held in the union's bank account.
- 14 At the hearing of the application to deregister the union, Mr Braybrook informed the Full Bench that it is intended that the funds be paid to a charity that assists people with vision impairment to obtain employment.
- 15 Having regard to the matters set out in the statutory declaration of Ms Hutchinson, the Full Bench was satisfied that the union has been defunct for some time. Whilst it has funds, it has no members and it has not been complying with the provisions of the Act or its rules.
- 16 After hearing from Mr Andretich on behalf of the Registrar and Mr Braybrook on behalf of the union, the Full Bench made an order that 'the registration of The Disabled Workers' Union of Western Australia be and is hereby cancelled on and from the

26th day of September 2018'. The Full Bench made no order as to the disbursement of the funds of the union as it has no power to do so.

		2018 WAIRC 00766
PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	-and-	
	THE DISABLED WORKERS' UNION OF WESTERN AUSTRALIA	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 26 SEPTEMBER 2018	
FILE NO/S	FBM 5 OF 2018	
CITATION NO.	2018 WAIRC 00766	

Result	Order made
Appearances	
Applicant	Mr R J Andretich, of counsel, and with him Ms S Kemp
Respondent	Mr M Braybrook

Order

This matter having come on for hearing before the Full Bench on 26 September 2018, and having heard Mr R J Andretich, of counsel, and with him Ms S Kemp on behalf of the applicant and Mr M Braybrook on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the registration of The Disabled Workers' Union of Western Australia be and is hereby cancelled on and from the 26th day of September 2018.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

		2018 WAIRC 00791
PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION LEIGH BISHOP	APPLICANT
	-and-	
	THE UNITED PROFESSIONAL FIREFIGHTERS UNION OF WESTERN AUSTRALIA	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
DATE	MONDAY, 8 OCTOBER 2018	
FILE NO/S	PRES 3 OF 2018	
CITATION NO.	2018 WAIRC 00791	

Result	Order made
Appearances	
Applicant	Mr T Nolan, as agent
Respondent	Ms L Anderson

Order

This matter having come on for hearing before me on 8 October 2018, and having heard Mr T Nolan, as agent, on behalf of the applicant, and Ms L Anderson on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. An interim Committee of Management is established, constituted as follows:
 - a. President
Kevin Wayne Jolly
 - b. Senior Vice President
Leigh Allister Bishop
 - c. Junior Vice President
Scott George Gamble
 - d. Secretary
Lea Patricia Anderson
 - e. Assistant Secretary
Louis Gerard Parker
 - f. Trustee (Firefighter)
Paul Loudon Roberts
 - g. Trustee (Officer)
Simon Benedict Nelson
 - h. Trustee (General)
Adam Wayne Steenson
 - i. General Committee Member (Officer)
Michael DiLallo
 - j. General Committee Member (Officer)
Lexie Claire Bowring
 - k. General Committee Member (Officer)
Timothy Robert Bovell
 - l. General Committee Member (Officer)
Mark Edmund Hayes
 - m. General Committee Member (Officer)
Darryl Victor Browning
 - n. General Committee Member (Firefighter)
Cian James Evans
 - o. General Committee Member (Firefighter)
Benjamin Adnams
 - p. General Committee Member (Firefighter)
Clement Koon Chung Chan
 - q. General Committee Member (Firefighter)
Darrel James Bates
 - r. General Committee Member (Firefighter)
Brendan Gerard McCormack
 - s. General Committee Member (General)
Kerry Yvonne Bailey
2. The definition of 'Committee of Management' in r 2, r 15, r 17A and r 24 of the rules of The United Professional Firefighters Union of Western Australia (the rules) shall be interpreted as the Interim Committee of Management and offices and officers holding office in the Interim Committee of Management.
3. Rule 24 'Election of President, Vice-President, Secretary, Assistant Secretary, Trustees and Members of the Committee of Management' is waived.
4. Rule 25 is waived.
5. The Committee of Management shall have the authority to exercise all of the powers, duties and functions of the Committee of Management and each of the Interim Committee Members shall have the authority to exercise all of the powers, duties and functions of their respective office held.
6. There be liberty to the parties to apply to vary the terms of this order.

7. Unless the operative effect of this order is varied, this order cease to have effect no later than 30 June 2021, or upon application, with consent, by the parties.
8. The application be otherwise adjourned sine die.

[L.S.]

(Sgd.) J H SMITH,
Acting President.

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

2018 WAIRC 00774

	CANCELLATION OF VARIOUS AGREEMENTS WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION COMMISSION'S OWN MOTION	
PARTIES	-v- (NOT APPLICABLE)	APPLICANT
		RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	THURSDAY, 27 SEPTEMBER 2018	
FILE NO/S	APPL 67 OF 2018	
CITATION NO.	2018 WAIRC 00774	
Result	Agreements cancelled	

Order

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

- (a) on the Commission's website on 6 November 2017;
- (b) in *The West Australian* newspaper on 15 November 2017;
- (c) in the Western Australian Industrial Gazette on 22 November 2017;
- (d) to The Shop, Distributive and Allied Employees' Association of Western Australia on 6 November 2017;
- (e) to Jacksons Drawing Supplies Pty Ltd on 4 May 2018; and
- (f) to Nestlé Limited on 7 May 2018,

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

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

As of 27 September 2018, the Commission has received no objections to the cancellation of the industrial agreements.

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

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

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

SCHEDULE

1. K Mart Armadale Rostering Agreement 1994
2. K-Mart Food Services (Wages) Agreement 1994
3. Mandurah Forum Takeaway and SDA Agreement 2003
4. Mitre 10 Warehouse Employees Agreement 2002
5. Myer Stores Limited Distribution Centre Carousel Road Cannington Site Agreement 1994
6. Nestle Australia Ltd Kewdale - SDA Agreement 2001
7. Osborne Cold Stores Enterprise Bargaining Agreement 1996, No. AG 125 of 1996
8. P & O Cold Storage Ltd Enterprise Agreement 1995, No. AG 26 of 1995
9. P & O Cold Storage Ltd Enterprise Agreement 1997
10. P& O Cold Storage Ltd Enterprise Agreement 1996, No. AG 66 of 1996

11. PVS/Worths Pty Ltd Jobskills Retail Agreement
12. PVS/Boutique Consolidated Pty Ltd Jobskills Retail Agreement
13. PVS/Silkside Pty Ltd Jobskills Retail Agreement
14. PVS/Suzanne Grae Corporation Pty Ltd Jobskills Retail Agreement
15. PVS/Universal Retailers Pty Ltd Jobskills Retail Agreement
16. PVS/Skyjack Jobskills Retail Agreement
17. PVS/Fabric Warehouse Jobskills Retail Agreement
18. PVS/Prints and Presence Jobskills Retail Agreement
19. PVS/Sportsgirl Sportscraft Group Jobskills Retail Agreement
20. PVS/Aquarius Cards and Gifts Jobskills Retail Agreement
21. PVS/Repco Auto Parts Jobskills Retail Agreement
22. PVS/Jacksons Drawings Supplies Pty Limited Jobskills Retail Agreement
23. PVS/Desert Designs Jobskills Retail Agreement
24. PVS/Peppermint Tree Jobskills Retail Agreement
25. PVS/Gardner Electronics Jobskills Retail Agreement
26. PVS/Poolmart Jobskills Retail Agreement
27. Rand National Transport Enterprise Bargaining Agreement 2002
28. River Rooster Bridgetown, SDA Enterprise Agreement 1998
29. River Rooster Stratton, SDA Enterprise Agreement 2001
30. River Rooster Coolbellup, SDA Enterprise Agreement 2001

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2018 WAIRC 00776

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION COLIN CLEAVE	APPLICANT
	-v- AYRTOUN FARMS	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	MONDAY, 01 OCTOBER 2018	
FILE NO/S	B 49 OF 2018	
CITATION NO.	2018 WAIRC 00776	

Result	Application dismissed
Representation	
Applicant	In person
Respondent	N/A

Order

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

AND WHEREAS on 13 August 2018 the respondent wrote to the Commission attaching documents that indicated the amount sought in this claim had been paid to Mr Cleave;

AND WHEREAS on 20 August 2018 my Associate wrote to Mr Cleave, requesting that he update the Commission about whether the claim has resolved or whether he requests it be listed for hearing;

AND WHEREAS on 28 August 2018 Mr Cleave telephoned my Associate and told the Commission that he had been paid and his claim had resolved. My Associate informed him that to discontinue his claim, he would need to file and serve a *Form 14 – Notice of withdrawal or discontinuance (Form 14)*;

AND WHEREAS Mr Cleave has not filed a Form 14 or contacted the Commission since 28 August 2018;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –
 THAT this application be, and by this order is, discontinued.

[L.S.]

(Sgd.) T EMMANUEL,
 Commissioner.

2018 WAIRC 00795

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2018 WAIRC 00795
CORAM : COMMISSIONER D J MATTHEWS
HEARD : TUESDAY, 10 JULY 2018, MONDAY, 16 JULY 2018, TUESDAY, 17 JULY 2018,
 WEDNESDAY, 18 JULY 2018, THURSDAY, 19 JULY 2018, MONDAY, 6 AUGUST
 2018, TUESDAY, 7 AUGUST 2018, WEDNESDAY, 8 AUGUST 2018 AND BY
 WRITTEN SUBMISSIONS FILED FRIDAY, 10 AUGUST 2018, MONDAY, 17
 SEPTEMBER 2018, MONDAY, 1 OCTOBER 2018
DELIVERED : MONDAY, 8 OCTOBER 2018
FILE NO. : U 36 OF 2018
BETWEEN : COLIN R DIXON
 Applicant
 AND
 DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Unfair dismissal claim – Dismissal due to alleged substandard performance – Dispute as to whether performance substandard and fairness of dismissal process – Performance was substandard, dismissal process was fair – In all of the circumstances dismissal was not harsh, unfair or oppressive
 Legislation : *Public Sector Management Act 1994*
 Result : Application dismissed
Representation:
 Counsel:
 Applicant : In person and later Mr R Skehan as agent
 Respondent : Mr W Fitt of counsel and later Ms J Vincent of counsel
 Solicitors:
 Respondent : State Solicitor's Office

Case(s) also cited:

In re Barrett and Women's Hospital, Crown Street [1947] AR (NSW) 565
Jones v Dunkel (1959) 101 CLR 298
Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch (1985) 65 WAIG 385
Mr Patrick Guretti v The Director General, Department of Education (2003) 93 WAIG 1399
Morley v Australian Securities and Investments Commission (2010) 274 ALR 205
Jean Stewart v Director General, Department of Education (2016) 96 WAIG 1419
Jennifer Anderson v Director General, Department of Education (2017) 97 WAIG 63

Reasons for Decision

- 1 The applicant was dismissed from his employment as a teacher for substandard performance.
- 2 He challenges that decision and has tried to convince me that the process followed to determine he was performing at a substandard level was flawed and that, in any event, he is not a substandard teacher. He has comprehensively failed in those endeavours.
- 3 The applicant commenced working as a teacher in 1980. He left teaching in 1986 and was a businessman for 23 years. He returned to teaching in 2009 and his statement of service, Exhibit 3 in these proceedings, shows that he worked on fixed term contracts and on a relief basis at various Western Australian public schools until commencing work as a permanent teacher at Toodyay District High School on 18 July 2016.
- 4 He remained in employment at Toodyay District High School until he was dismissed effective 20 February 2018.

- 5 The applicant says that he is not a substandard teacher. However, in terms of what persons may have observed of his performance at Toodyay District High School the applicant does not dispute that in some cases, and in relation to some classes, it may very well have looked like he was performing at a substandard level. The applicant says that such observations are based on, or the result of, the behaviour of some students in some of his classes.
- 6 The applicant accepts that to look at the behaviour of some students in some classes – evidencing disengagement, disrespect and unruliness – it may have looked like he was not being effective. However, the applicant strongly asserts that the behaviour that so counted against him was a direct result of the administration at Toodyay District High School failing to support him in the way it should have in his attempts to deal with that behaviour.
- 7 The applicant strongly asserts that had the administration at Toodyay District High School supported him as it should have done he would have been performing at a satisfactory level throughout his employment, and certainly by the end of 2017.
- 8 At the outset, I find that observations to the effect that the applicant was performing at a substandard level were accurate. The evidence on this was really all one way. Those who gave evidence before me about their observations of the applicant's teaching were credible, caring and intelligent people. They reported what they saw in a respectful but compelling way. They saw a teacher, the applicant, who had failed, over a long period of time, to establish appropriate classroom behaviour and, accordingly, an appropriate environment for education.
- 9 The failure on the part of the applicant was not isolated in time or place. It was an ongoing problem occurring across various cohorts.
- 10 However, this finding is by no means the end of this matter. As I say the applicant does not really dispute such a finding. Rather he argues that he could not possibly have demonstrated competency in all of the circumstances, with those circumstances being ultimately out of his control, and for that reason his dismissal was unfair.
- 11 I refer to the following in relation to the applicant's acceptance that unfavourable observations were not inaccurate.
- 12 In his opening submissions the applicant asserted, at T12, that "with proper support from Toodyay and with Toodyay following the appropriate student behaviour management process this culture of bad student behaviour at Toodyay would have been rectified and [I] would have been able to demonstrate [my] competency."
- 13 The applicant also contended in his opening submissions, at T13, that acts and omissions on the part of the administration team at Toodyay District High School "caused an erosion of respect and authority within [my] classroom and undermined [any] capacity [I] may have had to demonstrate [my] teaching capacity against the defined Standards and focal points".
- 14 The applicant said, at T16, that "[my] genuine attempts to improve [my] performance were not supported by Toodyay."
- 15 Consistent with his opening submissions, the applicant gave evidence, at T78, that "my understanding of the Standards is you need the skills to - to be able to perform them, but you cannot perform the skills under adverse conditions" with the "adverse conditions" the applicant referred to being bad student behaviour which the administration team at Toodyay District High School, on the applicant's case, failed to address.
- 16 The applicant also gave evidence, at T119, that he said to those managing his performance "Look, the school is not following the behaviour management plan, um, and that's causing me all the problems. If I could just have consequences in place for these kids that are coming in and out of my classroom, I could do a much better job than I'm currently doing."
- 17 He also gave evidence, at T145, that in his view "no teacher, no matter how good they are - if the kids know they can do what they like, no teacher, no matter how good he is, can work, can do his job. My job is to teach, it's not to deal with students who have learnt they can do what they like. So that's my point."
- 18 The applicant laid the blame for the attitude and behaviour of students on inaction on the part of the administration team of Toodyay District High School.
- 19 The applicant gave evidence, at T175, that "it's very hard to have respect when I'm not getting respect from my administration team and that's - that's palatable within the school and the toxic environment that I'm working in, ah, was the cause of that, not my - not my failing in my opinion, of course."
- 20 The applicant, as I have said, and as the submissions and evidence set out above show, contends that he had to teach some extremely ill behaved and troublesome students and that his attempts to manage the behaviour of these students were not supported by the administration team at Toodyay District High School.
- 21 The applicant says that because of the failures of the administration team, and not his own failures, the environment became so bad in some of his classes that he had no real or fair chance to show his wares as a teacher.
- 22 The evidence simply does not support the applicant's characterisation of matters.
- 23 The best evidence about the students at Toodyay District High School must come from those present at the Toodyay District High School when the applicant taught there.
- 24 Ms Kerry Knowles was a Deputy Principal at Toodyay District High School until the end of 2017. She has been a teacher in Western Australian public schools for the best part of 30 years. She has taught at other schools and as at the time of giving evidence was a classroom teacher at Harrisdale Senior High School.
- 25 Ms Knowles gave evidence that the behaviour of the student body at Toodyay District High School was "typical" (T326) and that the students the applicant taught at Toodyay District High School, which she also taught, were no different in terms of their behaviour than any other cohort she had taught. (T326)
- 26 Ms Sharon Edgar has been a Deputy Principal at Toodyay District High School since May 2016. She has been a teacher since 1991 and has worked at five different schools.

