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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2018 WAIRC 00804

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	APPELLANT
	-and- THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER	
DATE	TUESDAY, 16 OCTOBER 2018	
FILE NO/S	FBA 12 OF 2018	
CITATION NO.	2018 WAIRC 00804	
Result	Consent Order made	

Order

By consent, pursuant to the powers conferred on the Full Bench under the *Industrial Relations Act 1979* (WA), it is ordered that:

- The hearing of the application for an extension of time in which to appeal and any appeal in FBA 12 of 2018 be heard at the same time as the hearing of the appeal in FBA 11 of 2018.
- The appeal books filed by The State School Teachers' Union of WA (Incorporated) in FBA 11 of 2018 be used in these appeal proceedings (FBA 12 of 2018), with the following additions:
 - The Notice of Appeal filed in FBA 12 of 2018 on 2 October 2018 will become Tab 14.
 - The appellant's list of relevant page numbers of the transcript of the proceedings at which reference is made to the subject matter of the appeal in FBA 12 of 2018 will become Tab 15.
 (Together the '**Combined Appeal Book**')
- By 16 October 2018, the appellant is to file three copies of the updated index for the Combined Appeal Book and the two documents referred to in Order 2 above.
- By 16 October 2018, the appellant is to serve one copy of the updated index for the Combined Appeal Book and the two documents referred to in Order 2 above upon the respondent.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2019 WAIRC 00175

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. CR 15/2018**GIVEN ON 30 AUGUST 2018****WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2019 WAIRC 00175

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

HEARD : WEDNESDAY, 20 FEBRUARY 2019

DELIVERED : TUESDAY, 2 APRIL 2019

FILE NO. : FBA 11 OF 2018

BETWEEN : THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED);
 DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
 Appellant
 AND
 DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION;
 THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
 Respondent

FILE NO. : FBA 12 OF 2018

BETWEEN : DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION;
 THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
 Appellant
 AND
 THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED);
 DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
 Respondent

ON APPEAL FROM:

JURISDICTION : THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CORAM : COMMISSIONER D J MATTHEWS

CITATION : 2018 WAIRC 00724; (2019) 98 WAIG 1162

FILE NO. : CR 15 OF 2018

CatchWords : Industrial law (WA) – Appeal against a decision of the Commission – Extension of time in which to file appeal – Claim of harsh, oppressive or unfair dismissal – Decision to dismiss or retire a teacher on the grounds of ill health – Conflicting medical evidence – Reason for not working – Mistake of fact – Whether reinstatement or re-employment is practicable – Scope of Memorandum of matters referred for hearing and determination – Calculation of compensation – Matter remitted to the Commission – FBA 11 of 2018 appeal allowed, case remitted for further hearing and determination – FBA 12 of 2018 appeal dismissed

Legislation : Industrial Relations Act 1979 (WA): s 23A; s 29(1)(b)(i); s 44; s 44(9); s 49; s 49(5)(b) and (6a)

Result : FBA 11 of 2018 appeal allowed. Case remitted for further hearing and determination.
 FBA 12 of 2018 appeal dismissed.

Representation:**FBA 11 of 2018:**

Counsel:

Appellant : Ms R Cosentino of counsel for the State School Teachers' Union of W.A. (Incorporated)

Respondent : Mr J Carroll of counsel for the Director General, Department of Education

FBA 12 of 2018:

Counsel:

Appellant : Mr J Carroll of counsel for the Director General, Department of Education

Respondent : Ms R Cosentino of counsel for the State School Teachers' Union of W.A. (Incorporated)

Cases referred to in reasons:

BHP Billiton Iron Ore Pty Ltd v The Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch [2006] WAIRC 03908; (2006) 86 WAIG 642

Coal and Allied Operations Pty Limited (2000) 203 CLR 194

Director General of Education v United Voice [2015] WASCA 195 [17]

House v The King (1936) 55 CLR 499

Jacob Gilmore v Cecil Bros, FDR Pty Ltd (1996) 76 WAIG 4434

John Lane v Aussie Online Limited (ACN 004 160 929) (2002) 82 WAIG 430

Michael v Director General, Department of Education and Training [2009] WAIRC 01180; (2009) 89 WAIG 2266

Perkins v Grace Worldwide (Aust) Pty Ltd (1997) 72 IR 186

Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch [2017] WAIRC 00452; (2017) 97 WAIG 1329

Scicluna v Mr William Paul Brooks T/as Bayview Motel Esperance, WA [2016] WAIRC 00862; (2016) 96 WAIG 1475

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WASCA 86

*Reasons for Decision***The Full Bench:****Introduction**

- 1 These are appeals to the Full Bench pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision of the Commission delivered on 30 August 2018. That decision granted in part orders sought in a matter referred for hearing and determination pursuant to s 44 of the Act. It ordered the Director General, Department of Education (the Director General) to pay to a member of the State School Teachers' Union of Western Australia (Incorporated) (the SSTU), Mr William Kilner, a sum equating to 20 weeks of his salary as compensation for having unfairly dismissed Mr Kilner on the grounds of ill health.

Background

- 2 Mr Kilner was employed by the Director General as a teacher for 36 years, the last 28 of which were at Busselton Senior High School (SHS). In early 2018, the Director General terminated Mr Kilner's employment due to ill health.
- 3 On 30 April 2018, the SSTU applied to the Commission for a conference pursuant to s 44 of the the Act, alleging Mr Kilner's dismissal was harsh, oppressive or unfair. It sought orders for his reinstatement and for remuneration lost.
- 4 The matter was the subject of conciliation which did not resolve the dispute and it was referred for hearing and determination pursuant to s 44(9).

The scope of the dispute

- 5 The terms of the Schedule to the Memorandum of matters (the Memorandum) referred for hearing and determination are as follows:

THE parties agree that the matters for hearing and determination are:

1. Whether the Respondent's decision to dismiss William Kilner pursuant to cl 41(5) of the *Teachers (Public Sector Primary and Secondary Education) Award 1993* (Award) effective 3 April 2018 was harsh, oppressive or unfair, having regard to:
 - a. Mr Kilner's absence from the workplace in circumstances where he was on approved sick leave and had outstanding sick leave credits;
 - b. The evidence available to the Respondent; and
 - c. The Respondent's failure to offer Mr Kilner alternative work, namely redeployment as a teacher at a different school (included within this issue is whether it was necessary for the Respondent to consider alternative work options at all).
2. Whether, notwithstanding cl 41(5) of the Award, the dismissal of Mr Kilner was neither harsh, oppressive nor unfair because, on the evidence available to the Respondent, Mr Kilner was not fit to fulfil the inherent requirements of his employment for the foreseeable future.
3. If the Applicant is successful in establishing that Mr Kilner's dismissal was harsh, oppressive or unfair, the practicability of Mr Kilner's reinstatement or re-employment as a teacher at a different school.
4. The Applicant seeks the following orders:
 - a. A declaration that the dismissal of Mr Kilner by the Respondent on 3 April 2018 was harsh, oppressive or unfair.
 - b. An order that the Respondent forthwith reinstate Mr Kilner as a Senior Teacher in accordance with the *School Education Act Employees' (Teachers and Administrators) General Agreement 2014* (Agreement).

- c. An order that the Respondent redeploy Mr Kilner to a school other than Busselton Senior High School in consultation with the Applicant and Mr Kilner.
 - d. An order that Mr Kilner be paid an amount in respect of remuneration lost from the date of his dismissal to the date of his reinstatement in accordance with the rate of pay, entitlement and benefits applicable to Mr Kilner in accordance with the Agreement.
 - e. An order that Mr Kilner's service with the Respondent otherwise be deemed continuous for all benefit purposes.
5. The Respondent seeks the following orders:
- a. An order that the matter be dismissed.