- 27 Ms Edgar said of the students at Toodyay District High School that “behaviour wise, they’re much like any other kids at any of school” (T375) and that there was nothing special about the students in the applicant’s classes in terms of their behaviour. (T375)
- 28 Mr Innocent Chikwama was a Deputy Principal at Toodyay District High School from May 2016 until the end of 2017. He has been a teacher since 1996 and has worked in Western Australia in public schools since 2007.
- 29 At T390 Mr Chikwama gave evidence as follows about the student body at Toodyay District High School:
Toodyay it was a very small school where students are – comparing with other schools, were well behaved. Ah, and had small classes as well. And small year groups, which made it manageable. So in terms of behaviour, comparing those, it was a very small, manageable, beautiful school where parents, teachers, and students know each other because of the size of it.
- 30 The evidence that the student body at Toodyay District High School was unexceptional in the material sense was not disturbed by the applicant.
- 31 And yet, by his own admission, the applicant never got the behaviour of students sufficiently under control to create a good environment for education. The question is why this was the case and, in particular, was it because of deficiencies on the part of the applicant or because of a lack of support of him by the administration team at Toodyay District High School.
- 32 The answer to this comes from the evidence, which was all one way and ultimately overwhelmingly persuasive, that the applicant was a substandard teacher.
- 33 That evidence comes from those who observed the applicant at Toodyay District High School but, perhaps most tellingly, also comes from Mr Shane Stiles, the applicant’s direct line manager at another school, and from Mr William Purcell, the expert who assessed the applicant as part of the respondent’s substandard performance process.
- 34 There are some key themes which emerge from the evidence, and I make a finding of each of them, which may be listed as follows:
- (1) the applicant may have “known his stuff” but his preferred method of teaching, being to set work and have students work things out for themselves, was totally ineffective;
 - (2) the applicant was unable or unwilling to closely monitor the spread of abilities within a class and to tailor work to cater to those different abilities;
 - (3) the applicant was a poor communicator with students;
 - (4) related to (1), (2) and (3) above the applicant was incapable of setting a “tone” of respect in his classroom where he commanded proper authority;
 - (5) the applicant blamed others for the problems he encountered in the classroom, or expected others to fix them, rather than confronting them himself; and
 - (6) perhaps most tellingly, and this fell from the applicant’s own lips, the applicant had a tendency to bunker down and become stubborn and argumentative when things were not going his way rather than being flexible and proactive in tackling problems and, in at least one case, he gave up on trying to teach some students altogether.
- 35 In relation to (1) I rely upon the following evidence.
- 36 Ms Knowles gave evidence that the applicant “believed children should want to learn and they should listen to him and he should teach them”. She said this was unrealistic as “there’s lots of children in schools who don’t want to be there.” (T332)
- 37 Ms Knowles gave evidence that “Mr Dixon believed that people should keep up with his method of teaching, um, and that if they didn’t they weren’t working quick enough” (T334) and when she discussed the issue with the applicant he said the students “needed to keep up, it was like ... they weren’t keeping up with him.” (T335)
- 38 Ms Edgar gave evidence that the applicant would “put five questions up on the board with no explanation about how to go about doing it and then the kids would start to have a go, but then they’d be like, ‘I don’t know what I’m doing. Can I – I need some help’ and then he’d say ‘You should have done those by now. Here’s the answer’.” (T377)
- 39 Ms Knowles also gave evidence that questions were posed by the applicant “but [there was] no stepping out and showing the kids actually how you go about solving a problem, he would say, ‘You’ve got a calculator. Use a calculator.’ Or ‘Read your notes in your book’.” (T376)
- 40 Mr Chikwama said that the applicant used a computer programme and that the applicant “would click, go to the next one, then he’d explain, click ... but students would raise their hands and say, ‘Excuse me, sir, I didn’t get that part’ or ‘Excuse me, sir, I was copying that example. Can you go back?’, that’s – the website couldn’t go back.” (T394)
- 41 Mr Chikwama gave evidence that students said about the applicant “Mr Dixon is not teaching us, he is not explaining. You ask a question, he’s not answering.” (T402)
- 42 Mr Purcell was an expert in assessing the competency of teachers, something the applicant admitted when he said that Mr Purcell was “certainly someone who knew what he has talking about”. (T135)
- 43 Mr Purcell gave evidence about a computer programme the applicant had his students undertake during his observation of one of his classes. He said that students didn’t know what to do and many simply gave up on the task. He said the applicant had to “really make sure they know what to do ... and it just didn’t happen”. (T266)
- 44 Mr Purcell said the applicant failed to “stop everyone and – and just to confirm, ‘These are the instructions. How are we going? Ah, Johnny, what do you think? How are you going Mary?’ et cetera.” (T267)

45 At one point a student asked for help and Mr Purcell thought that was a “perfect opportunity to stop the group and say, ‘Well, I – I’m not going to give you the answer maybe but I’ll give you a hint’, but Mr Dixon’s reply was simply, ah, ‘You think about it. You work it out. You grow your brains’.” (T269)

46 In relation to (2) above I refer to the following evidence.

47 Ms Knowles gave the following pieces of evidence:

The work needed to be differentiated significantly across the classroom and I think that that was the adjustment that didn’t happen, so therefore those students who couldn’t understand the work, the pace was too fast, there was no time to go back and consolidate for them, um, there was no time for them to spend time looking at a problem and the conversation that I had with Mr Dixon frequently was about the use of an electronic whiteboard where the information went up and then was removed and the slower children - although I shouldn’t say “slower”, but the students - the students who had less ability were still working on that and it was gone and that would frustrate them and then they would get really angry because they’d be trying to do something and it would be gone. (T333)

I don’t believe that he has the capacity to differentiate the delivery of that curriculum to the range of the capacity of the students that sat in his classroom at Toodyay. (T334)

I didn’t ever see or believe that he would go to a student and differentiate the curriculum at the desk for that particular child. It was, “Up, we’ll do it, we’ll mark it, it’s done. Open it here”. He would teach his style and was not able to have a bucket load of ways to teach the one piece of information that he was trying to teach. (T334)

I didn’t see the teacher modelling, the teacher talk aloud, I didn’t see him stepping it out. The kids did have a – an opportunity to practice, but it was at a one size fits all level and then there was no – no reflection, no plenary at the end. (T377)

48 Mr Chikwama gave the following pieces of evidence:

Some of the students, because they were mixed classes, mixed activity, some of them were operating at different abilities. From there I could see - I observed some students being lost along the way. Maybe they would have benefitted from a lot of scaffolding, knowing what level they were working on, then trying to provide for their own specific, individual needs. (T394)

By scaffolding, it is when you were saying - almost differentiating, knowing that, “I will go and prepare my lesson and go one step at a time, and not give all the work to students. Stepping it out step by step, this, plus this, and this”, just in small chunks. But then those who are struggling, who stayed at that level, those who were going fast, those who were getting the work would keep on going and extending them. So that differentiation in scaffolding is where there were some other problems as well. (T394)

49 Mr Purcell gave evidence that “differentiation” meant:

that within any group of students, you have a wide range of abilities and, um - ah, and you need to - as a teacher, you need to be aware of the differences in abilities, the differences in, um, attitudes, the differences in, um, ah, in simply the way that they learn. Ah, and you need to make provision and allowance for, ah, all the different, ah, groups and individuals, ah, in any class. (T265)

50 Mr Purcell, at T272, gave evidence that a lesson he observed broke down because the applicant was not attuned to the need for differentiation.

51 Recognising that differentiated teaching is a challenge Mr Purcell gave the following pieces of evidence:

Well, in the classes that I saw, um, there was a wide spread and, ah, so, ah, the job to, um, to extend, ah, all of them or to challenge all of them is a challenging job. That’s a teacher’s job. It’s - it’s not easy and, ah, to cater for individual differences when there is such a wide range is not easy, ah, and it - and it’s very hard to do it, um, really successfully but you’ve got to have plans in place to try and achieve that. (T283)

So it is a difficult job and no one’s trying to say it’s easy, it’s not easy. It’s difficult, um, but there was a wide range but I’m sure that those same wide ranges exist in many, many schools, um, and - and no one’s trying to say that - ah, that other teachers in other schools do it perfectly, um, but, ah, there’s always going to be some people who somehow fall through the cracks but you’ve got to do the best you can, you’ve got to plan for it, um, you’ve got to, um, um, have a, ah - a big spread of support to help you do the best you possibly can for as many students as you can. That’s - ah, that’s what it’s all about. (T283)

52 Mr Purcell said that the applicant, despite having his heart in the right place, did not demonstrate to him that he was up to the challenge of planning for and executing effective differentiation in the lessons he observed.

53 In relation to (3) I rely on the following evidence.

54 Ms Knowles gave the following pieces of evidence:

He never swore a child when I was in his presence, but he did say some things to them that I felt was inappropriate, in that he would put them down. He is - he did try and engage and have a relationship with them at times. (T335)

Other times he was very curt with them and forthright and sometimes teachers have to do that. But I also believe that some of the remarks that he made to them made them angry in that would belittle them at times, perhaps in order for them to - to do the work that he wanted them to do. (T336)

Saying that they were - they didn't understand because they didn't work hard enough, they needed to try harder. I can't remember categorically off the top of my head, if I ever heard them - Mr Dixon refer to them as useless or dumb, but students reported to me that that was what was said. (T336)

I can't say I ever heard him praise somebody, but he would ask who got - so many right or wrong and say, "That's well done", he would use the term "Well done" generally to the class. I didn't hear individual praise a lot, but I wasn't in the classroom for long periods of time and it may have occurred. (T336)

55 Ms Edgar gave the following evidence:

He'd often make derogatory comments to them, which enraged them more, saying, "You didn't even try", or "You got it wrong because you didn't do it my way". (T376)

56 Mr Chikwama gave the following pieces of evidence:

And the teacher, when that happened, that's when I saw Mr Dixon, maybe the communicating becoming more and more angry, and maybe frustrated as well, and the lessons would degenerate after 20 minutes or 15 minutes. (T394)

When you talk about how he used to communicate with the students, what sorts of things do you say - what are you talking about? - - - Um, what I - what I - what I - what I notice in those two classes is, um, was, um, at times he would get angry a couple of times and that would escalate and some students leaving his classrooms and at times with him as well losing control of the class as well. (T398)

57 Mr Purcell gave the following evidence about one lesson he observed:

This little group of five were left more or less by themselves at the back of the room doing these questions and there was no interaction at all between Mr Dixon and this group. Ah, he didn't do anything with them other than just give them the sheets at the start of the lesson. ... there was no interaction. He didn't come to see them, he didn't talk to them ... and I don't think that's an appropriate way to treat ... a group of ... students. (T273)

58 Mr Purcell also gave evidence that the applicant did not praise students. He said there was no "celebration of success" and expanded as follows:

Um, it - it all goes to - it - it goes to, ah, individuals who have, um, achieved some success in a - in a classroom activity. Individuals need to be, um, congratulated on their success, "Well done, John. That's an excellent effort". It - it's - it's just good classroom practice. It helps develop those people's confidence. Young people, um, can very easily have their egos bruised and it's really important to build their egos by giving them, ah, congratulations when that's due. ... I think it's very important to celebrate success. (T274)

59 A combination of the problems identified by witnesses which I have listed at (1), (2) and (3) above led, according to the evidence of witnesses, to problems with "tone" and behaviour in the applicant's classrooms.

60 Mr Purcell's evidence best summarised what was happening in relation to (4) above. It was as follows:

I believe that, um, when students don't know how to - to start, you know, they just don't know what to do, um, you've really got to make sure they know what to do, um, and it just didn't happen. And as I say, um, there were too many students who - um, who really gave up on the task. They just didn't know what to do and so they gave up. And when that happens, then you've immediately created a rod for your own back, because you have a classroom that, ah, sort of descends into chaos. (T266)

It has to be - um, you - you need to maintain control and if there is no control when students don't know what's going on, then, ah, it's a recipe for, um, students wasting their time at best and for chaos and - and disorder and all sorts of other things at worst. (T267)

Class behaviour management is all about setting a classroom tone and having students aim to achieve the best they can but also not just as academic assessment or achievement but to be - to be seen as worthwhile people and to want to achieve, ah, that pat on the back to say, "Here, I'm a - I'm a worthwhile person". That's really important and in a classroom that's what builds respect and, um, respect in a classroom - a respect from teachers to students and respect from students to teachers. That's built by, um, interaction that's seen by students in the class, interaction between a teacher and someone who's done something well. (T274)

Um, I saw and heard, um, ah, students speaking to Mr Dixon in a - in a manner that was not respectful and, I mean, that's the student doing that. I - I didn't see Mr Dixon at any time be disrespectful to students but I did see students be disrespectful to Mr Dixon. Ah, and - and when that happens, um, and when it happens repeatedly, you get the feeling, or I got the feeling, that the general tone and the - and the - and the - the - the greater majority of the students in the classes had that same lack of respect and that undermines everything that a teacher is trying to do. And no matter, ah, how good a planner or how good a classroom practitioner Mr Dixon was, if you've got to try and deal with that lack of respect you've got no chance. (T275)

It was very clear to me that the respect from the students to Mr Dixon was not there and so those firm guidelines had not been drawn up at some stage in the past. If they had have been that behaviour wouldn't have shown itself like it did. (T275)

The Standards certainly delineate all sorts of different areas of the teaching profession and job and teaching is somewhere between paid work and creative art. It's got aspects of all of that, however, the fundamental, um, thing that underlines being a successful teacher, ah, as opposed to an unsuccessful teacher is the ability to establish a relationship with the students in your class, a positive relationship. (T282)

Respect has to be earned and, um - and it takes time to develop and on my two visits, I didn't see respect from those students towards you and maybe that takes time. Maybe you needed more time, whatever, but the time has to be spent in developing that respect because that's where it starts from. (T288)

61 In relation to (5) I rely on the following evidence.

62 Ms Knowles gave evidence that at times the applicant "passed the buck" to the administration team in relation to the classroom behaviour of students because it was the "easy option". (T331)

63 Ms Edgar gave the following evidence in relation to the applicant inappropriately referring behavioural matters in his classroom to the administration team at Toodyay District High School. She said the applicant referred:

students not following instructions, students throwing rubbish around the classroom, students not doing their work - it - it - irrelevant things, but then also when things had been - gotten out of hand and perhaps students had - it had - things had gone further. It was for more those high-end behaviours as well. But often it was the little behaviours that needed to be managed at a classroom level. (T379)

64 Mr Chikwama gave the following evidence in relation to his attempts to assist the applicant with his performance:

from everything that we did there was lack of ownership on his part as well because he always say it was the students, it was the school. I don't believe - I don't remember when Mr Dixon will take any ownership of his part in the process, it was always someone's fault or suggestions, "I'm not going to work". But I used tell him, "Mr Dixon, I'm from Africa, a good lesson in Zimbabwe, a good lesson in London, a good lesson in Newman is always a good lesson because that's a good lesson, you can tell it from there". (T398)

65 In relation to the idea that the applicant "passed the buck" on the management of behaviour in his classroom to the administration team Mr Chikwama said:

Mr Dixon used, um, the red card very often. Maybe in a lesson he would use it maybe more than three, four, five times. At times you get to the office - before you even get to the office coming from his classroom he is already sending a red card or some students. Initially we would agree to use the red card but after sometime students would refuse to take the red card to the office saying, "Mr Dixon, look, this student did nothing wrong". Then he would ring the office. So before we get to the office he would ring and maybe - and with the red card, in your hands and going to deal with those behaviour in supporting him as well. Ah, compared - compared to other - there was some teachers who never used the red card during my 19 months at Toodyay. And, ah, Mr Dixon used it maybe - at least three, four, five times in - in an hour until we have to go and stay - one of administration - administrators would have to stay - remain in the classroom with him to try to help him as well. (T403)

66 In relation to the evidence I have reproduced to demonstrate my basis for findings (1) to (5) above I accept that evidence as being truthful, accurate and insightful. I do not ignore that some witnesses suffered light blows under cross-examination and that, on occasion, they gave evidence in general terms without reference to specific examples. I accept that none of the witnesses shadowed the applicant and saw all of his teaching. However, these witnesses were extremely experienced educators and persons who presented as earnest and credible. I heard the same opinion expressed repeatedly by people who clearly know what they are talking about and had sufficient opportunity to see the applicant in action. Their opinions were not undermined in any serious way.

67 In relation to (6) I refer to the things the applicant himself said in his evidence. I do not ignore the evidence the applicant gave that reflects positively upon him, but admissions against interest, if I can put it that way, have a particular significance in this case.

68 At T67 the applicant said in relation to performance issues being brought to his attention early in his employment at Toodyay District High School:

... [the Principal] said back, "Look, Colin, you're the greatest source of problems so you've got to accept responsibility, you are the problem". It was - that was the way it was going on. And I said, "What are you going to do?" He said, "Well, to help you, we are going to stop rescuing you", is his words, stop rescuing me. So I said, "That means you're going to do less than you're doing now", and I see them not doing enough. And he said, "Yes. You've got to take control, you've got to win them over and we're going - I've instructed the Deputies to stop rescuing you". And I left that meeting, ah, "Okay, do I start looking for jobs now?"

69 Even at this early stage the applicant was demonstrating a lack of insight into the problem and a lack of proactivity in dealing with it. He did not have regard to what all of the evidence suggests was a fair point; that he himself needed to tackle the issue of classroom behaviour.

70 At T72 the applicant gave evidence in relation to his participation in the substandard performance process as follows: "I was trying to somehow get the administration to see that their behaviour management was not working."

71 The applicant believed the problems lay with others and went into the substandard performance process with the intention of having others address the failures he perceived on their part rather than his own. The problem, however, clearly did not lie with others on the evidence I have set out above from witnesses. The applicant's lack of insight and stubbornness caused problems from very early on and it is perhaps no wonder that the applicant never came to grips with the real issues, those being his deficiencies.

72 At T73 the applicant gave evidence that "I was hoping that that would force them to do their job properly. That was actually my underlying agenda of, um, encouraging the - the - the focusing on this. Anyway, so I - I went to the meeting and, um, I was"

- 73 The applicant mistakenly thought that the performance management process was about improving the performance of the administration team at Toodyay District High School. It was not, and it is telling that he had this attitude.
- 74 At T74 the applicant gave evidence of challenging Mr Chikwama's attempts to help him by saying: "But you're not a Maths teacher. You don't know how Maths works". This evidence shows that the applicant was so blinkered in his self-assessment that he thought, wrongly, it was appropriate to resist the authority of his superior on this spurious and disrespectful basis. The applicant simply refused to accept that the problems were mainly his and that it was incumbent upon him to make real attempts to address them.
- 75 At T81 the applicant said of some students:
- it's like herding cats, but getting them ready so they could do some work. And after 10 minutes, I'd put up the last 10, ask them at the end of that, "Is everybody happy with that?" Some of the kids who liked to create a problem would say, "You're too quick, sir. I need to do that. Can you stop the class and hold - not go on until I copy them down", which was just a - a distraction.
- 76 It is completely inappropriate for a teacher to think of a class of students as a "herd of cats" and to express this. Further, the applicant was wrong about his assessment of what was happening based on the weight of evidence I have heard. His students were not setting out to sabotage his performance rather they were not being properly managed by the applicant.
- 77 In relation to one attempt by Mr Chikwama to help the applicant with differentiation the applicant gave evidence of becoming argumentative and rejecting Mr Chikwama's input because he thought he knew better. (T84) This was inappropriate and highlighted the lack of insight on the part of the applicant that others came, correctly, to view as stubbornness and inflexibility.
- 78 At T98 the applicant gave the following evidence:
- And I based that assumption on that quite a few students had left, the - the more difficult students weren't coming to school anymore and the Year 10 class who was atrocious was of course leaving the school cos the - of course there's that and, um, I was thinking that Innocent's position wasn't continuing so Innocent would be leaving the school and that Grant wouldn't be - they'd be finding a new Principal because the position was up. So I was thinking there would be a new administration, the most difficult kids would be leaving, next year I've got the chance of starting with a fresh Year 7 class and the Year 9 class moving into Year 10 - um, sorry, the Year 8 class was going well at that - that stage. They were moving into the Year 9 class and I - I was convinced they would be a good class and, um, the Year 9 class moving into Year 10 would be a challenge but there was - half of them were pretty good kids anyway. So I thought that - but I was concerned about at that stage just lasting till the end of the year.
- Okay? - - - So I, um - at the end of the year I, um, backed off on pushing the kids.
- Okay. So you went into survival mode? - - - Went into survival mode but I believe I did some excellent teaching in - in that period, um, for the kids who wanted to learn and basically neglected the kids that didn't want to learn.
- 79 It is hard to know where to begin with this evidence. Students, let alone a whole year group, should not be described as "atrocious" by a teacher. Thinking that the problem lay with everyone else and that the applicant could sit back and wait for the players to change shows a remarkable lack of insight and proactivity. "Neglecting" students who did not want to learn is completely unacceptable.
- 80 At T144 the applicant gave evidence about his objection to one of his students being in his class when Mr Purcell was going to be assessing him. He said:
- And I - I said to - spoke to Innocent. I said, "Innocent, can you", um, "Deal with Hannah for me?" and she - "Oh, no, she has to go to class". I said, "Seriously? You know what's happening today and you're putting Hannah in my class?" and he - he started to argue with me.
- 81 The idea that Mr Chikwama should have manufactured a favourable environment for the applicant by not having one of the applicant's students in his class when he was to be assessed is a remarkable one. That the applicant should have suggested it, and then resisted Mr Chikwama as though Mr Chikwama were in the wrong, shows the applicant's lack of insight into his problems.
- 82 At T145 the applicant said "my job is to teach, it's not to deal with students who have learnt they can do what they like." The applicant could hardly be more wrong.
- 83 At T333 Ms Knowles gave the following evidence:
- it seemed that Mr Dixon believed that he tried everything that I suggested. I recall one time, you know, only because I looked at my diary last - last night, um, in late June last year I had a conversation with Mr Dixon and he - he said but he had tried all that and nothing seemed to work, the children were unteachable. And I said, "All children are teachable".
- 84 Again the applicant rejected attempts to assist him on the basis that the students were the cause of his problems.
- 85 In relation to all of the matters of concern I have listed above, however, perhaps the most telling evidence came from Mr Shane Stiles, Head of Maths at Eastern Hills Senior High School.
- 86 The applicant taught at Eastern Hills Senior High School for the 2016 school year. Mr Stiles was his direct line manager. The applicant made no complaint about the level of support Mr Stiles had given him while teaching at Eastern Hills Senior High School. Further, the applicant volunteered glowing assessments of Mr Stiles and the staff at Eastern Hills Senior High School.
- 87 That is, the applicant raised no issue of having received a lack of support at Eastern Hills Senior High School as he did in relation to Toodyay District High School.

- 88 During a hearing on an application for an adjournment brought by the applicant he was at pains to find out if Mr Stiles would be a witness because he said "he's the only one who's actually observed me a fair bit in my teaching". (T5)
- 89 The applicant gave evidence that Mr Stiles had been nominated by him as his "only" referee (T142). The applicant said he was "good" at Eastern Hills Senior High School but that, in comparison, his colleagues there were "exceptional." He said "they are the best Maths teachers I've ever worked with. It was a privilege to be there ... the group that Shane's in charge of is brilliant." (T142)
- 90 Against the background of the above Mr Stiles' evidence is material and telling.
- 91 Mr Stiles gave evidence that Eastern Hills Senior High School was much like other public high schools in terms of student behaviour in that it had 5% to 10% of students with whom there were behavioural "issues".
- 92 Mr Stiles agreed with the applicant insofar as he gave evidence that he had good opportunities to observe the applicant's teaching in 2016.
- 93 Unfortunately, Mr Stiles' evidence showed that the applicant lacked insight into the true level of his performance at Eastern Hills Senior High School and his competency as a teacher.
- 94 Mr Stiles gave evidence that the applicant's ability to manage student behaviour in the classroom was "poor" (T454).
- 95 He summarised his opinion, damningly, as follows:
The first thing you've got to do to get control of a class is build a rapport with the kids and it - there was no rapport with the children. There was zero. And I didn't feel, and nor did the staff, and the staff - um, whether you like it or not the staff will always come to the hot-headed - your line manager and say they've got problems, issues. So it was continual also from staff feedback. There was just no rapport. Unfortunately as soon as the kids have no respect or no rapport for you, you're right under the pump no matter what you put in place. That's unfortunately - and that then makes a huge indent on your teaching and learning ability and unfortunately for Mr Dixon his complete lack of knowledge of curriculum in Mathematics just compounded the whole issue. (T454)
- 96 In terms of the applicant's "complete lack of knowledge" Mr Stiles, under cross-examination, expanded as follows:
He - he knew which books, because we supply the books and everything else like that, and if you look at the thing, et cetera, except the thing that always - most probably bamboozled me as a teacher, and I go back to my teaching days, when I went to Applecross I had to teach a thing called Mathematic methods which is like Maths 2/3 in our day and I - and I had to go back and when I taught methods I had to prepare the whole night before because I hadn't done the maths for a while so I had to go in, I went into the class and when you teach in a leafy green school you've got to be really switched on. I didn't see that same - that same, ah, what do we call it, lesson planning, organisation, everything from Mr Dixon and if - and if it was it didn't come across in the classroom ... whenever I was in there or to the students. (T461)
- 97 Basically Mr Stiles, a witness in whom the applicant placed great store, gave evidence about exactly the same issues of concern having been observed in 2016 as arose as issues of concern at Toodyay District High School in 2017. I cannot possibly ignore this evidence in coming to my conclusions.
- 98 Despite the spirited case run by the applicant, and on his behalf by his good friend, Mr Skehan, whose contribution was both welcome and impressive, the conclusion reached by the expert Mr Purcell is one with which I join. The applicant is a "nice person" who is a "bad teacher". (T277)
- 99 The areas in which the applicant was a bad teacher seem to correspond clearly with those parts of the Australian Professional Standards for Teachers which were identified to the applicant during the substandard performance process undertaken in relation to him, namely standards 1.5, 3.1, 3.2, 3.5, 4.1, 4.2 and 4.3 (with standards 4.4 and 4.5 falling away following the opinion of Mr Purcell that the applicant had met these standards), not that they need do so for me to come to the conclusion that the applicant was a substandard teacher.
- 100 Insofar as the applicant complains, in his written closing submissions, that he was incorrectly assessed against the "proficient" level material in the Standards rather than the "graduate" level material in the Standards I note that while I have had regard to the Standards (as section 79(2)(iii) *Public Sector Management Act 1994* contemplates) the conclusion to which I have come that the applicant is a substandard teacher relies on all of the matters about which I have made reference in these reasons and my conclusion is not in any way limited only to cross referencing those matters to the Standards. So as to be clear, I find the applicant to be substandard regardless of whether I had considered him to be a "proficient" or "graduate" teacher so far as the Standards are concerned. I rely on the evidence which supports my findings (1) to (6) above and find that a person displaying those deficiencies is substandard.
- 101 Further on this, I note the applicant did not forensically pursue an argument about the appropriate level to apply in the proceedings, by which I mean the applicant did not articulate an argument about this aspect to such an extent that it could fairly be said the respondent had an opportunity to meet it during the hearing.
- 102 In any event on this, I accept that if the argument were relevant, and needed to be dealt with, it was fair and reasonable for the respondent to have assessed, and it would be fair for me to assess, the applicant against the "proficient" level material in the Standards given his years of experience as a teacher. In this regard the applicant seems to have conveniently forgotten, and at a very late stage, the way he presented himself to his superiors, the applicant and to me; that is that he is a very good and very experienced teacher.
- 103 The applicant lays the blame for any appearance of substandard performance upon a failure on the part of the administration team at Toodyay District High School to properly support his attempts to manage classroom behaviour.

- 104 I reject that contention. I find that while Mr Skehan did manage to point up a few failings on the part of the administration team they were not so widespread or sustained as to be called systemic. In general, as a matter of fact, I find that the applicant was well supported by the administration team in his endeavours, such as they were, to manage student behaviours. The truth of the matter is that this is a key area where the applicant simply lacked insight into what was really happening. The applicant thought it was the job of the administration team to manage out behavioural issues in his class so that he only had to deal with students who wanted to learn. By way of examples I point to the following evidence.
- 105 The applicant said of one class:
So I couldn't get anything started with that class until those three girls were removed. (T114)
- 106 I refer also to the evidence I quoted above in relation to the class Mr Purcell was to observe:
And I - I said to - spoke to Innocent. I said, "Innocent, can you", um, "Deal with Hannah for me?" and she - "Oh, no, she has to go to class". I said, "Seriously? You know what's happening today and you're putting Hannah in my class?" and he - he started to argue with me. (T144)
- 107 The truth of the matter, and a truth that the administration team patiently, politely and repeatedly pointed out to the applicant, was that it was his role to tackle behavioural issues in his classes by the establishment of rapport, by setting a tone of respect and, most importantly, by being proactive and flexible enough to make sure every child was engaged in interesting work pitched to their ability.
- 108 The applicant failed to grasp this and ultimately a finding that he was substandard is, regrettably given that the applicant is clearly a nice person, inescapable.
- 109 The applicant also complains about the process that led to his dismissal. The relevance of complaints about process diminish, even if made out, where I have conducted a hearing de novo on the applicant's performance and found it to be substandard. Nonetheless, in any such process, it remains important to identify that a teacher was given an opportunity to improve, with appropriate support and in the knowledge of the possible consequences of not improving.
- 110 The applicant was given every conceivable opportunity to improve. By late 2016 he was aware of the alleged deficiencies in his performance and the consequences of not addressing them (T79, T96 and T104). I note it was not the fault of the administration team at Toodyay District High School that his deficiencies were in so many areas.
- 111 The applicant was given a full year in 2017 to show that he could address those deficiencies. He was given ample support by the administration team at Toodyay District High School. He was provided with resources (T47-48, T193 and T399), advice (T333, T377, T378, T379 and T394-399), mentors (T120-121), opportunities to undertake professional development courses (T377 and T395), opportunities to observe and learn from competent teachers at Toodyay District High School (T172 and T192 - 193) and at other schools (T102, T120, T192, T193, T378, T395 and T399), information technology materials he requested (T61 and T193), he had difficult students removed from his classes (T114 and T194) and he was given fewer and less difficult classes to teach (T399 and T402).
- 112 The applicant failed to improve. Partly this was because he failed to accept that he actually had the deficiencies identified and ended up adopting an obdurate attitude to the processes designed to help him address them. But, in the main, it was because he simply did not have it in him to address the deficiencies. They were too many and too deep.
- 113 The applicant's written closing submissions made much of the fact that Toodyay District High School had been the subject of a "Performance Enquiry Report" prepared by an "Expert Review Group" in May 2015 and that report had identified that the case management of students at educational risk had been inadequate in terms of intervention or monitoring at Toodyay District High School.
- 114 As the report pre-dated the applicant's employment at Toodyay District High School I do not see the relevance of reference to it and no attempt was made during the long hearing of this matter to make anything of it from a forensic point of view.
- 115 The applicant also complains in the submissions about issues to do with Individual Education Plans for students at Toodyay District High School, compliance by the administration team with its own student behaviour "Intervention Process", a failure on the part of the administration team to properly induct him, failures on the part of the administration team to follow the respondent's "Complaints Policy" (insofar as it applied to complaints about him from parents) and inconsistencies in the evidence about the true levels of his reliance on the administration team to address student behaviour in his classrooms.
- 116 None of these submissions hit a mark when the weight of the evidence is considered. Any faults on the part of the administration team at Toodyay District High School, and no-one is perfect and there may have been a few minor ones, were not such as to affect, let alone undermine, the clear finding demanded by the evidence that the applicant was a substandard teacher and could not improve to a competent level despite time and support.
- 117 The applicant's lack of insight is revealed again; the team at Toodyay District High School should be praised and not criticised for their patience, understanding and earnest efforts, under great pressure, to help the applicant.
- 118 Finally, the applicant attempted to place weight on some evidence relating to the NAPLAN results of some of his classes. The evidence was ultimately quite confusing but, even taking it at its highest for the applicant, it does not undermine the weight of evidence plainly against him.
- 119 The respondent cannot be said to have acted harshly, unfairly or oppressively in terminating the applicant's employment.
- 120 The application is dismissed.
- 121 A final note which I feel compelled to make, given that this decision is an overwhelmingly negative one for the applicant, is that while his deficiencies were exposed in typical classroom settings there may very well still be a place for the applicant somewhere in education.