The applicant's case at first instance

- 6 In its Outline of Submission, the SSTU said that Mr Kilner's dismissal was harsh, oppressive or unfair having regard to the issues raised in paragraph 1 of the Memorandum.
- 7 The SSTU said that cl 41(5) of the Award covers the field in terms of the requirements on the employer to enable retirement on the grounds of ill health. The Director General did not comply with that clause.
- 8 The decision-maker is also said to have misconstrued the medical evidence said to justify retirement on the grounds of ill health. The written submission expresses in the double negative that the medical evidence 'does not indicate that Mr Kilner is not fit to perform the duties and responsibilities of his position as a teacher'.
- 9 It also said that Mr Kilner had sufficient sick leave and therefore the contract of employment was not frustrated. The SSTU also questioned whether the medical report by Dr Lai is independent evidence for the purposes of cl 41(5) of the Award.
- 10 There is then an issue of whether the Director General's consideration of whether Mr Kilner could perform as a teacher in his substantive position, that is at Busselton SHS, as opposed to as a teacher more generally, and whether the Director General ought to have considered alternative work options including redeployment to another location.
- 11 The SSTU said that the Director General did not comply with the Award and therefore the retirement was unlawful. From that is said to flow unfairness in the dismissal. It sought Mr Kilner's reinstatement, to a school other than Busselton SHS.

Mr Kilner's evidence

- 12 Mr Kilner gave evidence through a witness statement. In it, he recited his history as a teacher, commencing with the Department in about May 1982. He transferred to Busselton SHS in 1990.
- 13 He referred to student behaviour problems at the school, abuse he has been subjected to and the failure of local management to deal with it. He referred to the Department's Expert Review Group's review of the school from 2011 to 2014 and says that it 'found that challenging student behaviours were a problem at BSHS along with limited support for staff'.
- 14 He said that 'while the problems have usually only been caused by a small number of students, the behaviour can be very disruptive'.
- 15 Mr Kilner said he had been abused and threatened by students on a number of occasions and he recited some of that abuse. He said that he had made complaints to the Department and to politicians about student behaviour and the failure of local management to deal with it.
- 16 Mr Kilner then set out circumstances of the behaviour, abuse and threats he received from a particular student on 16 March 2017. Mr Kilner said he briefly restrained the student. He met with the Principal, Mr Dainon Couzic, and Mr Couzic reported it to the Department.
- 17 Mr Kilner also set out circumstances of 28 March 2017, when he was abused by another student. He said that by this time, he was feeling extremely anxious and unwell. His general practitioner provided a medical certificate, and Mr Kilner took sick leave from 3 to 5 April 2017. Mr Kilner said his health did not improve, his feelings of unwellness and anxiety seemed to be getting worse and he started to have suicidal thoughts.
- 18 On 13 April 2017, Dr Buckeridge, Mr Kilner's general practitioner, diagnosed him as having post traumatic stress disorder, gave him a medical certificate and put him on a mental health plan. This describes 'Problem Number 1' as 'PTSD'.
- 19 On 17 April 2017, Mr Kilner informed Busselton SHS that he would not be returning to school in Term 2 and provided a medical certificate. On 14 June 2017, he provided a medical certificate certifying him as being unfit for work for the period 8 June to 8 September 2017.
- 20 On or about 15 June 2017, Mr Couzic informed Mr Kilner that he would be referred to the Department's doctor.

First review by Dr Lai

- 21 Mr Kilner was referred to Dr Lai, the Department's Occupational Physician, for a medical review of his fitness for work. The referral, dated 15 June 2017 and completed by Mr Couzic, set out a chronology of events and then provided reasons for the referral as being:
- I have genuine concerns and I am worried for Bill's mental health.
 - The medical certificates I have received are not sufficiently specific enough to ensure duty of care.
 - I would also like some more information on the expected length of absence from the workplace.

- 22 The referral asked a number of questions of Dr Lai.
- 23 Mr Kilner attended the appointment with a representative of the SSTU on 5 September 2017. Amongst other things, they discussed that Mr Kilner had 321 days of sick leave. Mr Kilner says Dr Lai said that he should use that leave to get better.
- 24 Dr Lai's report dated 5 September 2017 records, under the heading of 'Summary', that towards the end of Term 1 2017, Mr Kilner felt overwhelmed and unable to cope due to:

'a combination of non-work stressors and work stressors (difficult student behaviours). Since stopping work he has undertaken regular psychological therapy and has gradually improved. He still feels quite anxious in relation to work. If he sees the difficult students in the community, he deliberately avoids them (left a function at a local cinema).

At this time, he cannot see himself ever returning to work at Busselton SHS, mainly in relation to difficult student behaviours and feeling unsupported in the management of such behaviour. He has 321 days of sick leave.

Findings

Mr Kilner presented as mildly anxious. He became very emotional when discussing his anxiety and difficulties faced. When discussing less sensitive topics he presented reasonably well.'

- 25 Dr Lai went on to answer the specific questions posed by the Department:
- that Mr Kilner's condition that may be affecting his ability to work is an anxiety disorder;
 - that he was substantially improved from three months ago and continued to improve, and was receiving appropriate treatment and support;
 - that his ability to undertake his role at his substantive site safely and effectively, including attending work regularly and working up to standard, without risk to self and others was that '[h]e is currently medically unfit for teaching due to anxiety. He is still triggered when seeing certain students. The anxiety would interfere with the effective performance of his teaching duties inclusive of behaviour management.'
- 26 His prognosis was that Mr Kilner had 'previously recovered from similar episodes of anxiety in the past (2007, 2012) and successfully resumed duties at Busselton... He stated today that he does not want to ever return to work at Busselton Senior High School – this is obviously a negative prognostic indicator. Nevertheless, this view may change as the anxiety resolves as I expect it will over the next few months.'
- 27 As to the timeframes for recovery, Dr Lai considered that Mr Kilner would regain fitness for substantive teaching before the end of that year, that is, 2017. Dr Lai suggested a review in December 2017, which would have been in three months, and an appointment was made for 6 December 2017.

Standards and Integrity Investigation

- 28 On 18 May 2017, Mr Paul Milward, Acting Manager Investigative Services, Standards and Integrity for the Department, wrote to Mr Kilner. The letter advised Mr Kilner of an allegation that Mr Kilner had made physical contact with a student on 16 March 2017. The allegation was to be investigated.
- 29 Mr Kilner says he was not informed of the letter until 6 September when Mr Couzic called him. He says that Mr Couzic told him he had waited five months to tell him about the letter because he was worried about Mr Kilner's health.
- 30 The letter advised Mr Kilner of the possible actions in the event of a finding that he had breached discipline, advised him that he now had an opportunity to respond to the allegation and he was given 10 working days to do so.
- 31 On 13 November 2017, the Director General wrote to Mr Kilner saying that it was open to her to form the view that Mr Kilner had committed a breach of discipline and indicating that she had formed a preliminary view that he had breached discipline. The letter set out the proposed action against him should she make that preliminary view final. Mr Kilner had 10 working days to respond.

Second review by Dr Lai

- 32 Mr Kilner said that at this appointment, he told Dr Lai that being found guilty of a breach of discipline had taken him back to where he had been in March. He said he was very agitated and angry during the appointment.
- 33 Dr Lai provided a report to Mr Couzic about the review on 6 December 2017. He recorded that:
- Mr Kilner continued to improve since the last review. He is not prescribed nor taking any medication;
 - Mr Kilner had spoken for over an hour to the parliamentary committee inquiry on school violence on 10 October 2017;
 - Mr Kilner had had 'an enjoyable active New Zealand holiday';
 - The Standards and Integrity investigation outcome made Mr Kilner angry and that Mr Kilner was in the process of appealing the decision;
 - Mr Kilner had said that his psychologist and doctor had advised him not to return to work and that he did not see himself returning to work until satisfactory resolution of that process. Mr Kilner 'did not rule out an eventual return to work at an undefined point in the future'.