122 The respondent made no error in dismissing the applicant and there was no obligation upon her to find a school that could suffer the applicant’s deficiencies best, his deficiencies ran too deep for that and the applicant had done too little to address them, but it may be that private tutoring or the private education system could make use of the talents the applicant does have. This exchange, at T295, captures what I mean and I emphasise the last part of it which shows some insight on the part of the applicant:

“Are a lot of your answers, Mr Purcell, going to be variations on the theme of the answer you gave to the first question, that when you were asked about Canning College, that in a purely lecture situation with interested specialist kids, Mr Dixon would be great but if you’re talking about kids with a wide range of abilities and a need for a lot of over the shoulder teaching, you have a feeling that Mr Dixon would struggle? - - - I believe that’s true.

Are these variations in that theme? - - - Probably.

Well, Mr Dixon puts to you, “Look, if I had a great class I’d be a good teacher, wouldn’t I?”, but if he doesn’t have a great class, he’s going to struggle, isn’t he, in your view? - - - I think so.

DIXON, MR: Okay. Thank you. **That was well put.**”

2018 WAIRC 00794

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION COLIN R DIXON	APPLICANT
	-v-	
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	MONDAY, 8 OCTOBER 2018	
FILE NO/S	U 36 OF 2018	
CITATION NO.	2018 WAIRC 00794	

Result	Application dismissed
Representation	
Applicant	In person and later Mr R Skehan as agent
Respondent	Mr W Fitt of counsel and later Ms J Vincent of counsel

Order

HAVING HEARD the applicant in person and later Mr R Skehan as agent for the applicant and Mr W Fitt of counsel and later Ms J Vincent of counsel for the respondent the Western Australian Industrial Relations Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby orders the the application be and is hereby dismissed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2018 WAIRC 00790

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DR MARK GRANITTO	APPLICANT
	-v-	
	RSC DENTAL PTY LTD T/AS KEYS DENTAL CENTRE	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	MONDAY, 8 OCTOBER 2018	
FILE NO/S	B 29 OF 2015	
CITATION NO.	2018 WAIRC 00790	

Result	Application dismissed
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Order

1. This is a claim of loss of contractual benefits referred to the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* on 12 February 2015.
2. Following a number of conciliation conferences, on 19 November 2015, the parties reached an agreement in principal to settle the matter subject to the finalisation of terms.
3. On 8 March 2016, Cor Cordis Chartered Accountants advised the Commission that administrators had been appointed in respect of the respondent.
4. The applicant sought that the application remain open pending any prospect that he may be able to pursue it.
5. On 21 November 2017, the Commission convened a for mention hearing. At that hearing, the Commission was advised that the respondent was in liquidation. The Commission directed the applicant to report back to the Commission in September 2018 as to the status of the matter.
6. On 17 September 2018, the respondent's liquidator advised the applicant and the Commission of the respondent's financial position.
7. On 27 September 2018, the Commission noted that the matter was listed for mention on 2 October 2018 and asked the applicant to advise of his status as a creditor of the respondent, his prospects for getting satisfaction from the respondent's assets, and the purpose of keeping this matter on foot.
8. On 27 September 2018, the applicant advised that he would discontinue this claim within 21 days.
9. On 1 October 2018, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance* in respect of this matter.

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

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2018 WAIRC 00739

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2018 WAIRC 00739
CORAM : COMMISSIONER T EMMANUEL
HEARD : TUESDAY, 11 SEPTEMBER 2018
DELIVERED : WEDNESDAY, 12 SEPTEMBER 2018
FILE NO. : B 63 OF 2018
BETWEEN : JACLYN HARROP-MARRINER
 Applicant
 AND
 TAHLIA FERGUSON TRADING AS PLAYFUL INK
 Respondent

CatchWords : Denied contractual benefits – Unpaid wages – Parties have reached an agreement to compromise the claim – Unimpeached compromise agreement – Commission can make orders in the terms of the agreement – No appearance by the respondent

Legislation : *Industrial Relations Act 1979* (WA) s 26(1)(a), s 27(1)(c), s 27(1)(d); *Industrial Relations Commission Regulations 2005* (WA) reg 24(2)(d)

Result : Order issued

Representation:

Applicant : In person

Respondent : No appearance

Case(s) referred to in reasons:

Beverley MacLeod v Paulownia Trees Pty Ltd (1997) 78 WAIG 1057

Diana Elizabeth Downs-Stoney v Derbarl Yerrigan Health Service [2004] WAIRC 11100; (2004) 84 WAIG 2613

Green v Rozen and others [1955] 2 All ER 797

Maurice Bradbury v Jos van Baren, John Denwick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate (1995) 75 WAIG 2927

Prudential Assurance Co. Ltd. v McBains Cooper (A Firm) and Others [2000] 1 WLR 2000

Decision

- 1 Mrs Jaclyn Harrop-Marriner worked as a receptionist for Ms Tahlia Ferguson at her tattoo business from 21 November 2017 to 20 March 2018. She has filed a claim against Tahlia Ferguson trading as Playful Ink for the denied contractual benefits of \$1,538.25 in unpaid wages and \$250.00 in unpaid annual leave.
- 2 Ms Ferguson did not file an answer denying Mrs Harrop-Marriner's claim. On 10 July 2018 my Associate contacted the parties by email to provide a digital copy of the *Form 3 – Notice of claim of entitlement to a benefit under a contract of employment* and to request the parties provide their availability for a conciliation conference. Ms Ferguson did not reply to the Commission. On 13 July 2018, my Associate wrote to the parties by email and letter to inform them a video conference was listed for 2pm on Monday 30 July 2018.
- 3 Ms Ferguson emailed the Commission minutes before the conference was due to start and asked that it be vacated because her child was unwell. This conference was relisted for 2pm on Wednesday 1 August 2018. At 11:10am on Wednesday 1 August 2018, Ms Ferguson again requested by email the conference be vacated. This time the reason she gave was that she had only now decided to consult a lawyer. The Commission told the parties that the conference would go ahead and if necessary a further conference could take place.
- 4 The parties both attended the conference on Wednesday 1 August 2018. There they reached an agreement to resolve application B 63/2018 (**Agreement**). The Agreement was recorded in an email from my Associate to the parties:

Dear Mrs Harrop-Marriner and Ms Ferguson,

I confirm a conference was held today before Commissioner Emmanuel between Mrs Harrop-Marriner and Ms Ferguson in application B 63/2018.

At the conference, the parties reached an agreement to resolve this matter (**Agreement**). The Agreement is as follows:

- The respondent agrees it owes Mrs Harrop-Marriner \$948.25 (net) for unpaid wages under her contract of employment.
- The respondent agrees to pay \$100 (net) every week by electronic funds transfer until the full \$948.25 (net) has been paid to Mrs Harrop-Marriner:
 - o The first payment of \$100 (net) will be made by **8 August 2018**.
 - o The second payment of \$100 (net) will be made by **15 August 2018**.
 - o The third payment of \$100 (net) will be made by **22 August 2018**.
 - o The fourth payment of \$100 (net) will be made by **29 August 2018**.
 - o The fifth payment of \$100 (net) will be made by **5 September 2018**
 - o The sixth payment of \$100 (net) will be made by **12 September 2018**.
 - o The seventh payment of \$100 (net) will be made by **19 September 2018**.
 - o The eighth payment of \$100 (net) will be made by **26 September 2018**.
 - o The ninth payment of \$100 (net) will be made by **3 October 2018**.
 - o The tenth payment of \$48.25 (net) will be made by **10 October 2018**.
- Mrs Harrop-Marriner agrees to discontinue this claim B 63/2018 **within 7 days** of receiving the final payment from the respondent.
- The parties agree that in the event the respondent does not comply with the Agreement, the Commission may hear this claim B 63/2018 and make an order in the terms of the Agreement.

Regards,

Abbey Mardon

Associate to Commissioner T Emmanuel

Western Australian Industrial Relations Commission

- 5 The first payment was due on 8 August 2018. On 14 August 2018, Mrs Harrop-Marriner contacted my Associate and informed her that she had not yet received any payments from Ms Ferguson. On 22 August 2018, Mrs Harrop-Marriner confirmed she still had not received any payments and said:

I confirm that I would like the Commission to hear the claim B63/2018 in regards to the agreed upon terms that were discussed in the conciliation meeting on 1st August 2018.

- 6 Accordingly, on Tuesday 28 August 2018 this matter was listed for hearing. That day, my Associate posted a notice of hearing to Ms Ferguson at the address she provided the Commission, being 1 Sprigg Pass, Clarkson WA 6030. My Associate also sent the notice of hearing to the email address provided by Ms Ferguson and to the email address provided in the notice of claim. Email delivery receipts were received by the Commission.
- 7 For the third time, Ms Ferguson emailed the Commission just hours before a listing, this time a hearing, to say she cannot attend. Her email dated 11 September 2018 states:

Hi

I cannot attend today unfortunately, I'm not ignoring the situation but since last hearing, serious personal circumstances have arisen including 2 family deaths and financial circumstances. Due to a combination of these issues I have not been in Perth or checked my emails to see the date was today. Like the original hearing I dispute the facts and agreed to payment plan so it was sorted and thought we had agreed on this.

Thanks

Tahlia Ferguson

- 8 My Associate telephoned Ms Ferguson several times straight after receiving that email but Ms Ferguson did not answer her telephone. My Associate also emailed Ms Ferguson and asked her to telephone the Commission as soon as possible. Ms Ferguson did not telephone the Commission.
- 9 My Associate then emailed Ms Ferguson, attaching my Associate's email set out at [4] and asked that Ms Ferguson confirm whether:
 - a. she agrees she has not made any payments to Mrs Harrop-Marriner since the conciliation conference on 1 August 2018; and
 - b. she does not object to the Commission making an order as agreed by the parties at the conciliation conference on 1 August 2018.
- 10 Ms Ferguson wrote back to my Associate and confirmed that she has not made any payments to Mrs Harrop-Marriner since the conciliation conference and she does not object to the Commission making an order as agreed by the parties at the conciliation conference. She also said that she 'can pay the requested amount within 28 days.'
- 11 The Commission has the power to proceed to hear and determine the matter in the absence of any party who has been duly served with notice of the proceedings: s 27(1)(d) *Industrial Relations Act 1979* (WA) (**IR Act**). Service on the respondent in this matter may be effected by leaving the notice at, or sending it by pre-paid post to, Ms Ferguson's usual or last known place of abode or place of business: reg 24(2)(d) *Industrial Relations Commission Regulations 2005* (WA). I am satisfied Ms Ferguson has been duly served with notice of these proceedings and the Commission may proceed with the hearing in her absence in the circumstances.

Evidence

- 12 Mrs Harrop-Marriner gave evidence that at the conciliation conference on 1 August 2018 the parties reached the Agreement to compromise her claim for denied contractual benefits. The terms of the Agreement were as set out in the email from my Associate in [4]. She tendered her bank records and said that the last payment she received from Ms Ferguson was on 18 July 2018. Mrs Harrop-Marriner's evidence is that Ms Ferguson has not made any payments to her since the conciliation conference and therefore has not complied with the Agreement.

Consideration

- 13 Mrs Harrop-Marriner was a credible witness and I accept her evidence.
- 14 I find that the parties reached the Agreement to compromise Mrs Harrop-Marriner's claim, that the terms of the Agreement are as set out at [4] and that Ms Ferguson has not complied with the Agreement.
- 15 An unimpeached compromise represents the end of the dispute or disputes from which it arose: *Prudential Assurance Co. Ltd. v McBains Cooper (A Firm) and Others* [2000] 1 WLR 2000. The Agreement reached by the parties has therefore overtaken Mrs Harrop-Marriner's claim for denied contractual benefits: *Maurice Bradbury v Jos van Baren, John Denwick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate* (1995) 75 WAIG 2927; *Green v Rozen and others* [1955] 2 All ER 797. Now before the Commission is not the claim for denied contractual benefits but the Agreement in settlement of that claim.
- 16 The circumstances of this matter are similar to those considered by Beech C (as he was then) in *Beverley MacLeod v Paulownia Trees Pty Ltd* (1997) 78 WAIG 1057 and I agree with his reasoning. I also agree with the reasoning of Smith C (as she was then) that the Commission has inherent power to make an order in the terms of a compromise agreement: *Diana Elizabeth Downs-Stoney v Derbarl Yerrigan Health Service* [2004] WAIRC 11100; (2004) 84 WAIG 2613. I adopt the following reasoning that she sets out from [44] – [53]:

44. The Commission is not a superior court of record, it has no inherent jurisdiction, and its jurisdiction is limited to that explicitly provided by the Act (*Robe River Iron Associates v Federated Engine Drivers and Firemen's Union of Workers of Western Australia* (1987) 67 WAIG 315; *Australian Glass Manufacturing Co Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers', Western Australian Branch* (1992) 72 WAIG 1499). The Commission's powers are circumscribed by statute. In respect of an application under s 29, powers to make orders are confined to the express provisions of the Act (see *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26). The Commission does have implied powers that arise by necessary implication out of the effect of exercise of a jurisdiction which is expressly conferred (*Grassby v The Queen* (1989) 168 CLR 1 at 16-17 per Dawson J). Pursuant to s 12(1) of the Act the Commission is a Court of record. It exercises judicial power when hearing and determining claims by an employee under s 29(1)(b). As its jurisdiction is limited it is an inferior court of record. Dawson J, in *Grassby v The Queen* (1989) 168 CLR 1 at 16, delivered the leading judgment of the court in which he discussed the limits of the implied jurisdiction of an inferior court. Dawson J, first referred to Menzies J observations in *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7, that implied jurisdiction requires no authorising provision, and Dawson J then went on to say at 16 to 17:

"Inherent jurisdiction is an elusive concept and the proposition that it arises from the nature of a court has been described as metaphysical. See *Yale Law Journal*, vol. 57 (1947) 83, at p. 85, cited by Jacob, 'The Inherent Jurisdiction of the Court', *Current Legal Problems*, vol. 23 (1970) 23, at p. 27. But it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster. On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (*ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J. points out, fundamental.

...

It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'."

45. In this matter the Commission has before it an application under s 29(1)(b)(i) and (ii). Despite the fact the Applicant was reinstated to her position as Director, Client Services on 23 September 2003, the application was not discontinued. The Commission cannot in this case make orders expressly under s 23A in relation to the application under s 29(1)(b)(i) because as the Respondent points out the Commission may only make an order under the section if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair. Section 23A has no application to a contractual benefit claim under s 29(1)(b)(ii). This matter has been the subject of conciliation and arbitration under ss 23(1) and 32 of the Act. The Commission has no express power under ss 23(1), 23A or 32 to make an order in terms of a compromise agreement. Although there is no express power vested in the Commission to make an order in terms of a compromise agreement I am of the view that the Commission has inherent power to do so in relation to this matter. The reasons why I have reached this conclusion are as follows.