- Mr Kilner 'presented well, in a good mood, cheerful and we had a normal conversation with good rapport, ie, normal mental state. He became a little agitated when talking about the Standards and Integrity process but it was confined to that discussion. We started well and ended well.'

34 In response to the questions posed for the review, Dr Lai answered 'no' to whether Mr Kilner had a medical condition that may be affecting his ability to work. He added, 'not working for reasons unrelated to medical condition. He recently received the outcome of the Standards and Integrity investigation and he is angry about it.'

35 In response to a question about the 'status and control of [his] current condition', Dr Lai said:

He has been angry over the last week since receiving the Standards and Integrity outcome and now working through the appeals process. At [sic] it is a recent event his current reaction falls within 'a normal response' and I consider not warranting any medical diagnoses at this time.

Reviewing previous psychiatrist reports that Mr Kilner previously provided (2007, 2013), his current presentation is similar to that described in the reports when it was deemed he had no active medical condition. His concerns about student behaviour are very longstanding, going back over a decade.

36 In response to a question about Mr Kilner's 'medical capacity to undertake the inherent requirements of [his] substantive position, including regular attendance, ability to work safely and ability to undergo normal performance management', or, '[i]f not fully fit, what is the impact of the condition as it relates to work tasks', Dr Lai reported:

Has identified non-medical matters that they believe impact upon their ability to perform their duties in their current workplace.

He is appealing the S&I process and understandably not in a good frame of mind (angry) to teach independently and effectively. I recommend a period of absence until the S&I process is finalised.

In relation to the possibility of a work trial at other schools he felt he had burnt his bridges at all the schools within the local region with the exception of Bunbury.

37 In the report, the next question for Dr Lai to answer was whether there were any 'restrictions, adjustments or modifications required to allow Mr William Kilner to work safely and effectively at their substantive site'. Dr Lai answered, 'Not applicable.'

38 As to the prognosis, Dr Lai wrote '[t]he prospect of a successful return to work at Busselton SHS appears poor at this time and I do not anticipate that he will willingly return to work term 1, 2018.'

39 Dr Lai then wrote that he had written to Mr Kilner's doctor and psychologist asking their opinions on his return to work prognosis – whether Mr Kilner is likely to return to his substantive site in the foreseeable future, and would provide an update once these were received.

40 On 20 December 2017, Dr Lai again wrote a report to Mr Couzic, headed 'FITNESS FOR WORK ASSESSMENT UPDATE'. He provided information he had received from Mr Kilner's treating health professionals. He reported that:

- Dr Mowat, psychologist, in a letter of 8 December 2017, said 'I do not think he is likely to regain medical capacity to return to Busselton Senior High School in the foreseeable future.'
- Dr Buckeridge, general practitioner, in a letter of 15 December 2017, said:

This is to certify that Bill Kilner will be unable to attend work from 15 December 2017 to 1 July 2018 inclusive due to a medical condition.

At this stage, I do not know whether Bill is likely to regain capacity. I will assess this midway through next year.

41 Dr Lai went on to state:

In my opinion, it is unlikely that Mr Kilner will be able to return to work at Busselton SHS without significant risk of further stress leave for the foreseeable future, ie, permanent incapacity for his substantive position. This is based on the long history of his unresolved concerns with student behaviours, the lack of change following an extended period of time off work, the ongoing S&I process and the prognostic information from his treatment providers.

42 Mr Kilner said that on 22 January 2018, he received a letter from Mr John O'Brien, Manager, Labour Relations for the Department, informing him that he would be recommending that Mr Kilner be retired on the grounds of ill health pursuant to cl 41(5) of the Award. Mr O'Brien wrote that if Mr Kilner had 'medical specialist information that indicates that you are likely to be able to safely fulfil the inherent requirements and responsibilities of your substantive position in the foreseeable future', he could provide it.

43 On 29 January 2018, Mr Kilner sent the following email to Mr O'Brien:

My health continues to improve under the care plan developed by Dr Mowat and Mr Buckeridge. I do see myself returning to the workplace after the charges I face are dealt with in the Industrial Commission and I am enabled to process the consequences of this unfair action.

My progress to recovery has been severely hampered by the Standards Integrity charge.

My doctors are aware of the agitation this has created for me and consequently, have suggested that I continue with my care plan until the 1st of July 2018 when my fitness for work will be reviewed. I am extremely confident that my prognosis would be much better then, as was Dr Lai.

I shall not be availing myself of an early pathway to retirement on the grounds of ill health. However, I thank you for your correspondence.

44 On 22 February 2018, Mr Kilner received a letter, dated that day, from Mr Damien Stewart, Executive Director, Workforce for the Department. Mr Stewart noted the preliminary view referred to above, that Mr Kilner's 'incapacity precludes the continuation of [his] employment.' He referred to Dr Lai's report of 20 December 2017. He said that, in effect, Mr Kilner had not provided any additional medical information and accordingly, his employment would now come to an end effective in five weeks' time.

45 Mr Kilner's witness statement of 2 June 2018 concludes by saying that:

1. He had 170 days of sick leave remaining at the time of termination of his employment;
2. He saw and continued to see Dr Buckeridge and Dr Mowat on a regular basis;
3. He felt he had made significant progress over the past year. While he found the investigation process difficult, Mr Kilner said he had recovered from that setback and would like to return to work in the future. He expected to be able to return in September 2018 or, at the latest, by the end of Term 4.

46 The Director General did not cross-examine Mr Kilner.

Preparedness to return to work

47 At the commencement of the hearing before the Commission on 25 July 2018, the learned Commissioner asked the SSTU's counsel, in turning to the question of remedy, should they be successful in the claim that the retirement was unfair, whether Mr Kilner was now able to go back to work. In response, counsel indicated that the annoyance Mr Kilner had experienced at the disciplinary process 'is not a medical condition or not of such gravity that it would affect the practicability of reinstatement or redeployment' (ts 3). Counsel later said that 'the upset with Standards and Integrity process' might be why Mr Kilner does not want to return to Busselton SHS at this time but that 'is not a reflection upon medical evidence of his fitness to return to work' (ts 38). When the learned Commissioner put to counsel that Mr Kilner's evidence was that he would not return to work until '... September, at the latest by the end of Term 4 and you're saying it's not medically related so all I can interpret from that is he's refusing to return to work because he's annoyed about the Standards and Integrity process', counsel replied 'And that may be the case' (ts 39). Counsel later withdrew his submissions in relation to the Standards and Integrity process, saying he 'exceeded [his] remit to some extent' (ts 63). In his witness statement, Mr Kilner says he expects he will be able to return to work in September 2018 or, at the latest, by the end of Term 4. However, the SSTU did not at that time have a medical assessment.

Appellant's submissions at first instance

48 The SSTU submitted that there are three broad areas of deficiency in the process applied by the Department:

1. Sick leave
 - (a) That cl 41(5) of the Award, dealing with 'Ill Health Retirement' could not properly have been activated at the time;
 - (b) While Mr Kilner had sick leave available, he could access that leave to become fit for work.
2. The medical evidence
 - (a) The medical evidence conclusively showed that Mr Kilner was not suffering from a medical condition at the time he was retired on the grounds of ill health.
 - (b) Furthermore, Dr Lai gave no opinion about retirement on the grounds of ill health.
 - (c) The Department progressively misconstrued the evidence in order to reconstruct it to support retirement on the grounds of ill health.
 - (d) Whether Dr Lai's medical advice was independent medical advice for the purposes of cl 45.
3. Alternative work
 - a) The Department erroneously assessed Mr Kilner against his substantive position in his location at Busselton SHS, whereas the test ought to have been against his position generally as a teacher.
 - b) The Department ought to have considered alternative work options and, specifically, redeployment to another location.

49 The SSTU said that cl 41(5) of the Award is comprehensive, it covers the field. Therefore, non-compliance with the provision renders the retirement unlawful. Even if it was lawful, the retirement was unfair.

The respondent's case at first instance

50 The Director General submitted that Mr Kilner was not fit to perform his duties and would not become so for the foreseeable future.

- 51 The respondent called evidence from Belinda Claire Airey. Ms Airey's evidence-in-chief consisted of a recitation of the documentary history of Mr Kilner's employment and the retirement on the grounds of ill health process. Ms Airey had had no involvement in the process or the decision regarding the termination of Mr Kilner's employment. She seems simply to have collated the documents.
- 52 In addition to the documents attached to Ms Airey's witness statement is Exhibit 3. This is a memorandum or briefing note, dated 14 February 2018 from John Heyward, Principal Consultant Injury Management, Employee Support Bureau of the Department to the decision-maker in the decision to retire Mr Kilner, Mr Damien Stewart. According to Ms Airey, and consistently with references in the briefing note to two attachments, the only material before Mr Stewart was this briefing note, Dr Lai's 'Update' report of 20 December 2017 and Mr Kilner's email response to Mr Stewart dated 29 January 2018. It did not attach either of Dr Lai's reports of 5 September or 6 December 2017.
- 53 Mr Heyward's briefing note says:

'MR WILLIAM JOHN KILNER (E0355996) RETIREMENT ON THE GROUNDS OF ILL HEALTH RECOMMENDATION

Based on the below information, it is recommended that you terminate Mr William Kilner's employment with the Department on the grounds of ill health.

BACKGROUND

Mr William John Kilner is a Mathematics Teacher at Busselton Senior High School (Busselton SHS) where he has worked for the last 30 years.

Mr Kilner was referred to the Occupational Physician in June 2016 due to concerns surrounding his mental health and wellbeing. Mr Kilner has been absent from work due to illness since 24 April 2017. Mr Kilner has a history with the Employee Support Bureau including a declined claim for alleged stress in 2013 and long standing difficulty managing student behaviour. Prior to the commencement of his sick leave in Term One, 2017 there had been an incident reported to Standards & Integrity involving violent behaviour towards a student.

Mr Kilner attended an initial appointment with Dr Roger Lai, Occupational Physician on 5 September 2017. Mr Kilner reported he had taken time off work due to a combination of work (difficult student behaviour) and non-work factors and at that time could not ever see himself returning to Busselton SSH. He had 321 days of personal leave accrued. Dr Lai noted a diagnosis of Anxiety Disorder, confirmed he was receiving adequate treatment and support and was medically unfit for teaching.

Mr Kilner was delivered the allegation letter from Standards & Integrity (with medical endorsement) on 8 September 2017 and later in the year the finding and penalty which he is reportedly in the process of appealing. The penalty was the deduction of two days' pay and the requirement to attend Professional Development on appropriate restraints for students.

A further fitness for work assessment was attended on 6 December 2017 at which time Dr Lai reported Mr Kilner's treating Psychologist and General Practitioner advised him not to return to work for mental health reasons relating to receiving the outcome of the Standards & Integrity investigation. Dr Lai deemed it to be for non-medical reasons that Mr Kilner was not at work and commented he was not in a good frame of mind to teach independently and effectively. It was recommended he remain off work until the Standards & Integrity process was finalised and correspondence sent to his treating doctors seeking advice on future return to work prognosis.

Dr Lai issued a Supplementary Report on 20 December 2017 after receiving return correspondence from Mr Kilner's treating Clinical Psychologist and treating General Practitioner. Dr Lai's medical opinion was that Mr Kilner was unlikely to return to work at Busselton SSH and had a permanent incapacity for his substantive position (**Attachment 1**).

The attached letter was sent to Mr Kilner on 22 January 2017 advising him of the recommendation for retirement on the grounds of ill health. Mr Kilner responded to this letter via email on 31 January 2018, advising that he did not intend to voluntarily retire. Mr Kilner did not provide any further medical information (letter and response enclosed herewith and marked as (**Attachment 2**)).

EMPLOYEE SUPPORT BUREAU COMMENT

Mr Kilner has been deemed medically unfit for his substantive role at Busselton SHS and medical retirement is recommended.'

Commissioner's Reasons for decision

- 54 The Reasons for decision set out that Mr Stewart's letter of 22 February 2018 informed Mr Kilner that his employment would be coming to an end because 'your current medical condition [means] you are unable to fulfil the duties and responsibilities associated with your substantive position as a teacher and there is no prospect of you regaining fitness to work as a teacher for the foreseeable future.'
- 55 The Commissioner noted that Mr Stewart was acting upon a recommendation contained in a briefing note dated 14 February 2018, set out above.

- 56 The learned Commissioner then quoted from the briefing note that ‘Mr Kilner has been deemed medically unfit for his substantive role at Busselton Senior High School and medical retirement is recommended.’ The Commissioner then noted that ‘[t]he key document before the decision-maker was the ‘supplementary’ report of Dr Lai dated 20 December 2017’, and the terms of the letter are produced in full.
- 57 The learned Commissioner then noted that ‘the key opinion expressed by Dr Lai in this report is that if the applicant’s member returned to work at Busselton Senior High School there is a risk of further stress leave and that this was likely to be the situation for the foreseeable future.’
- 58 He said that ‘Dr Lai seems to then say by the use of the ‘ie’, that this sentence may be accurately rephrased as ‘Mr Kilner has permanent incapacity for his substantive position’.
- 59 The learned Commissioner then set out a series of responses that, in his view, a reasonable person or reasonable reader would make. He also referred to this reasonable reader as being in particular a reader with the heavy responsibility of deciding a person’s employment future. This reasonable reader would:
- wonder how a ‘significant risk of further stress leave for the foreseeable future’ if a person resumes working in a position may be accurately rephrased as a ‘permanent incapacity’ to work in that position;
 - want more information on what Dr Lai means when he says that one equals the other.
- 60 The desire of the reasonable reader for that explanation would, in his view, be added to by what follows in Dr Lai’s report. The learned Commissioner then noted that Dr Lai set out the bases for the opinion and says that he ‘would expect that this would squarely address the issue of “permanent incapacity” in the medical context.’ He then recorded the bases Dr Lai wrote as grounding his belief:
1. the long history of the applicant’s member’s unresolved concerns with student behaviour;
 2. the lack of change following the applicant’s member having had an extended period of time off work;
 3. the ongoing S&I process; and
 4. the prognostic information from his treatment providers, which he described as ‘pretty short and lacking in essential detail’.
- 61 The learned Commissioner then set out four thoughts he believed a reasonable reader would have had in their mind on reading Dr Lai’s comments. Each was a question requiring further information. He noted that the reasonable reader would have noted that in the other material provided with the briefing note was Mr Kilner’s email received on 31 January 2018 in which he wrote that he did not see himself returning to work until his challenge to the disciplinary process had been completed and that his ‘progress to recovery has been severely hampered by the Standards Integrity charge’.
- 62 The learned Commissioner then postulated that the reasonable reader would have wondered, especially given Dr Lai’s report, whether there were medical reasons for Mr Kilner not having ‘capacity’ to work or whether something else was going on, whether Mr Kilner’s ‘permanent incapacity’ to return to work was a medical incapacity or not. He then said that in such circumstances, the briefing note and its attachments would have raised more questions than given answers, and the reasonable reader would have sought more comprehensive information. He said that ‘the reasonable decision-maker would have insisted on reading the other medical reports by Dr Lai. If he had done so, he would have noted that Dr Lai’s report of 5 September 2017 had been overtaken, noting that the summary of the report in the briefing note is a poor one.
- 63 In particular, the learned Commissioner noted, ‘the summary’s conclusion that the report was to the effect that [Mr Kilner] “was medically unfit for teaching” ignores that was the “current” opinion of Dr Lai expressed some months before and that, by way of much better context, Dr Lai had said [Mr Kilner] was “substantially improved from three months ago and continues to improve”, and that he was only “mildly anxious” and that his anxiety, which related only to “certain students” was expected to “resolve”. It also omits the key note that ‘Mr Kilner has previously recovered from similar episodes of anxiety’.
- 64 The learned Commissioner then noted that the reasonable reader would wonder about whether Mr Kilner had continued to improve as predicted and what his current status was, and its impact on his work.
- 65 He then summarised the 6 December 2017 report’s substance, including that Dr Lai expressed ‘the opinion that there was no medical reason why [Mr Kilner] could not return to work’.
- 66 He notes that properly read and understood, the report would have lead the decision-maker to realise that the materials ‘fell well short of what is required to bring a person’s employment to an end **on medical grounds**’ (*emphasis in the original decision*), and that they clearly raise the possibility that non-medical issues were significant.
- 67 The learned Commissioner concluded that had all the materials been provided, the reasonable decision-maker ‘could not possibly have come to the conclusion that Mr Kilner was unable to work due to ill health’.
- 68 He also said that no store ought to have been placed on Mr Kilner’s email of 31 January 2018, that it was a self-assessment of his health, and was ‘neither reliable nor relevant’.
- 69 The learned Commissioner found that it was not necessary to deal with the issue of an alleged breach of the Award. He found the dismissal on the grounds of ill health was unfair.