46. This application was referred for conciliation and for arbitration under ss 23(1) and 32 of the Act. Section 23(1) provides:

"(1) Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter."

47. Section 32(1), (2) and (7) provides:

"(1) Where an industrial matter has been referred to the Commission the Commission shall, unless it is satisfied that the resolution of the matter would not be assisted by so doing, endeavour to resolve the matter by conciliation.

(2) In endeavouring to resolve an industrial matter by conciliation the Commission shall do all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter.

(7) Where a matter is decided by arbitration the Commission shall endeavour to ensure that the matter is resolved on terms that could reasonably have been agreed between the parties in the first instance or by conciliation."

48. Section 32A of the Act provides that conciliation and arbitration functions may be exercised at anytime and are not limited by any other provision of the Act.

49. Pursuant to s 7(1a) of the Act the Commission still has before it an industrial matter. Section 7(1a) provides:

"(1a) A matter relating to —
the dismissal of an employee by an employer; or
the refusal or failure of an employer to allow an employee a benefit under his contract of service,
is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended."

50. As Beech C, observed in *MacLeod v Paulownia Trees (op sit)*, s 6(b) and (c) of the Act are consistent with making order in terms of a compromise agreement. Section 6(b) and (c) provide it is a principal object of the Act:

"(b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;

(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;"

51. For a power to be implied, it must be necessary for the effective exercise of the jurisdiction. What is "necessary" requires identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies provided for in the Act (see *Pelechowski v The Registrar, Court of Appeal* (1999) 198 CLR 435 at 452; [51] per Gaudron, Gummow and Callinan JJ).

52. I am of the view that the Commission has power to make orders in terms of a compromise agreement providing that the orders it makes could otherwise be made expressly under ss 23(1), 23A and 32 of the Act. The power to do so is implied in the Act when regard is had to objects in s 6(b) and (c) as the grant of power in ss 23(1), 32 and 32A carries with everything that is necessary for the effective exercise of the power.

53. In the context of claims made under s 29(1)(b) it is reasonably necessary or legally ancillary to the proper object of accomplishing settlement of industrial disputes that parties be held to their bargains and the means for holding them to their bargains be carried out with the maximum of legal form and technically. The implied power does not extend to making orders that are not within the scope of the original application or to make orders in terms of a compromise that could not have been made following an arbitration of the merits of the application in the absence of any compromise agreement. For example the Commission could not make an order requiring the Respondent to pay the Applicant's legal costs as to do so is contrary to s 27(1)(c) of the Act.

17 Ms Ferguson has not complied with the Agreement. For the Commission to make an order in the terms of the Agreement is within the Commission's jurisdiction, consistent with the objects of the IR Act and in accordance with s 26(1)(a) of the IR Act.

18 I am satisfied on the evidence that Ms Ferguson trading as Playful Ink owes Mrs Harrop-Marriner \$948.25. As at today's date, Ms Ferguson trading as Playful Ink should have paid Mrs Harrop-Marriner \$500.00 under the Agreement so I will order that she pays Mrs Harrop-Marriner \$500.00 within 14 days of the date of the order and \$100 on a weekly basis thereafter until the total amount of \$948.25 (subject to applicable taxation) under the Agreement is paid.

2018 WAIRC 00747

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JACLYN HARROP-MARRINER	APPLICANT
	-v- TAHLIA FERGUSON TRADING AS PLAYFUL INK	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	MONDAY, 17 SEPTEMBER 2018	
FILE NO/S	B 63 OF 2018	
CITATION NO.	2018 WAIRC 00747	

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard from Mrs J Harrop-Marriner on her own behalf and there being no appearance on behalf of the respondent;
NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT the respondent pay the applicant a total of \$948.25 (subject to applicable taxation); and
2. THAT this amount be paid by the respondent to the applicant in the following instalments:
 - a. \$500.00 within 14 days of the date of this order; and
 - b. \$100.00 per week thereafter until the remaining \$448.25 is paid, with the last instalment being \$48.25.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2018 WAIRC 00781

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	KATHY MOORE	
	-v-	
	LJ HOOKER SETTLEMENTS PTY LTD	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 5 OCTOBER 2018	
FILE NO/S	B 76 OF 2018	
CITATION NO.	2018 WAIRC 00781	

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

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,
Commissioner.

2018 WAIRC 00786

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2018 WAIRC 00786
CORAM	:	CHIEF COMMISSIONER P E SCOTT
HEARD	:	WEDNESDAY, 3 OCTOBER 2018
DELIVERED	:	FRIDAY, 5 OCTOBER 2018
FILE NO.	:	U 115 OF 2018
BETWEEN	:	KAREN ELIZABETH JANE YOUNG Applicant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	:	Industrial law (WA) – Unfair dismissal – Claim referred out of time – Lengthy delay – Union discontinued s 44 application in relation to termination of applicant's employment – Respondent did not object to claim being accepted out of time – Circumstances considered – Application accepted out of time
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 29(2), s 29(3)
Result	:	Referral received out of time
Representation:		
Applicant	:	Ms K Young on her own behalf
Respondent	:	Mr J Carroll of counsel

Reasons for Decision

- 1 The applicant claims that she was harshly, oppressively or unfairly dismissed by the respondent. Her claim was referred to the Commission on 19 September 2018. The dismissal is said to have occurred on 5 April 2018. Therefore, the claim was referred to the Commission outside of the time allowed by s 29(2) of the *Industrial Relations Act 1979*.
- 2 However, the applicant's dismissal was the subject of an application made by the State School Teachers' Union of W.A. (Incorporated) (SSTU) in application C 18 of 2018. That application was filed on 21 May 2018 and was the subject of conciliation by the Commission. The matter was not resolved.

- 3 The applicant says that the SSTU subsequently advised her that it would not pursue the application further and, on 12 September 2018, filed a *Form 14 – Notice of withdrawal or discontinuance*.
- 4 Although the respondent initially objected to this application being received out of time, following proceedings before the Commission on 3 October 2018, the objection was withdrawn.
- 5 I have taken account of the circumstances of this matter, the test set out in *Malik v Director General, Department of Education* [2004] WASCA 51; (2004) 84 WAIG 683 and, in accordance with s 29(3) of the Act, decided that it would be unfair to not accept the referral out of time. Accordingly, the application will be received out of time. It will now be listed for conciliation.

2018 WAIRC 00787

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KAREN ELIZABETH JANE YOUNG	APPLICANT
	-v- DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	FRIDAY, 5 OCTOBER 2018	
FILE NO/S	U 115 OF 2018	
CITATION NO.	2018 WAIRC 00787	

Result	Application received out of time
Representation	
Applicant	Ms K Young on her own behalf
Respondent	Mr J Carroll of counsel

Order

HAVING HEARD from Ms Young on her own behalf and Mr Carroll of counsel on behalf of the respondent, the Commission, pursuant to s 29(3) of the *Industrial Relations Act 1979*, hereby orders that the application be received out of time.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Christopher Bristow	East Metropolitan Health Service - Department of Health	U 43/2018	Commissioner T Emmanuel	Discontinued
Melissa Sue Hargreaves	Benjamin Ryan Kenward trading as Food Graffiti	B 151/2017	Commissioner T Emmanuel	Discontinued
Mr Jaydon Hodges	Mr Andrew Titterton, Equaria Ornamental Fish	U 37/2018	Commissioner T Emmanuel	Discontinued
Mr Jaydon Hodges	Mr Andrew Titterton, Equaria Ornamental Fish	B 37/2018	Commissioner T Emmanuel	Discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Medical Association (WA) Incorporated	The East Metropolitan Health Service	Emmanuel C	PSAC 18/2018	18/06/2018	Dispute re union member's employment	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Chief Executive Health Support Services	Emmanuel C	PSAC 16/2018	19/06/2018	Dispute re union member's employment status and conditions	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of WA Incorporated	The Western Australian Land Information Authority	Emmanuel C	PSAC 20/2018	18/07/2018	Dispute re alleged unfair disciplinary process against union member	Discontinued
The Civil Service Association of Western Australia Incorporated	Commissioner, Western Australia Police Department	Emmanuel C	PSAC 1/2018	30/01/2018 13/03/2018 16/04/2018 16/04/2018	Dispute re disciplinary action of union member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00796

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 12 JULY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PROGRAMMED INDUSTRIAL MAINTENANCE PTY LTD ACN 133892350

APPLICANT

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT

DATE

WEDNESDAY, 10 OCTOBER 2018

FILE NO/S

APPL 58 OF 2018

CITATION NO.

2018 WAIRC 00796

Result Order issued

Representation

Applicant

Mr S Davies SC and with him Mr G Giorgi and Ms E Jones of counsel

Respondent

Mr J Blackburn SC and with him Ms S Swanson of counsel

Order

1. This is an application for review of a decision of the Construction Industry Long Service Leave Payments Board referred to the Commission pursuant to s 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985*.
2. On Tuesday, 4 September 2018, the Commission convened a conference for the purpose of scheduling the matter. At the conference, orders were resolved to ensure an expeditious hearing of the matter. Those orders issued on Thursday, 6 September 2018 ([2018] WAIRC 00730; 98 WAIG 1169).
3. On Tuesday, 9 October 2018, at the request of the respondent, the Commission convened a further conference. At the conference, it was resolved that the orders be amended and the hearing listed on 3 and 4 December 2018 be vacated.

Pursuant to the powers conferred under the *Industrial Relations Act 1979* and the *Construction Industry Portable Paid Long Service Leave Act 1985* the Commission hereby orders:

- (1) THAT Order 5 be deleted and the following substituted in lieu thereof:
 - "(5) THAT a directions and scheduling conference be listed during the week commencing 16 November 2018 to:
 - (a) deal with any interlocutory matters; and
 - (b) to settle dates for the hearing of the matter."
- (2) THAT the hearing listed on 3 and 4 December 2018 be vacated.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2018 WAIRC 00775

BUILDING TRADES (CONSTRUCTION) AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT**-v-**

ALL READY SURFACING CO PTY LTD, APOLLO CONSTRUCTION & RENOVATION PTY LTD, ASSOCIATED SHOPFITTEES PTY LTD

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE MONDAY 01 OCTOBER 2018
FILE NO. APPL 74 OF 2017
CITATION NO. 2018 WAIRC 00775

Result Direction issued
Representation (by correspondence)
Applicant Ms K Hunter (of counsel)
Respondent N/A

Direction

HAVING heard from Ms K Hunter (of counsel) on behalf of the applicant, the Commission is satisfied the following named respondents have been deregistered, had their business names removed or have no record on the Australian Securities and Investments Commission register:

Adsigns Pty Ltd
Arcus Pty Ltd
Best and Son Holding Pty Ltd
Bonanza Reinforcing
Brambles Manford
Bric-Bloc Constructions Pty Ltd
Busby W F and Co
Cataldo
Colour Circle Pty Ltd
Coogee Painting Services
D'Ercole and Co
Doro Painting Contractors
Doust H A Pty Ltd
Ellis Concrete Construction
Fairway Painting Contractors
Forster J V and P A
Fremantle Sheet Piping Contractors
Geraldton Building Co Pty Ltd
Henk and Co
Interform Pty Ltd
Iris Painting Co Pty Ltd
Interstruct Pty Ltd
Jaco Painting
Jason Industries Ltd
Jeb Scaffolding Co
M Kilgren and Co
GKN Lysaght Pty Ltd
Marblecrete Co
Maric and Co Painters

J H and A L Mitchell and Co
 Mount Lawley Concrete Co Pty Ltd
 Olsen Constructions
 Osborne Terrazo Pty Ltd
 Peter Excavation and Demolition
 Patio Makers The
 Paul's Outdoor Leisure Centre
 Peel Estate Builders
 Regency Decor
 J and K Reinforcings Pty Ltd
 Road Marking Specialists
 C S Roofing
 R and J Roofing and Repairs
 Sabemo (WA) Pty Ltd
 Shaft Airconditioning Co
 M Silver and Son Pty Ltd
 Squeez Crete Pump Hire
 Stegbar (WA) Pty Ltd
 Swan Irrigation
 Swan Plumbing Service Pty Ltd
 Tarten Painting Contractors
 Thompson Watson and Carruthers
 The Tercon Co Pty Ltd
 K Vilips and Co Pty Ltd
 Wallpaper House The
 Wallpaper World and Furnishing Fabrics
 Wattle Grove Painting Services
 WA Salvage Demolition Pty Ltd
 West Australian Insulation Co
 West Swan Formwork Pty Ltd
 G Wickhams

In these circumstances, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

THAT the applicant need not serve those respondents named above with the amended *Form 1 – Notice of Application (general)* filed 10 August 2018 in application APPL 74 of 2017.

[L.S.]

(Sgd.) T EMMANUEL,
 Commissioner.

2018 WAIRC 00780

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER
 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

PARTIES

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

COMMISSIONER D J MATTHEWS

DATE

THURSDAY, 4 OCTOBER 2018

FILE NO/S

CR 10 OF 2018

CITATION NO.

2018 WAIRC 00780

Result	Order issued
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr F Cardell-Oliver of counsel

Order

HAVING heard Mr D Stojanoski of counsel for the applicant and Mr F Cardell-Oliver of counsel for the respondent on Thursday, 4 October 2018 the Western Australian Industrial Relations Commissions, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby orders that the hearing dates Tuesday, 9 October 2018 and Wednesday, 10 October 2018 are vacated.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority Railway Employees (Trades) Industrial Agreement 2018 AG 15/2018	09/17/2018	The Public Transport Authority of Western Australia	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch, Electrical Trades Union WA	Commissioner D J Matthews	Agreement registered
Public Transport Authority/ARTBIU Railway Employees (Network and Infrastructure) Industrial Agreement 2018 AG 17/2018	09/17/2018	The Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner D J Matthews	Agreement registered
WA Health System - HSUWA - PACTS Industrial Agreement 2018 PSAAG 8/2018	09/18/2018	Child and Adolescent Health Service, East Metropolitan Health Services, Health Support Services	Health Services Union of Western Australia	Commissioner T Emmanuel	Order issued
Western Australian TAFE Lecturers' General Agreement 2017 AG 16/2018	09/17/2018	The State School Teachers' Union of W.A. (INC), Governing Council of North Metropolitan TAFE, Governing Council of South Metropolitan TAFE	(Not applicable)	Commissioner D J Matthews	Agreement registered

EMPLOYMENT DISPUTE RESOLUTION ACT 2008—Notation of—

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

Application Number	Award, order or industrial agreement varied	Parties	Commissioner	Matter	Dates	Result
APPL 30/2018	N/A	N/A	Emmanuel C	Request for mediation	26/06/2018	Discontinued
APPL 28/2018	N/A	N/A	Emmanuel C	Request for mediation	19/06/2018	Concluded

RECLASSIFICATION APPEALS—

2018 WAIRC 00778

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2018 WAIRC 00778
CORAM : PUBLIC SERVICE ARBITRATOR
 COMMISSIONER T EMMANUEL
HEARD : TUESDAY, 4 SEPTEMBER 2018
DELIVERED : WEDNESDAY, 3 OCTOBER 2018
FILE NO. : PSA 94 OF 2013, PSA 95 OF 2013, PSA 96 OF 2013 AND PSA 97 OF 2013
BETWEEN : MRS KATHLEEN POSKITT
 MS ANDREA BLAZEVIK
 MRS MARIA CALMA
 MRS DONHA EDWARDS

Applicants

AND

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR
 HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND
 HEALTH SERVICES ACT 1927 AS THE EMPLOYER

Respondent

CatchWords : Public Service Arbitrator – Industrial law (WA) – Claim for reclassification – ECG
 Recordists – Additional skills, duties and responsibilities – Whether there has been a
 significant increase in work value

Legislation : *Industrial Relations Act 1979* (WA) s 80E(2)

Result : Applications dismissed

Representation:

Applicant : Mr C Studsor (as agent)

Respondent : Mr J Ross (as agent)

Case(s) referred to in reasons:

The Minister for Health in his Incorporated Capacity Under s. 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals Formerly Comprised in the Metropolitan Health Service Board v The Health Services Union of Western Australia (Union of Workers) [2013] WAIRC 00836; (2013) 93 WAIG 1565

Reasons for Decision

- 1 Mrs Poskitt, Ms Blazeovich, Mrs Calma and Mrs Edwards are or have been employed in the review position of ECG Recordist Cardiology G-2 at Royal Perth Hospital (**RPH**). On 28 August 2014, the applicants made an internal claim for the seven ECG Recordist Cardiology G-2 positions at RPH to be reclassified to ECG Technician G-3. The Whole of Health Classification Review Committee (**Committee**) determined there had not been a significant enough increase in work value to warrant reclassification. It also determined that if the review position were reclassified, there would be the potential for significant flow-on effects at other hospitals such as Fiona Stanley Hospital and Sir Charles Gairdner Hospital. The reclassification request was not granted.
- 2 Mrs Poskitt, Ms Blazeovich, Mrs Calma and Mrs Edwards have filed reclassification applications PSA 94, 95, 96 and 97 of 2013 at the Commission. They request the Public Service Arbitrator review the Health Service's decision not to reclassify the review position at RPH.
- 3 The applicants are all represented by the Health Services Union of WA (Union of Workers) (**Union**). They agree to their applications being heard together and that evidence given by Ms Mikulich and Ms Blazeovich will be considered in relation to all four applications. They agree to be bound by the outcome of the single hearing.
- 4 The Union says the main function of the review position was primarily to take electrocardiography recordings (**ECGs**), but now it also includes interpreting the ECG and advising medical staff of any relevant findings. This means the skills, knowledge and responsibilities required to perform the review position have increased, resulting in a net addition to work value. The type of recordings has also changed (more and different equipment is used by the review position to get different data). According to the Union, the review position's responsibility has increased because it now requires the interpreting and reporting of ECGs and no longer just the recording of ECGs.
- 5 The Health Service says while there have been some changes to the tasks performed by the review position, they are not sufficient to warrant reclassifying the review position at a higher level. The Health Service says this is because it is the volume of work that has changed, not its value or associated responsibility. The Health Service says the potential flow-on effects of such a decision would be large, given the review position's place in the WA Health Service classification structure and how that structure is designed to sit with Australian Health Practitioner Regulation Agency (**AHPRA**) guidelines.

- 6 I must decide whether there has been a significant net increase in the review position's work value, arising from changes to the work, skill, responsibility or conditions.

Principles

- 7 To succeed in their claims for reclassification, the applicants must establish there has been a significant net increase in the review position's work value which arises from changes to the review position's work, skill, responsibility or conditions under which the work is performed.
- 8 The test the Public Service Arbitrator applies when considering work value changes is set out in the Statement of Principles of the State Wage Order [2018] WAIRC 00368:

7. Work Value Changes

- 7.1 Applications may be made for a wage increase under this Principle based on changes in work value.
- 7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
- 7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage "leapfrogging" arising out of changes in relative position.
- 7.4 These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.
- 7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.
- 7.6 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.
- 7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.
- 7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.
- 7.9 Where the tests specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work and the nature and extent of the change in work.
- 7.10 The expression "the conditions under which the work is performed" relates to the environment in which the work is done.
- 7.11 The Commission should guard against contrived classifications and over-classification of jobs.
- 7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

- 9 The Public Service Arbitrator applies the test strictly.

The Union's Case

- 10 The Union says there has been an increase in work value in the duties performed by the review position. It says although the Job Description Form (**JDF**) has been updated in 2002, 2007 and 2013, there is no indication the review position classification has also been reviewed.
- 11 In its statement of facts, the Union says the increase in the review position's work value should be assessed against the 2002 JDF because it was the earliest available at the time these applications were filed. The 2002 JDF was filed by the Union and is not an agreed document. Relevantly, it outlines the reporting relationships of the review position and contains a summary of the duties performed by the review position. In 2002, the review position did not supervise or manage any other position. It reported to the Senior Cardiac Scientific Officer HSU Level P-2 (**CSO P-2**) and the Head of Department (Cardiovascular Medicine). The core duties (listed in order of importance according to the 2002 JDF) included:
- ECG recording (in various locations within the hospital);
 - Exercise testing (including explaining the procedure to patients, preparing the equipment and patient, conducting the test, monitoring data throughout the procedure, documenting data obtained and setting up for the subsequent Dobutamine testing);
 - Holter monitors (advising patients on procedure and care required, connecting the Holter monitor, recording information in a log book, entering data into a computer, reporting analysed information to cardiologist, liaise with medical staff about urgent findings and cleaning and checking equipment); and

- Other (other duties as directed by the Head of Department or CSO P-2).
- 12 At the hearing, despite having filed a registered JDF for 2013 as an agreed document, the parties appeared to agree the most recent registered JDF is from 2007. The 2007 JDF was filed by the Union and is not an agreed document. However, at the hearing, the Health Service said the review position's duties should be assessed against the 2007 JDF because it is 'the last registered JDF'. The Union did not dispute this at the hearing.
- 13 The 'Brief Statement of Duties' in the 2007 JDF states:
1. Record and interpret ECG as and when necessary, informing physician of any abnormality. Cleaning of ECG machines and associated equipment after use.
 2. Advises the patient of procedure for exercise tests, applies ECG electrodes, records initial ECG and blood pressure, assists cardiac technician in performing procedure.
 3. Identifies pacemaker model from patient's notes and attaches to appropriate programmer.
 4. Arrange bookings for exercise tests, documenting of patient's statistics for billing for hospital records on computer. Distribute the day's ECG request forms, restocking of linen within the department and associated rooms, the ordering of consumables, training of new staff in ECG technique.
 5. Participates in professional development.
 6. Participates in data entry.
 7. Complies with SMAHS Policies and Procedures, MHS Code of Conduct and other relevant legislation.
 8. Participates in Quality [sic] activities and performance management. Any other relevant duties as requested by the Supervisor/Head of Department.
- 14 The Union says since 2002, the review position has assumed the additional duties of teaching new staff, recording and explaining blood pressure results, placing and removing ECG monitors in a broader range of tests (increasing the complexity of this task) and participating in peer review and professional development activities.
- 15 The Union says because of these additional duties, the skills required to perform the review position have changed.
- 16 The Union says in addition to requiring a sound knowledge of ECG interpretation, the review position is also expected to troubleshoot equipment, instruct other staff on its use and set up and operate a variety of tests including ECG recordings, blood pressure monitors, Dobutamine Stress ECGs and Holter monitors. Additionally, the review position must be able to operate the computer programs Oracle Iproc, PMG and COS. The review position is also expected to deal with telephone enquiries.
- 17 Ms Mikulich is a Cardiac Scientific Officer. She manages the review position at RPH. Her evidence is that the review position has not been reviewed since 1989 and the main function of the review position has changed from primarily recording ECGs to 'being responsible for the recording, understanding and interpretation of routine ECGs within the hospital environment'.
- 18 Ms Mikulich says 'the ECG Recordist once had limited technical skills but is now clinical personnel who are capable of and responsible for some assessment of the patient. The ECG Recordist is now required to have a clinical understanding to recognise and determine when an assessment by a physician is necessary'. For example, the review position is now expected to explain the Dobutamine Stress ECG to patients and alert the Cardiac Scientific Officer if further assessment of the patient's results is required. She conceded for any test other than blood pressure, where the review position does not consider further assessment is necessary, the Cardiac Scientific Officer will still look at the results. For blood pressure testing, a Consultant will still look at the results. Ms Mikulich also considers work value is increased by the review position getting patients to fill in a detailed questionnaire for ambulatory blood pressure monitoring.
- 19 Ms Mikulich says the review position shares responsibility with the Cardiac Scientific Officer but the review position has a duty of care to the patient and is 'just as responsible'. She concedes the Cardiac Scientific Officer has final reporting, professional autonomy and has to 'have the responsibility and accountability.'
- 20 According to Ms Mikulich, the review position 'requires extensive experience in this field', which Ms Mikulich says means a minimum of one year of relevant experience. She says the demand for the service provided by the review position has increased and now training and teaching have become inherent parts of the role. She lists the additional duties of the review position as administrative duties, care and cleaning of equipment, stock and inventory and blood pressure monitoring.
- 21 In cross-examination Ms Mikulich agreed the review position has delegated responsibility for less important duties and assists with analysis, the review position is not a technician position and Cardiac Scientific Officers analyse the results.
- 22 Ms Blazeovich has been an ECG Recordist for 28 years. Her evidence is that the review position's work value has increased because there is a larger amount of data to record, different computer programs must be used, culturally, socially and linguistically diverse patients must be accommodated and the occupant of the review position must be able to compare a patient's current and previous recordings to look for abnormalities. She also gave evidence the review position must now have basic life support training, which was not required when she initially began working in the review position.
- 23 The Union says the additional reporting, training and troubleshooting has led to increased responsibility for the review position. Rather than just recording ECGs, the review position is now responsible for interpreting the ECG and advising medical staff of relevant findings.
- 24 The Union says the flow-on effect of reclassifying the review position would be minimal because it only contributes 12.5 full-time equivalent positions to the Health Service.
- 25 In requesting the review position be reclassified, the applicants compared the review position with the positions of Anaesthetic Technician G-3 and Orthopaedic Technician G-3. They provided a document that outlines the similarities between the review position and these two Technician roles. In its written submissions, the Union says it challenges the Health Service's position that the tasks are similar 'on the surface only'. The Union does not explain why it challenges that position.
- 26 The Union says the skills, knowledge and responsibilities related to the additional duties indicate an increase in work value of the review position. It notes that, although the BIPERS score is not the only factor relevant to reclassifications, in this instance

the score should represent a G-3 classification. Since the 2002 JDF, the review position has evolved in complexity and requires greater knowledge and skills. Its responsibility has increased because of the additional interpretive and reporting requirements.

The Health Service's Case

- 27 The Health Service does not dispute there have been changes to the review position's duties. However, it says these changes are not sufficient to meet the Public Service Arbitrator's strict test for work value changes.
- 28 It says a comparison of the review position's JDFs shows the duties are essentially the same. The Health Service agrees the ECG monitors are used in a broader range of tests than previously, however it says this is a work volume issue and does not involve a significant change in the nature of the work performed by the review position.
- 29 The Health Service says although the review position now participates in teaching, peer review and professional development activities, these are duties that commonly occur in other level G-2 positions such as Therapy Assistants. These activities are not new or different and do not change the work value of the review position.
- 30 The Health Service also says these changes to the duties of the review position are also not sufficient to warrant reclassifying the positions at a higher level because of the way the WA Health classifications are designed to sit with AHPRA guidelines.
- 31 The Health Service says there are three relevant AHPRA categories that inform the Health Service's position classification system. These are:
- Allied Health Assistants;
 - Technicians; and
 - Allied Health Professionals.
- 32 The Health Service says the review position is an Allied Health Assistant position. This is a generic classification that applies across WA Health. Allied Health Assistants work under the delegation and supervision of an Allied Health Professional. Allied Health Assistants are not required to have formal qualifications and are traditionally classified as levels G-1 and G-2. They can work under the supervision of a Technician or an Allied Health Professional performing less complex support tasks.
- 33 Technicians are non-tertiary qualified, but require a qualification such as a TAFE Certificate 3 or diploma. They use a practical approach based on a field of technology in which they have certification and their duties may be similar to that of an Allied Health Professional, although their tasks are usually less complex and in a selective area. Traditionally, Technicians are classified as level G-3 and above (up to G-6).
- 34 Allied Health Professionals are tertiary qualified, autonomous practitioners (from level G-4 to G-8).
- 35 The Health Service says prior to 2007, the review position assisted Cardiac Technicians in the performance of less complex tasks to allow the Cardiac Technician to perform more complex tasks.
- 36 In 2007, the Cardiac Technicians were successfully reclassified as Cardiac Scientific Officers at level P-1 (G-4). The Health Service says the Cardiac Scientific Officers retained all their existing duties and have responsibility and accountability for the services referred to in the reclassification request submitted by the review position. It says the review position provides the less complex support and assistance as necessary but is not accountable or responsible for the provision of services.
- 37 The Health Service says after the creation of the Cardiac Scientific Officer role, the ECG Recordist position effectively remained unchanged and although minor changes to the tasks performed occurred, the work value did not increase.
- 38 The Health Service says it has considered the skills required to perform the current duties of the review position and has concluded these skills are within the parameters of what is expected of an Allied Health Assistant G-2 position.
- 39 In its view, allocating less complex supportive tasks to an Allied Health Assistant does not diminish the professional autonomy, responsibility or accountability of the Allied Health Professional's role. In its initial review of the internal reclassification request, the Committee compared the tasks performed by the review position and its supervising role, the Cardiac Scientific Officer. It found the review position provided the less complex support or assistance as necessary but was not accountable or responsible for the provision of these services. The Health Service says this approach is consistent with the AHPRA classification system. It says delegating support tasks to the review position does not and cannot mean the responsibility or accountability for the provision of that service is delegated.
- 40 The Health Service disputes the Union's argument that because the review position now does some interpretation of the ECGs, its responsibility has increased. The Health Service says:
- the ECG Recordists [sic] interpretation is basic, limited to identifying readable markers/warning and advising staff accordingly. It is a less complex task to assist the Cardiac Scientific Officers in prioritising their ECG interpretations. ECG recordists are not tertiary qualified to interpret ECG recording [sic] and to diagnose or treat patients based on their interpretations. That is the responsibility and accountability of the Cardiac Scientific Officer as the responsible HP.
- 41 Mr Holland, who was on the Committee when it made the decision not to reclassify the review position, gave evidence that although there have been some changes in the review position's responsibilities, these are not enough to justify reclassification. Having reviewed the previous and proposed JDFs, Mr Holland concludes the duties included in the proposed JDF are essentially those included in previous JDFs. He also made it clear that from the Health Service's perspective, the professional accountability of the service provision still lies with the Cardiac Scientific Officer, not the review position.
- 42 The Health Service relies on Mr Holland's evidence that the review position reports to senior or supervising health professionals and reclassifying the review position at higher than level G-2 is likely to lead to broad flow-on across a range of positions. There are currently no Allied Health Assistants with the level G-3 classification within the Health Service because traditionally level G-3 positions are classified as Technicians and require a non-tertiary qualification consistent with AHPRA guidelines. In any event, the Health Service's view is that all the duties identified by the Union as being new or increased would be within the list of common duties identified as level G-2 in its classification tool, therefore they 'make no contribution to [the] strict work value test'.