Remedy

- 70 The learned Commissioner considered that reinstatement was not practicable, taking account of Mr Kilner's wish not to return to Busselton SHS and of the respondent not wishing him to return there. He said it would be a rare case where the Commission would disagree with both parties where they say it is impracticable to reinstate and said that this was not that rare case.
- 71 He then turned to the issue of an order that Mr Kilner be employed in an available and suitable alternative position and found that 'such a placement would be impracticable'.
- 72 He noted that the SSTU had been successful in its case that there was no proper basis for the respondent to have concluded that Mr Kilner could not return to work due to ill health because there was no evidence that at the time he was suffering from ill health.
- 73 He concluded that Mr Kilner's reason for not going to work was unrelated to his health and that this was because of a reaction to the disciplinary process. This was not a medical reaction but an emotional one, 'perhaps exacerbated by the long history of [Mr Kilner] raising concerns about student behaviour' at the school. He noted that it must have been galling to Mr Kilner that he was being disciplined for his conduct towards students when he had been raising concerns about their conduct.
- 74 The learned Commissioner also noted that in his evidence, Mr Kilner said he had 'recovered' from whatever effect the disciplinary process had on him but he could still not return to work. He concluded that Mr Kilner had 'a dramatic, exaggerated and long-term, but non-medical, reaction to the disciplinary proceedings', and that this was the 'most significant reason' for Mr Kilner 'not working for an extended period, and for not, even today, being ready to return to work'. This is at the time of the hearing on 25 July 2018.
- 75 The learned Commissioner said he was 'left with the inescapable conclusion' that Mr Kilner 'reacted in an abnormal way to the start of the disciplinary process and that the abnormal reaction was dramatic and sustained. No employer ought to be ordered to re-employ someone whose reaction to a disciplinary process is so dramatic and sustained'. He said that it was impracticable for any employment relationship to be re-established by the Commission against such a background. He then proceeded to consider compensation.

Compensation

- 76 The Commissioner concluded that there was no safe basis to assume other than that Mr Kilner would have continued in employment beyond six months from the date of termination of employment, and that 'he ought to be awarded six months of compensation'. However, he noted that Mr Kilner had not attempted to mitigate his loss. Acknowledging that it involved some speculation on his part, the Commissioner then considered that had an attempt been made by Mr Kilner to find work, or obtain money through, for example, Newstart, he would have earned or received money equivalent to one month of his remuneration in the six months following his dismissal. He ordered the respondent to pay Mr Kilner 20 weeks' salary.

Appeal FBA 11 of 2018

- 77 The SSTU abandoned grounds 2 and 3 of its appeal. This leaves grounds 1, 4 and 5. They are:

Ground 1

1. The learned Commissioner erred in fact and law in concluding at paragraphs [59] to [65] of the reasons for decision that:
 - a. it was open for him to conclude that Mr Kilner was not going to work for reasons unrelated to his health;
 - b. Mr Kilner was not going to work for reasons unrelated to his health;by either mistaking the facts or failing to consider the evidence as to the reasons why Mr Kilner was not attending work.

Particulars

- 1.1 The learned Commissioner was correct to find at paragraph [13] of the reasons for decision that the significant risk of Mr Kilner taking stress leave in the future, as raised in Dr Lai's 20 December 2017 report, did not necessarily mean that Mr Kilner had a permanent incapacity to perform his substantive role. It does not follow, however, that Mr Kilner was absent from work for reasons that were not associated with his health.
- 1.2 Dr Lai's report dated 20 December 2017 made it plain that the reason why Mr Kilner had not returned to work was because he was stressed. Stress was clearly a matter related to Mr Kilner's health.
- 1.3 The evidence was that Mr Kilner was medically certified unfit to work as a teacher at Busselton Senior High School but may be fit to work at an alternative school or location.
- 1.4 There was no evidence that the employer had considered whether there existed opportunities for Mr Kilner to work at an alternative school or location, nor that it had offered Mr Kilner such option.

Ground 4

4. The learned Commissioner erred in law in finding at paragraph [66] of the Reasons for Decision that Mr Kilner's re-employment was impracticable by having regard at [60] to [65] of the reasons for decision to irrelevant considerations, namely, Mr Kilner's reaction to a separate Standards and Integrity process.

Ground 5

5. The learned Commissioner erred in law and fact, specifically by mistaking the facts or failing to consider a relevant consideration, in finding at paragraph [65] of the reasons for decision that Mr Kilner's reaction to the disciplinary process was abnormal.

Particulars

5.1 Mr Kilner's unchallenged evidence was:

- On 16 March 2017, Mr Kilner was involved in an incident at Busselton Senior High School where he had to physically restrain a student.
- On 29 March 2017, Mr Kilner was involved in another incident where he had been verbally abused and threatened by a different student.
- Between 3 April 2017 and 5 April 2017, Mr Kilner was off on sick leave due to feeling anxious and unwell.
- On 6 April 2018, Mr Kilner returned to work, but continued to feel anxious and unwell.
- On or around 13 April 2017, Dr Buckeridge diagnosed Mr Kilner as having Post Traumatic Stress Disorder.
- On or around 15 April 2017, Mr Kilner went off on sick leave due to his mental health issues. He had been certified as unfit for work by his doctor. Mr Kilner remained off work for the remainder of his employment.
- On 6 September 2018, Busselton Senior High School Principal, Mr Dainon Couzic informed Mr Kilner that Mr Couzic had received a discipline letter from the Department in relation to the 16 March 2017 incident, and that he had waited 5 months to tell Mr Kilner about that letter because he was worried about Mr Kilner's mental health.

5.2 Given that unchallenged evidence, it was not open for the learned Commissioner to find that Mr Kilner had reacted in an abnormal way to the start of the disciplinary process. Mr Kilner did not become aware of the start of the disciplinary process until some 5 months after it had started (during which time, Mr Kilner was already off on sick leave).

5.3 In relation to the outcome of the disciplinary process, Dr Lai's medical opinion dated 6 December 2017 stated that Mr Kilner's reaction to the S&I outcome fell within a normal response to that kind of event, and that it was understandable that Mr Kilner was not in a good frame of mind to teach independently and effectively.