Consideration

- 43 I accept health professionals delegate supportive tasks to the review position, for example, monitoring results for abnormalities and alerting medical staff as needed, and I accept the review position assists in the provision of many services. However, based on the evidence before me, I am satisfied responsibility for those tasks lies with the health professionals and not with the review position.
- 44 Additionally, there has been some degree of liaising with senior staff about results and findings for many years, including as shown by the 2002 JDF at 3.6: 'Report analysed information for Cardiologist, and liaise with medical staff regarding urgent findings' and first essential criteria: 'Experience in/exposure to ECG recording **and interpretation**' (emphasis added).
- 45 I accept the review position uses new technology and additional computer programs but that does not necessarily show an increase in skill required. In her evidence, Ms Mikulich says the various tests are 'operated through complex software packages', but the applicants have not explained why they say the software programs are complex or whether and how they are more complex than what was used before. As outlined in *The Minister for Health in his Incorporated Capacity Under s. 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals Formerly Comprised in the Metropolitan Health Service Board v The Health Services Union of Western Australia (Union of Workers)* [2013] WAIRC 00836; (2013) 93 WAIG 1565 (**Frontline Clerks Case**) at [151]:
151. Many of the witnesses relied upon an increased number of computer programmes and software for the purpose of demonstrating increased knowledge. In fact, it would seem that the current introduction of webPAS may replace a number of computer programmes. The mere number of computer applications is not indicative of any increased level of skill. Rather, it may be a broadening of skill at the same level. This was envisaged in the broadbanding of the classification structure by reference to multiskilling and the removal of the requirement for promotion beyond the limited tasks that were originally allocated to a position and the transferability of skills from one area to another.
- I consider there has been a broadening of skills and duties within the G-2 level.
- 46 Similarly, I accept the review position now trains other staff and participates in peer review activities. I also recognise the review position now requires its occupants to be trained in basic life support and be able to respond to certain types of emergency situations. Again, as outlined in the Frontline Clerks Case at [180], I consider such duties are within the G-2 level.
- 47 Taking into account all of the evidence and submissions, I accept there is some increase in work load and generally a broadening of tasks within the G-2 level. It is clear the applicants have had to adapt to a medical context that has experienced a degree of technological, cultural and social change over the last few years, and that the review position's current client base poses new and different challenges. That change does not amount to a significant net increase in work value.
- 48 As has been noted in many reclassification decisions, the BIPERS assessment is a guide and not an absolute determinative tool. In any event I accept the Health Service's reasoning in relation to its BIPERS assessment and find the review position falls within the G-2 level.
- 49 I have no doubt the review position has evolved since 2002. It is also clear to me, as Mr Holland acknowledged during his evidence, that the applicants perform important and valuable work for the Health Service. However I am not persuaded the work, skill and responsibility relied upon by the applicants are of a higher level than G-2. I find there is an insufficient increase in work value to warrant reclassifying the review position. The applications will be dismissed.

2018 WAIRC 00782

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MRS KATHLEEN POSKITT	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 5 OCTOBER 2018	
FILE NO	PSA 94 OF 2013	
CITATION NO.	2018 WAIRC 00782	

Result	Application dismissed
Representation	
Applicant	Mr C Studsor (as agent)
Respondent	Mr J Ross (as agent)

Order

HAVING heard Mr C Studsor (as agent) on behalf of the applicant and Mr J Ross (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 by this order is, dismissed.

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

[L.S.]

2018 WAIRC 00783

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MS ANDREA BLAZEVIK	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 5 OCTOBER 2018	
FILE NO	PSA 95 OF 2013	
CITATION NO.	2018 WAIRC 00783	

Result	Application dismissed
Representation	
Applicant	Mr C Studsor (as agent)
Respondent	Mr J Ross (as agent)

Order

HAVING heard Mr C Studsor (as agent) on behalf of the applicant and Mr J Ross (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 by this order is, dismissed.

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

[L.S.]

2018 WAIRC 00784

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MRS MARIA CALMA	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 5 OCTOBER 2018	
FILE NO	PSA 96 OF 2013	
CITATION NO.	2018 WAIRC 00784	

Result	Application dismissed
Representation	
Applicant	Mr C Studsor (as agent)
Respondent	Mr J Ross (as agent)

Order

HAVING heard Mr C Studsor (as agent) on behalf of the applicant and Mr J Ross (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 by this order is, dismissed.

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

[L.S.]

2018 WAIRC 00785

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MRS DONHA EDWARDS

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER T EMMANUEL

DATE

FRIDAY, 5 OCTOBER 2018

FILE NO

PSA 97 OF 2013

CITATION NO.

2018 WAIRC 00785

Result Application dismissed

Representation

Applicant Mr C Studsor (as agent)

Respondent Mr J Ross (as agent)

Order

HAVING heard Mr C Studsor (as agent) on behalf of the applicant and Mr J Ross (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 by this order is, dismissed.

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

[L.S.]

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2018 WAIRC 00423

REFERRAL OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL
THE WORKSAFE WESTERN AUSTRALIAN COMMISSIONER

PARTIES

APPLICANT

-v-

TRANSDEV WA PTY LTD

FIRST RESPONDENT

PRATEEK BHARADWAJ

SECOND RESPONDENT

CORAM

SENIOR COMMISSIONER S J KENNER

DATE

MONDAY, 16 JULY 2018

FILE NO/S

OSHT 1 OF 2018

CITATION NO.

2018 WAIRC 00423

Result	Order issued
Representation	
Applicant	No appearance required
First Respondent	Mr M Babalola and with him Mr B Smith
Second Respondent	No appearance
Intervenor	Mr J Collier and with him Ms K Pnacek of the Transport Workers' Union Western Australian Branch

Order

HAVING heard Mr M Babalola and with him Mr B Smith on behalf of the first respondent and Mr J Collier and with him Ms K Pnacek on behalf of the Transport Workers' Union Western Australian Branch the Tribunal pursuant to the powers conferred on it under the Occupational Safety and Health Act 1984, hereby orders –

THAT pursuant to section 27(1)(k) of the Industrial Relations Act 1979 as applied by section 51I of the Occupational Safety and Health Act 1984 the Transport Workers' Union Western Australian Branch be and is hereby granted leave to intervene in the herein matter.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00425

REFERRAL OF DISPUTE

PARTIES THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL
THE WORKSAFE WESTERN AUSTRALIAN COMMISSIONER

APPLICANT

-v-

TRANSDEV WA PTY LTD

FIRST RESPONDENT

PRATEEK BHARADWAJ

SECOND RESPONDENT

TRANSPORT WORKERS' UNION WESTERN AUSTRALIAN BRANCH

INTERVENOR**CORAM** SENIOR COMMISSIONER S J KENNER**DATE** TUESDAY, 17 JULY 2018**FILE NO.** OSH 1 OF 2018**CITATION NO.** 2018 WAIRC 00425

Result	Recommendation issued
Representation	
Applicant	No appearance required
First Respondent	Mr M Babalola and with him Mr B Smith
Second Respondent	No appearance
Intervenor	Mr J Collier and with him Ms K Pnacek of the Transport Workers' Union Western Australian Branch

Recommendation

WHEREAS on 14 June 2018 a Notice of referral to the Tribunal was filed by the applicant as required by ss 30(6) and 30A(4) of the Occupational Safety and Health Act 1984;

AND WHEREAS the subject matter of the referral concerns a dispute between the first and second respondents in relation to the election of safety and health representatives at the first respondent's CATS depot. The parties are also in dispute about who will conduct the election and how any election is to be conducted. The applicant has previously endeavoured unsuccessfully to resolve the issues in dispute between the parties in accordance with ss 30(6) and 30A(3) of the OSH Act;

AND WHEREAS the Tribunal listed a conciliation conference under s 51J of the OSH Act in order that the matters in dispute may be further discussed between the parties with the assistance of the Tribunal;

AND WHEREAS at the conference the Tribunal was informed that the first respondent operates bus services across the metropolitan area and has depots in Fremantle, Rockingham, Mandurah, Joondalup, Nowergup, Wangara and the CATS depot in the city, which is the subject of the present dispute. The Tribunal was informed that the second respondent and delegates appointed by employees at the CATS depot wish to have three safety and health representatives elected, with a further three safety and health representatives available on standby, if needed. On the other hand, the first respondent considers that only two safety and health representatives and one stand by representative are required;

AND WHEREAS furthermore, the parties have been in dispute in relation to the method of election of safety and health representatives at the CATS depot. In particular, the Tribunal was informed that the parties have been unable to agree on how casual vacancies for safety and health representatives in the CATS depot would be filled;

AND WHEREAS the Tribunal, in consideration of the matters in dispute and in the interests of endeavouring to progress the matters towards a resolution, proposes to make a recommendation in relation to the election issues;

NOW THEREFORE the Tribunal pursuant to the powers conferred on it under s 51J of the Occupational Safety and Health Act 1984, hereby recommends –

THAT in relation to the election of safety and health representatives at the first respondent's CATS depot:

- (a) the substantive election be undertaken by the Western Australian Electoral Commission; and
- (b) that casual vacancies for safety and health representative positions be filled following an election undertaken jointly by the first respondent and the Transport Workers' Union Western Australian Branch.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2018 WAIRC 00800

REFERRAL OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION : 2018 WAIRC 00800
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : FRIDAY, 13 JULY 2018, MONDAY, 27 AUGUST 2018,
DELIVERED : THURSDAY, 11 OCTOBER 2018
FILE NO. : OSH 1 OF 2018
BETWEEN : THE WORKSAFE WESTERN AUSTRALIAN COMMISSIONER
 Applicant
 AND
 TRANSDEV WA PTY LTD
 Respondent
 AND
 PRATEEK BHARADWAJ
 Second Respondent
 AND
 TRANSPORT WORKERS' UNION WESTERN AUSTRALIAN BRANCH
 Intervenor

Catchwords : Industrial Law (WA) - Occupational Safety and Health Tribunal - Referral to Tribunal under ss 30(6) and 30A(4) of the Occupational Safety and Health Act 1984 (WA) -appropriate number of safety and health representatives for workplace - method of voting in elections - whether employer or union should conduct election - Principles applied

Legislation : *Industrial Relations Act 1979* (WA)
Occupational Safety and Health Act 1984 (WA) ss 5, 19, 29, 30, 30A, 33

Result : Order issued

Representation:

Counsel:

First Respondent : Mr M Babalola
 Second Respondent : Ms R Cosentino of counsel

Solicitors:

Applicant :
 Respondent :

Case(s) referred to in reasons:

Commissioner of Occupational Health and Safety and Welfare v Stirling Community Hospital (1991) WAIRC 10563

*Reasons for Decision***Background**

- 1 The respondent Transdev WA Pty Ltd is a bus service operator under contract to the Public Transport Authority (PTA). Transdev operates from depots in Fremantle, Rockingham, Mandurah, Joondalup, Nowergup, Wangara and the Perth Central Area (PCA). The second respondent, Mr Bharadwaj, has been employed as a bus driver by Transdev for around seven years and six months. Mr Bharadwaj is one of approximately 90 employees who work at the PCA depot, of which around 75 are CAT bus drivers. The other 15 or so employees comprise administrative staff, mechanics, and control and communication centre workers. Mr Bharadwaj, along with four other Transdev employees at the PCA depot, is a delegate for the Transport Workers' Union Western Australian Branch (TWU).
- 2 Appointed delegates of the workforce and Transdev have been conferring for some time in relation to matters concerning the election of safety and health representatives (SHRs). Agreement on most matters has been reached, as set out in an unsigned Memorandum of Agreement dated 15 November 2017 and tendered as exhibit A1. There are three issues referred to the Tribunal for determination by the WorkSafe Western Australian Commissioner, under ss 30(6) and 30A(4) of the *Occupational Safety and Health Act 1984* (WA) (OSH Act), on which agreement could not be reached. The first issue is the appropriate number of SHRs required to service the Perth CATs depot. The second issue to be determined is the method of voting. Both parties agreed that the WA Electoral Commission should conduct the election and the "first past the post" election system be used. However, it was Mr Bharadwaj's position that "block voting" be allowed, where each employee could vote for as many candidates as there are vacancies. Transdev's position was that each employee should have one vote only. The third issue related to who would conduct the election for casual vacancies, with the TWU maintaining that it should and Transdev's position being any such election should be conducted jointly.
- 3 The background of the dispute referred to the Tribunal was outlined by the WorkSafe Commissioner in his referral letter:

In May 2016, Mr Bharadwaj, an employee of Transdev based at the Perth CATs depot, provided a notice to Transdev requiring the election of SHRs pursuant to section 29 of the OSH Act.

In July 2016, Transdev invited employees, including those at the Perth CATs depot, to appoint delegates to represent them in consultation with Transdev on matters requiring determination prior to the election of SHRs, as obliged by section 30 the OSH Act.

Transdev's original invitation to employees to appoint delegates specifically proposed one delegate and one reserve delegate for the Perth CATs depot, consistent with the proposal for most other depots.

Transdev received several nominations for the Perth CATs delegate role.

Transdev's proposal was later revised to propose two delegates from the Perth CATs depot. Transdev's position was that for operational reasons, only two delegates from Perth CATs would be released to attend scheduled consultation meetings.

At this time there are six Perth CATs delegates, including Mr Bharadwaj.

The consultation process has been ongoing since February 2017.

To date, there have been a number of issues in dispute between Transdev and Mr Bharadwaj. This has included a number of matters specified in sections 30(6) and 30A(3) of the OSH Act as being capable of referral to the WorkSafe WA Commissioner to attempt to resolve. Those issues capable of referral were:

 - An appropriate number of SHRs to be elected for the Perth CATS depot;
 - The person by whom and the manner in which SHR elections is to be conducted (in respect of both the initial general election and for replacements for vacancies); and
 - Various details of the election scheme.
- 4 At the hearing before the Tribunal, the WorkSafe Commissioner took no part in the proceedings. The TWU appeared in its capacity as an intervenor, but adopted the submissions of Mr Bharadwaj, and otherwise took no further part in the proceedings.

Positions of the parties

- 5 It was the contention of Mr Bharadwaj and the TWU that the PCA depot ought to have four SHRs, two for early shifts and two for twilight shifts. The position of Transdev was put that two fixed and two reserve SHRs would be sufficient. The reserve representatives would not receive occupational health and safety training or be able to attend meetings of the occupational health and safety committee.
- 6 In relation to the election of SHRs, Mr Bharadwaj and the TWU submitted that the method of counting the vote should be "first past the post" with the ability for employees to vote for as many candidates as there are positions vacant. Transdev agreed that the "first past the post" method should be used however, each employee should have a single vote on the ballot paper, regardless of the number of vacancies.
- 7 As to casual vacancies, Mr Bharadwaj and the TWU contended that the election should be conducted by the TWU. Transdev's position was that elections should be jointly conducted by the parties. The parties further agreed that a "mini-election" for casual vacancies would be held only if there were four months or more remaining on the term of the SHR.

Statutory provisions

8 It is convenient at this point to set out relevant provisions of the OSH Act bearing on the issues to be determined by the Tribunal. An employee who provides a notice to their employer in accordance with s 29(1), requiring the election of a SHR, invokes the consultative process outlined in s 30 of the OSH Act:

30. Consultation on matters relevant to elections

- (1) An employer shall, within 21 days of being given notice under section 29 requiring the election of a safety and health representative, invite the employees who work at the workplace in respect of which the notice is given to appoint a delegate or delegates in accordance with subsection (3).
- (2) An employer may, at any time the employer requires the election of a safety and health representative for a workplace of the employer, invite the employees who work at the workplace to appoint a delegate or delegates in accordance with subsection (3).
- (3) The employees who work at a workplace may, upon being invited under this section to do so, appoint a delegate or delegates from amongst their number to represent them.

9 The matters required to be determined prior to an election taking place are dealt with in s 30(4) and they are:

- (a) the number of safety and health representatives to be elected; and
- (b) the matters, areas or kinds of work in respect of which each safety and health representative is to exercise functions, so far as those things are not to be dealt with by provision of a kind mentioned in section 30B(2) or (3); and
- (ba) how a vacancy in an office of safety and health representative that occurs in the circumstances mentioned in section 32(2)(b), (ba), (c) or (d) is to be dealt with; and
- (c) the person by whom and the manner in which the election is to be conducted.

10 For the purposes of the Tribunal's jurisdiction, any matter mentioned in s 30(4) of the OSH Act that remains unresolved notwithstanding attempts to resolve the matter under s 30(3a) may be referred to the Commissioner who shall, if unable to resolve the matter to the satisfaction of each of the parties concerned, refer the matter to the Tribunal for determination. That is what has occurred in this case.

11 At this point it is relevant to note that 'workplace' as defined in s 3 of the OSH Act as "a place, whether or not in an aircraft, ship, vehicle, building, or other structure, where employees or self-employed persons work or are likely to be in the course of their work", includes both the PCA depot and the CAT buses, even when in transit.

12 In relation to s 30(4)(a), the OSH Act does not prescribe a formula for calculating the number of SHRs that should be elected in a workplace. In *Commissioner of Occupational Health, Safety and Welfare and The Federated Miscellaneous Workers' Union of Australia, W.A. Branch v Stirling Community Hospital* (1991) WAIRC 10563 the number of employees within the workplace, the type of work being performed, the location of employees, and the roles and functions of SHRs as outlined in s 33 of OSH Act were considered potentially relevant considerations. Section 33 is as follows:

33. Functions of safety and health representatives

- (1) The functions of a safety and health representative are, in the interests of safety and health at the workplace for which he or she was elected –
 - (a) to inspect that workplace or any part of it –
 - i. at such times as are agreed with the employer; or
 - ii. where he or she has not inspected the workplace, or that part of it, in the preceding 30 days, at any time upon giving reasonable notice to the employer;
 - (b) immediately, in the event of an accident, a dangerous occurrence, or a risk of imminent and serious injury to, or imminent and serious harm to the health of, any person, to carry out any appropriate investigation in respect of the matter;
 - (c) to keep himself or herself informed as to the safety and health information provided by his or her employer in accordance with this Act and liaise as necessary with the department and other Government and private bodies;
 - (d) forthwith to report to the employer any hazard or potential hazard to which any person is, or might be, exposed at the workplace that comes to his or her notice;
 - (e) where there is a safety and health committee for the workplace, to refer to it any matters that he or she thinks should be considered by the committee;
 - (f) to consult and cooperate with his or her employer on all matters relating to the safety or health of persons in the workplace;
 - (g) liaise with the employees regarding matters concerning the safety or health of persons in the workplace.
- (2) A safety and health representative for a workplace has such powers as are necessary for the carrying out of the safety and health representative's functions under this Act and in particular, but without limiting the generality of this provision may, where requested to do so by an inspector, accompany an inspector while the inspector is carrying out, at the workplace, any of the inspector's functions under this Act.
- (3) A safety and health representative incurs no civil liability arising from his or her performance of, or his or her failure to perform, any function of a safety and health representative under this Act.

- (4) If a scheme has been established under section 30A, the references in this section to *the workplace*, *that workplace* and *a workplace* include —
- (a) if the scheme applies to more than one workplace, each workplace to which the scheme applies; and
 - (b) if under the scheme a safety and health representative is elected for a group of employees, each workplace or part of a workplace at which any member of the group works.
- 13 Employers have duties to provide and maintain a safe working environment. These duties are set out in s 19 which is in the following terms:

19. Duties of employers

- (1) An employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer (the **employees**) are not exposed to hazards and in particular, but without limiting the generality of the foregoing, an employer shall —
 - (a) provide and maintain workplaces, plant, and systems of work such that, so far as is practicable, the employees are not exposed to hazards; and
 - (b) provide such information, instruction, and training to, and supervision of, the employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards; and
 - (c) consult and cooperate with safety and health representatives, if any, and other employees at the workplace, regarding occupational safety and health at the workplace; and
 - (d) where it is not practicable to avoid the presence of hazards at the workplace, provide the employees with, or otherwise provide for the employees to have, such adequate personal protective clothing and equipment as is practicable to protect them against those hazards, without any cost to the employees; and
 - (e) make arrangements for ensuring, so far as is practicable, that —
 - (i) the use, cleaning, maintenance, transportation and disposal of plant; and
 - (ii) the use, handling, processing, storage, transportation and disposal of substances at the workplace is carried out in a manner such that the employees are not exposed to hazards.
 - (2) In determining the training required to be provided in accordance with subsection (1)(b) regard shall be had to the functions performed by employees and the capacities in which they are employed.
- 14 Transdev submitted that the PTA owns the CAT buses and that Transdev operates and maintains the buses on its behalf. It is well-established that the health and safety duties of an employer are non-delegable and in any event, these duties extend to those who have control of the workplace. In this regard, s 22 of the OSH Act relevantly states:

22. Duties of persons who have control of workplace

- (1) A person that has, to any extent, control of —
 - (a) a workplace where persons who are not employees of that person work or are likely to be in the course of their work; or
 - (b) the means of access to and egress from a workplace, shall take such measures as are practicable to ensure that the workplace, or the means of access to or egress from the workplace, as the case may be, are such that persons who are at the workplace or use the means of access to and egress from the workplace are not exposed to hazards.
 - (2) Where a person has, by virtue of a contract or lease, an obligation of any extent in relation to the maintenance or repair of a workplace or the means of access to and egress from the workplace, the person shall be treated for the purposes of subsection (1) as being a person that has control of that workplace or that means of access or egress.
 - (3) A reference in this section to a person having control of any workplace or means of access to or egress from a workplace is a reference to a person having control of that workplace or that means of access or egress in connection with the carrying on by that person of a trade, business or undertaking (whether for profit or not).
- 15 The statutory provisions outlined above should be read together with the objects of the OSH Act. That is, the role and function of SHRs, including the number to be elected in a workplace, should be considered, consistent with principles of statutory interpretation, as furthering the objects of the legislation. Section 5 deals with the objects of the OSH Act and it provides as follows:

5. Objects

The objects of this Act are –

- (a) to promote and secure the safety and health of persons at work;
- (b) to protect persons at work against hazards;
- (c) to assist in securing safe and hygienic work environments;
- (d) to reduce, eliminate and control the hazards to which persons are exposed at work;
- (e) to foster cooperation and consultation between and to provide for the participation of employers and employees and associations representing employers and employees in the formulation and implementation of safety and health standards to current levels of technical knowledge and development;

(f) to provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health;

(g) to promote education and community awareness on matters relating to occupational safety and health.

Appropriate number of SHRs

- 16 The CAT bus fleet, consisting of approximately 40 buses, provide free transport over four routes from the PCA; two of these routes operate from around 6.00am to 6.45pm Monday to Thursday, and from 6.00am to 8.00pm on Friday. On weekends and public holidays these routes are operational from 8.30am to 6.00pm. The third route services Leederville, operating from 6.00am to around 7.00pm Monday to Friday, and the fourth route operates a broader span of hours until around midnight on Friday and Saturday nights in Northbridge. Most of the bus fleet are on the road at any one time during operational hours.
- 17 CAT bus drivers are allocated early or twilight shifts through one of three roster types: a roster for full-time employees; a roster for full-time employees who complete their 38 hours in a four-day period; or a roster for part-time employees working early shifts or working twilight shifts. Full-time early shifts start at 5.40am and finish between 1.30pm to 5.00pm and part-time early shifts start at 5.40am and finish between 10.30am to 1.00pm. Twilight shifts commence at around 9.30am and finish at 6.30pm to 8.00pm. Exhibit A3 was an example of a "Final Post Roster" listing start and end times of shifts for CAT bus drivers.
- 18 Mr Bharadwaj and Ms Pnacek, an organiser from the TWU who consults with CAT bus drivers, gave evidence of the types of health and safety risks that CAT drivers are exposed to at the workplace. These risks include verbal abuse from passengers; assaults between passengers or against the driver by a passenger; navigating construction works and route changes; traffic in congested areas; collisions with vehicles and pedestrians; mechanical issues with buses; passengers drinking or taking drugs on the bus; and being spat at by passengers. Mr Bharadwaj gave evidence that these risks are a daily occurrence for CAT bus drivers. He said CAT drivers also experience a unique risk of a higher percentage of homeless passengers who use the buses for shelter or to move around Perth CBD, in comparison to other Transdev depots. In other respects, Mr Bharadwaj referred to maintenance issues with some of the buses and in and around the PCA depot building itself, that have taken some time to resolve with management.
- 19 The existence of these health and safety risks were not disputed by Transdev. However, there was some disagreement between the parties as to the frequency of health and safety incidents occurring, including the percentage of incidents which involved CAT buses in comparison to other Transdev depots. Transdev submitted that, on average, 48 traffic accidents occur every month with around 50 percent occurring in relation to the Fremantle-O'Connor depot, with the remaining 50 percent spread across the other six depots. Therefore, the CAT buses did not experience an exceptionally high rate of accidents in comparison to other depots, and did not require a higher ratio of SHRs, according to Transdev.
- 20 Mr Bharadwaj gave further evidence that each bus has the capacity for around 68 passengers and out of approximately 40 buses, five or six have safety cages for drivers and all have security cameras. He stated that once a CAT bus driver is on route, the driver does not have any contact with fellow drivers, except for possibly sharing a lunch break if shift times allow. Furthermore, Mr Bharadwaj gave evidence that the radio communication system contained on the CAT buses is comprised of buttons with corresponding levels of urgency, which when pressed, alert the communications or control centre. For example, switch "P1" means urgent help is needed and switch "P2" means contact is needed to make, for example, a non-urgent report. After pressing the switch, the bus driver is required to wait for the control centre to call the driver and is unable to initiate direct contact.
- 21 Ms Pnacek said that from her experience, face to face communication between SHRs and employees in the workplace is best. From what she has observed, much of Transdev's communication about health and safety matters is achieved by notices on the noticeboard. On her visits to the Transdev workplace, employees have expressed the desire for greater involvement by SHRs in consultation, conducting workplace inspections and access to SHRs.
- 22 Transdev's evidence on these issues was through the testimony of Mr Van Trier, a SHR at the CAT depot. Mr Van Trier gave evidence about his duties as a SHR. When he sees a hazard, he reports it. He may radio in to the depot. Mr Van Trier conducts inspections of the depot each month. He testified that most issues are fixed when issues are raised. Mr Van Trier commented that many issues are the responsibility of the PTA, such as problems with bus stops for instance. This means Transdev has limited ability to influence the outcome. As mobile phones cannot be used by drivers during shifts, most issues are brought to his attention by drivers leaving a message in his pigeon hole in the depot, although few have done so. He described the role of a SHR as not too demanding and thought the health and safety committee generally operated well.
- 23 As to workplace incidents, Mr Van Trier accepted that as drivers, employees were at risk. He had been spat on and assaulted himself. Mr Van Trier had witnessed a passenger on his bus assault another person. Mr Van Trier also agreed that when driving in the CBD drivers must be "on the ball" more so than suburban drivers. I understood this to be referring to the risks of CBD driving, also raised by Mr Bharadwaj in his evidence.

Election process

- 24 Mr Bharadwaj said that the election for casual vacancies should be conducted by the TWU, who have the sufficient experience and expertise. Ms Pnacek said that the TWU follow set procedures for running elections which include ensuring that notice is given; that the nomination and voting process is clearly communicated; that a representative of the employee body and a representative from management is present when ballots are cast and scrutinised; that ballots are verified; and the ballot box remains locked. As to the security of voting boxes, Ms Pnacek said that commonly, there are two intertwined locks, requiring a key from management and the employee representative to open it. Another option is to have the box sealed in a way that makes it evident when the box has been opened.
- 25 Transdev's position was that it took advice from the Electoral Commission on voting processes and that the "first past the post" system, with voting for one candidate only was its preference.

Consideration

- 26 As to the number of SHRs, whilst Transdev emphasised the need for balance between its various depots, each workplace needs to be considered separately and there is no presumption of standardisation. The capacity to communicate, from a SHR to the workforce and vice versa, is important. Also, a SHR must be able to respond promptly to incidents and accidents in the workplace, especially where, as here, the workplace for a driver is effectively out on the road for most of an employee's time. I accept the evidence and it is a matter of common sense, that the level of hazards in relation to CBD driving is high and CAT drivers do face some additional hazards in the city environment, such as dealing with homeless people for example, that may not be equally faced by drivers on suburban routes.
- 27 The shift patterns in place for the CAT drivers mean that there are a substantial number of drivers who work on twilight shifts. There are also different types of shift rosters that drivers work, including full-time, full-time four-day and part-time rosters. Saturdays and Sundays are worked as part of rosters, although seemingly by the offering of overtime. Employees often swap shifts between morning and twilight. As opposed to suburban routes that have a greater number of buses on the road in peak hours, the number of CAT buses on the road is more consistent.
- 28 It was also the evidence that understandably, whilst on shift, drivers cannot communicate with each other, except perhaps, during lunch breaks. There is the ability of drivers to contact Transdev control centre via the secure radio channels. As noted, the system operates on a call back basis, where a driver receives a call back from the control centre. I am satisfied that as to methods of communication between the SHR and employees who are CAT drivers, the opportunities are limited. On Mr Van Tier's evidence, matters may come to his attention through messages left for him in his pigeon hole in the Depot. It did not seem that many contacts by employees are made with him in this way. Whilst this is no doubt one method of communication, opportunities for employees to have face to face interaction with SHRs is important.
- 29 The appropriate number of SHRs for a workplace will depend on the circumstances of that workplace. There is not a formulaic approach to the matter. As the Tribunal has noted above, simply because there may be a certain number of SHRs in one location of an employer's workforce, does not mean that the same number is appropriate throughout. Regard must be had to the requirements of the OSH Act, especially s 33. I have considered the evidence in this matter as to the nature of this workplace in terms of the number of employees; its working arrangements and hazards; the need for communication between SHRs and employees and vice versa; the need for SHRs to be available to communicate with the employer on health and safety issues and for SHRs to be visible.
- 30 I consider that there are difficulties in Transdev's proposal to have a reserve SHR. Such a person, who will not be trained, will not be immediately available to attend to any incident and would be of limited value to either employees or the employer. There was no real suggestion from Transdev that its ability to manage its operations will be adversely affected by having four SHRs, with two on each shift rather than one, or that any additional training cost would be prohibitive. Having regard to all that is before the Tribunal, I consider that having two SHRs for this workplace on each shift would be appropriate, consistent with the objects and other relevant provisions of the OSH Act. I do not consider such a commitment would be overly burdensome on the employer.
- 31 As to the method of conducting elections for SHRs, the parties have agreed to use the "first past the post" voting method. The area of disagreement is the ability of a voter to vote for more than one candidate, if that circumstance arises. It seems to me that having taken the advice of the Electoral Commission, who would be running any election, then its preferred system should be used, as outlined by Transdev. The advice provided was not disputed. Furthermore, given the evidence before the Tribunal, I also cannot see any reason why the TWU and Transdev should not jointly conduct elections for casual vacancies for employee SHRs.
- 32 The Tribunal will order accordingly.

2018 WAIRC 00802

REFERRAL OF DISPUTE

PARTIES THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL
THE WORKSAFE WESTERN AUSTRALIAN COMMISSIONER

APPLICANT

-v-

TRANSDEV WA PTY LTD

FIRST RESPONDENT

PRATEEK BHARADWAJ

SECOND RESPONDENT

TRANSPORT WORKERS' UNION WESTERN AUSTRALIAN BRANCH

INTERVENOR**CORAM** SENIOR COMMISSIONER S J KENNER**DATE** THURSDAY, 11 OCTOBER 2018**FILE NO/S** OSHT 1 OF 2018**CITATION NO.** 2018 WAIRC 00802

Result	Order issued
Representation	
First respondent	Mr M Babalola
Second respondent	Ms R Cosentino of counsel

Order

HAVING heard Mr M Babalola on behalf of the first respondent and Ms R Cosentino of counsel on behalf of the second respondent the Tribunal pursuant to the powers conferred on it under the Occupational Safety and Health Act 1984, hereby orders –

- (1) THAT for the bus operator group at the first respondent's Perth Depot there be a total of four safety and health representatives with two for each shift.
- (2) THAT in elections for safety and health representatives at the first respondent conducted by the Western Australian Electoral Commission each voter will cast one vote only.
- (3) THAT in relation to casual vacancies for safety and health representatives at the first respondent the election be conducted jointly by the intervenor and the first respondent.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.