Appeal FBA 12 of 2018**Extension of time for FBA 12 of 2018**

- 78 An appeal to the Full Bench is to be instituted within 21 days of the date of the decision appealed against. To be within time, any appeal was to have been lodged by Thursday, 20 September 2018. The appeal in FBA 11 of 2018 was lodged on the last day, 20 September 2018. The appeal in FBA 12 of 2018 was lodged 12 days after the due date.
- 79 The SSTU does not object to FBA 12 of 2018 being received out of time.
- 80 The Director General does not press ground 1. In respect of ground 2, the Director General asserts that the learned Commissioner erred in fact and law in finding that Mr Kilner suffered compensable loss or injury. This ground is:

Ground 2

2. The learned Commissioner erred in fact and law in finding that Mr Kilner suffered compensable loss or injury.

Particulars

- (a) The Commission can only order compensation for injury or loss: *Industrial Relations Act 1979* (WA), s 23A(6).
- (b) The applicant provided no evidence of Mr Kilner having suffered any injury as a result of the dismissal.
- (c) The only loss that Mr Kilner could have suffered was the economic loss of being deprived of salary or entitlements if he had remained employed with the appellant.
- (d) The learned Commissioner found that, at the time of his dismissal, Mr Kilner was not going to work for reasons unrelated to his health.
- (e) Given Mr Kilner was not going to work for reasons unrelated to his health, he was not entitled to access paid sick leave.

- (f) Given that Mr Kilner was not ready, willing, and able, to work at the time of his dismissal, and he otherwise could not lawfully access paid sick leave, Mr Kilner was not entitled to any salary or benefits if he had not been dismissed.
- (g) The applicant was therefore unable to substantiate that Mr Kilner suffered any economic loss caused by the dismissal.

- 81 The Full Bench has power to grant an extension of time (*Director General of Education v United Voice* [2015] WASCA 195 [17]). The principles applicable are set out in *John Lane v Aussie Online Limited (ACN 004 160 929)* (2002) 82 WAIG 430 at [9] per Sharkey P, with whom Coleman CC and Gregor C agreed.
- 82 In this case, as in *Jacob Gilmore v Cecil Bros, FDR Pty Ltd* (1996) 76 WAIG 4434, the SSTU filed its appeal, FBA 11 of 2018, on the last day, and this provided an explanation of why a cross appeal was then filed out of time.
- 83 The Director General filed FBA 12 of 2018 less than 14 days later, and well before the hearing was set down. No significant additional resources or costs would be incurred by the SSTU in dealing with the cross appeal.
- 84 Taking account of the principles to be applied, and noting that the SSTU does not object to the appeal being received out of time, we would allow the necessary extension of time.

Consideration

- 85 In *Michael v Director General, Department of Education and Training* [2009] WAIRC 01180; (2009) 89 WAIG 2266 from [140] – [143], Ritter AP sets out the well-established principles which apply in the Full Bench considering an appeal against a discretionary decision by reference in particular to *House v The King* (1936) 55 CLR 499 and *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194:

‘The relevant principles were set out in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505 as follows:

‘The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.’

As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19]-[21]. At [19] their Honours explained by reference to the reasons of Gaudron J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76, that a discretionary decision results from a ‘decision-making process in which ‘no one [consideration] and no combination of [considerations] is necessarily determinative of the result’’. Instead ‘the decision-maker is allowed some latitude as to the choice of the decision to be made’. At [21] their Honours said that because ‘a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process’. Their Honours then quoted part of the passage of *House v King* which I have quoted above.

Similarly, Kirby J in *Coal and Allied* at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with ‘caution and restraint’. His Honour said this is ‘because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view’. (See also *Norbis v Norbis* (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535).

These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519. There, his Honour explained that although ‘error in the proper weight to be given to particular matters may justify reversal on appeal, ... disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge’. This is because, in considering an appeal against a discretionary decision it is ‘well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion’, and that when ‘no error of law or mistake of fact is present, to arrive a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight’. (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]).

- 86 It is important to note that the matter was inadequately argued before the Commission at first instance. The SSTU's position about Mr Kilner's health and readiness to return to work was somewhat contradictory and incomplete. The Director General's case was less than ideal in that her only witness knew little of the process or the decision except for what was in the documents prepared for and by the Department. To put forward a witness simply to produce documents, and not present evidence from a person who had some direct involvement in the decision, is unhelpful. As to several important issues, which we refer to below, regrettably the evidence at first instance was riddled with ambiguity. This was quite unhelpful in the disposition of the matter at first instance.
- 87 The SSTU's grounds of appeal are interrelated so we will deal with them together, and then deal with the Director General's ground of appeal. It is not our intention to traverse the parties' arguments about distinguishing between whether Mr Kilner was suffering from a medical condition or was unfit for work. This is for reasons which will become apparent as we deal with the material before the decision-maker on behalf of the Director General.
- 88 Neither party argues that the learned Commissioner's finding that the decision to dismiss or retire Mr Kilner on the grounds of ill health was unfair and was in error. However, the issues on appeal arise from the conclusions about Mr Kilner's state of health, the reason for Mr Kilner not returning to work and about the remedy for the unfairness.
- 89 The learned Commissioner based those findings and conclusions largely on Dr Lai's reports. In September 2017, Dr Lai's prognosis included the preamble that Mr Kilner had 'previously recovered from similar episodes of anxiety in the past (2007, 2012) and successfully resumed normal duties at Busselton ...'. He then noted '(h)e stated today that he does not want to ever return to work at Busselton SHS – this is obviously a negative prognostic indicator. Nevertheless, this view may change as the anxiety resolves as I expect it will over the next few months.'
- 90 Dr Lai said he believed that Mr Kilner was unlikely to regain fitness for substantive teaching before the end of the year. He was to review the situation in December 2017.
- 91 In his report of 6 December 2017, Dr Lai reported that Mr Kilner continued to improve since the last review. However, he said:
1. Mr Kilner received the outcome of the Standards and Integrity investigation and '(t)his made him angry...'
 2. 'He said his psychologist and doctor have advised him not to return to work for mental health reasons'.
 3. During their discussion, Mr Kilner presented in 'normal mental state' but 'became a little agitated when talking about the Standards and Integrity process but it was confined to that discussion.'
 4. That Mr Kilner did not have a medical condition that may be affecting his ability to work. He said 'not working unrelated to medical condition', that he had 'recently received the outcome of the Standards and Integrity investigation and he is angry about it'.
 5. He referred to 'identified non-medical matters'.
 6. In respect of a prognosis, Dr Lai says that 'the prospect of a successful return to work at Busselton SHS appears poor at this time and I do not anticipate that he will willingly return to work Term 1, 2018'.
- 92 However, Dr Lai then said he was obtaining further medical information from treatment providers. He did so and reported this to the respondent. Both Dr Mowat, Mr Kilner's psychologist, and Dr Buckeridge, his general practitioner, provided reports to Dr Lai which stated that Mr Kilner was unlikely 'to regain medical capacity to return to Busselton Senior High School in the foreseeable future' (Dr Mowat) and 'that Bill Kilner will be unable to attend work from 15 December 2017 to 1 July 2017 (sic) inclusive due to a medical condition' (Dr Buckeridge).
- 93 Dr Lai then provided a further report dated 20 December 2017, containing this information. He concluded by saying that:
- In my opinion, it is unlikely that Mr Kilner will be able to return to work at Busselton Senior High School without significant risk of further stress leave for the foreseeable future, ie, permanent incapacity for his substantive position. This is based on the long history of his unresolved concerns with student behaviours, the lack of change following an extended period of time off work, the ongoing Standards and Integrity process and the prognostic information from his treatment providers.
- 94 Two things are clear. Firstly, there is conflict as well as a lack of clarity in the medical opinions.
- 95 Dr Lai raised the prospect of Mr Kilner being not prepared to return to Busselton SHS because he was angry about the Standards and Integrity process. However, the main issue was about the prospect of future stress (leave). He reported that both Dr Mowat and Dr Buckeridge reported Mr Kilner having a medical condition.
- 96 Secondly, in this context, the learned Commissioner was correct to conclude that the briefing note, which did not comprehensively report, nor did it attach all the necessary information, would have raised more questions than given answers, and fell well short of what is required for medical retirement. However, the answer to that issue was for the decision-maker to have made further enquiries. The finding of unfairness in the dismissal is, in our respectful view, correct. However, what follows in the learned Commissioner's reasoning in terms of the reason for Mr Kilner's absence is erroneous and a perhaps premature conclusion about what was keeping Mr Kilner from returning to work.
- 97 We are of the view that the learned Commission erred in drawing his own conclusion that 'had all the material been provided to a reasonable decision-maker, that decision-maker could not possibly have come to the conclusion that (Mr Kilner) was unable to work due to ill health'. That conclusion ignores Dr Mowat's and Dr Buckeridge's, albeit brief, reports.

- 98 The learned Commissioner concluded that Mr Kilner's reaction to the disciplinary process was abnormal, that it was dramatic and sustained. It was clear from Dr Lai's report that Mr Kilner was angry about the outcome of the Standards and Integrity process. However, Mr Kilner told him that his 'psychologist and doctor have advised him not to return to work for mental health reasons'. While he described Mr Kilner as being 'well presented, in a good mood, cheerful ... ie, normal mental state', Dr Lai described Mr Kilner becoming a little agitated when talking about the Standards and Integrity process. At point 2 under the heading of **Medical opinion**, after saying Mr Kilner had been 'angry over the last week since receiving the S&I outcome and is now working through the appeal process', he said that as this was a 'recent event his current reaction falls within a "normal response"'.
- 99 Further, Mr Kilner had complained about student behaviour for some time, had been abused twice before taking an extensive period of leave for PTSD and anxiety disorder. His response to being faced with a finding that he was at fault and had breached discipline in his conduct towards one of those students in that context was, in our view, and it would appear, Dr Lai's view, a normal response.
- 100 The medical evidence leads inescapably to a conclusion that Mr Kilner had suffered a period of ill health due to anxiety and stress. That stress arose from the circumstances he had encountered at Busselton SHS. His condition had improved but he was still suffering from a medical condition and was unfit to return to the particular workplace where the cause of his medical condition arose. The improvement had been compromised by the disciplinary finding. It took him back to where he was in March.
- 101 This finding related directly to the circumstances causing Mr Kilner's ill health in the first place, his response to student behaviour, which behaviour was one of the causes of his stress.
- 102 At the time the respondent was considering and then decided to retire him on the grounds of ill health, Mr Kilner was improving, but the Standards and Integrity process hampered that. His doctor said he should be away from work for another six months. The medical evidence, contradictory as it is, makes clear that Mr Kilner ought not return to Busselton SHS.
- 103 Therefore, in our view, the Commissioner's conclusion that it was open to him to find that Mr Kilner was not going to work for reasons unrelated to his health was in error.
- 104 This leads on to grounds 4 and 5, and in our respectful view, an error in the conclusion that re-employment was impracticable because of an abnormal response by Mr Kilner to the Standards and Integrity process.
- 105 The learned Commissioner found, based on his acceptance of Dr Lai's report of 6 December 2017, that Mr Kilner was unable to work for some reason other than ill health. He said that he was left with the inescapable conclusion that Mr Kilner reacted in an abnormal way to the start of the disciplinary process and that abnormal reaction was dramatic and sustained'. He concluded that Mr Kilner's reason for not working was unreasonable, an emotional one, not a medical one. According to the learned Commissioner, it was 'dramatic, exaggerated and long-term, but non-medical reaction to the disciplinary proceedings'. This was not a conclusion open to the Commissioner on the evidence. Dr Lai said in his report of 6 December 2017 that Mr Kilner's reaction to the Standards and Integrity report fell within 'a normal response'. There was no other medical evidence before the Commission.
- 106 Dr Lai also reported that Mr Kilner told him that his psychologist and doctor had advised Mr Kilner not to return to work for mental health reasons. This is consistent with Dr Buckeridge's and Dr Mowat's reports subsequently provided to Dr Lai that Mr Kilner was unlikely to regain medical capacity to return to Busselton SHS in the foreseeable future, and that he had a medical condition. In that context, Mr Kilner did not see himself returning to work until there was a satisfactory resolution of the Standards and Integrity process.
- 107 Therefore, the evidence before the employer, while contradictory in some aspects, suggested strongly that Mr Kilner was suffering stress and anxiety. This would be resolved or improved subject to the outcome of the Standards and Integrity process challenge; that Mr Kilner's response was, in fact, normal.
- 108 In any event, we find that the conclusion that Mr Kilner was not suffering a medical condition but an emotional one is not supportable. There was no medical evidence to enable a conclusion, nor any explanation in the reasons for decision, that an emotional response is unrelated to a medical or health issue.
- 109 In all of these circumstances, we conclude that grounds 1, 4 and 5 of FBA 11 of 2018, are made out.
- 110 The question then arises as to how the appeal ought to be disposed of. Section 49(5)(b) of the Act provides for the Full Bench to vary the decision in such a manner as it considers appropriate. This is subject to subsection (6a) which provides it is not to remit a case to the Commission under subsection (5)(b) unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.
- 111 In our respectful view, the Full Bench is not able to make its own decision on the merits of the case because of the lack of evidence about Mr Kilner's current state of health and the practicability of reinstatement or re-employment. The matter ought to be remitted for further hearing and determination based on the issues we have dealt with above.
- 112 The Memorandum required the Commission to consider 'the practicability of Mr Kilner's reinstatement or re-employment as a teacher at a different school'. The orders sought by the SSTU included '[a]n order that the respondent redeploy Mr Kilner to a school other than Busselton Senior High School in consultation with the applicant and Mr Kilner'. The SSTU made it clear in its submissions that it sought reinstatement or redeployment to a school other than Busselton SHS (ts 4, 40, 44 – 48 and 63). It discussed this as being in some form of graduated return to work which the learned Commissioner noted would be 'like a workers' compensation order' (ts 45). The learned Commissioner said that the prospect of issuing an order requiring the respondent to reinstate Mr Kilner by transferring him to another school would not hold him up for long if he thought it was the appropriate order to make, noting that the Director General is 'a massive employer'. He expressed concern though at whether Mr Kilner was ready and willing to return to work.

- 113 The learned Commissioner and Mr Scaife for the SSTU had a brief discussion about an order in the nature of a graduated return to work and whether that was available to the Commission, and whether the Commission would be exercising 'general unfair dismissal powers' (ts 45). Mr Scaife noted that an order requiring the parties to engage in a return to work or redeployment process may 'not be an order that the Commission is used to making in these cases that is at least one of the reasons why this application was brought under section 44 ... was to enable that to be done' (ts 47), that such an order is 'plainly' within the Commission's powers 'under s 44 if that is what it takes to resolve the dispute in a fair and lawful manner' (ts 45).
- 114 Therefore, the issue of the Director General not offering Mr Kilner alternative work, of redeploying him to teach at a school other than Busselton SHS, was squarely before the Commission.
- 115 In *BHP Billiton Iron Ore Pty Ltd v The Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* [2006] WAIRC 03908; (2006) 86 WAIG 642 (*BHP v TWU*), Ritter AP at [75] – [79] made obiter comment to the effect that an order relating to a claim of unfair dismissal determined under s 44(9) of the Act could be within jurisdiction if it grants relief or redress which is not of the type that could be made under s 23A of the Act. This is because such an order was within the scope of, or explicitly part of, the dispute remaining for determining under s 44(9) following the conclusion of a conference.
- 116 In *Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* (Merlo) [2017] WAIRC 00452; (2017) 97 WAIG 1329, Smith AP, with whom Scott CC agreed, examined a matter of a remedy sought which went beyond those in s 23A, of demotion upon re-employment of the dismissed employee. Her Honour referred to Ritter AP's observation in *BHP v TWU*. She said:
143. 'I reject the argument that it is not necessary or appropriate in this matter to determine whether some of those observations are correct. The point, whilst not raised at first instance, is squarely raised by the PTA in ground 5 and both parties have filed comprehensive submissions addressing the point. In my opinion, his Honour's observations in the first sentence at [79] are clearly correct.'
- ...
148. 'Having made a finding that dismissal was not a proportionate penalty (leaving aside the disposition of this appeal raised in ground 4 of the appeal), and then determining a demotion was a proportionate and appropriate penalty, these findings were findings that were squarely part of or put another way explicitly part of the industrial matter referred for hearing and determination pursuant to s 44(9) of the Act. Consequently, by the power conferred in s 44(9) to hear and determine a dispute, it was open to the learned Acting Senior Commissioner to make the order reinstating Mr Merlo to a position of transit officer, level 3, and to make the order for loss of remuneration assessed at the rate of pay, entitlements and benefits applicable to the position of transit officer, level 3.'
- 117 Matthews C, the other member of the Full Bench in that matter, agreed that the Commission 'may, within jurisdiction, make an order that was 'explicitly part of the dispute remaining under s 44(9) of the Act'.
- 118 Further, s 23A provides for a number of remedies where reinstatement is impracticable. Firstly, s 23A(3) empowers the Commission to order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal. Alternatively, if such reinstatement would be impracticable, then s 23A(4) empowers the Commission to order re-employment in another position the Commission considers the employer has available and is suitable. This involves a two-step process which would enable the Commission to consider the question of re-employment of Mr Kilner at a school other than Busselton SHS. If reinstatement or re-employment would be impracticable, then the Commission may order compensation for loss or injury caused by the dismissal (s 23A(6)).
- 119 Therefore, the learned Commissioner, while not being restricted to the relief or redress set out in s 23A of the Act, is obliged to address and determine the issue of Mr Kilner being offered alternative work, that the respondent re-employ Mr Kilner at a school other than Busselton SHS. As Kenneth Martin J said in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2017] WASCA 86; (2017) 97 WAIG 431 at [148], this will require consideration of all of the circumstances, a 'bespoke factual evaluation'. The issue of practicability requires a common-sense and objective assessment, not simply of the preferences of the parties or of inconvenience or difficulty. The parties might each have their reasons for their respective preference, but these reasons require objective assessment, see also *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 189 – 191.
- 120 Therefore, in our view, the proper disposition of this matter requires that the decision be suspended and the matter remitted to the Commission to hear and determine according to law. This requires consideration of Mr Kilner's capacity to return to work, the practicability of being reinstated or alternatively re-employed at a school other than Busselton SHS.
- FBA 12 of 2018**
- 121 The Director General argues that the Commissioner erred in his reasoning in the calculation of compensation. This ground only requires consideration if we are wrong in respect of the SSTU's appeal.
- 122 The learned Commissioner noted that the respondent did not argue that employment could have fairly been brought to an end within six months, and '[m]y start point then is that the applicant ought to be awarded six months of remuneration by way of compensation'.

- 123 The Commissioner noted that Mr Kilner made no efforts to mitigate his loss. He went on to say that ‘the respondent should not be made to fully fund that failure’. The learned Commissioner then acknowledged that his next consideration is based on speculation, that if he had attempted to find work or other income, Mr Kilner would have earned the equivalent of one month’s remuneration. He deducted this from six months’ pay and ordered that the respondent pay him 20 weeks’ pay.
- 124 The Director General’s appeal is based on a submission that the learned Commissioner erred in assuming that if he had remained in employment, Mr Kilner would have been paid salary.
- 125 The Director General says that in light of the learned Commissioner’s finding that Mr Kilner was not working for reasons unrelated to his health, it was not open to find that he would have been entitled to salary or other entitlements. If he was not working or properly on paid leave, Mr Kilner would not have been entitled to payment. Therefore, he was not entitled to compensation for loss caused by the dismissal.
- 126 Compensation is for loss or injury caused by the dismissal. In *Scicluna v Mr William Paul Brooks T/as Bayview Motel Esperance, WA* [2016] WAIRC 00862; (2016) 96 WAIG 1475, Smith AP and Scott CC, with whom Emmanuel C agreed, set out the principles to be applied in considering an order of compensation for loss or injury caused by dismissal. This decision dealt with the Commission’s powers under s 23A of the Act, if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair. Such a determination may arise on a referral under s 29(1)(b)(i) or under s 44. Those principles of particular relevance to this matter are set out in [61] as follows:

...

- (e) The first step is to assess the total amount of compensation that can be awarded; that is the amount of the remuneration of the employee that would be payable in a period not exceeding six months (see s 23A(8) and s 23A(9) of the Act).
- (f) the employee is to establish his or her loss and/or injury on the balance of probabilities. This involves a finding of fact or mixed law and fact, as to what is the loss and injury established on the evidence: *Bogunovich [No 2]* (9) (Sharkey P), (13) (Kenner C).
- (g) the onus of proof of failure to mitigate rests upon the employer. If it is established that an employee has failed to mitigate his or her loss, then it may be that there has not been a loss of remuneration caused by the dismissal. A finding that an employee has a duty or is required to mitigate his or her loss is a misstatement of the law: see the discussion in *Sealanes (1985) Pty Ltd v Foley* [2006] WAIRC 04110; (2006) WAIG 1239 [99] – [104]; applied in *Curtis v Ausdrill Ltd* [2006] WAIRC 05656; (2006) 86 WAIG 3133 [35] – [38] (Ritter AP and Gregor SC).
- (h) Regard is also to be had to any efforts of the employer to mitigate the loss suffered by the employee as a result of the dismissal (s 23A(7)(a)).
- (i) The Commission must assess the proper amount of compensation for loss and/or injury in light of all the relevant circumstances, but disregarding the cap prescribed by s 23A(8). If the amount is in excess of the cap, the amount to be awarded is the permissible maximum: *Bogunovich [No 2]* (8) (Sharkey P).
- (j) The assessment of compensation:
 - (i) is to be made in light of all relevant circumstances;
 - (ii) must not be arbitrary;
 - (iii) must have regard to whether the employee has taken reasonable steps to find alternative employment: *Curtis* [36] – [38], [43] (Ritter AP and Gregor SC);
 - (iv) is a determination pursuant to s 26(1)(a) made according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms. This legislative direction does not enable the Commission to determine the matter without resort to established legal principles, where those principles are established. However, as Beech CC observed in *Curtis*, when considering an award of compensation made pursuant to s 23A [64]:

The Commission should be slow to fetter its own wide discretion under s 26(1) to produce an outcome which is just and equitable and not simply lawful. It is not irrelevant to note that the power given to the Commission is to order compensation, not damages; what might be a correct outcome in a court of law may nevertheless be unacceptable according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. There may well be good reason for the inclusion of s 23A(7)(c) if it thereby allows the Commission to have regard to any other matter believed to be crucial to achieving a fair go all round to be taken into account in the overall assessment of any compensation ordered in lieu of reinstatement (*Sprigg v Paul’s Licensed Festival Supermarket* (1998) 88 IR 21 at 31).

...

- (m) When deciding questions of future loss, assistance can be derived from *Malec v J C Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638 in which it was held by Deane, Gaudron and McHugh JJ that a court must assess the degree of probability that an event would have occurred or might occur, and adjust its award to reflect the degree of probability. Unless the chance is so low as to be regarded as speculative or so high as to be practically certain, the chance is to be taken into account in assessing compensation: *Bogunovich [No 2]* (8) (Sharkey P).
- (n) How long an employee would have remained employed by the employer is a matter that is relevant to an assessment of loss causally connected to an unfair dismissal. In particular, it may be open to find on the evidence that an unfairly dismissed employee could have been fairly dismissed by the employer at a time post the dismissal: *Bogunovich [No 2]* (13) (Kenner C). It may also be open on the evidence that an employee may have left the employer's employment voluntarily at some point in the future following the dismissal: *Bogunovich [No 2]* (13) (Kenner C). However, there would need to be evidence capable of characterisation as more than mere speculation and that there was a real prospect of the employment being terminated fairly at some point therefore (the dismissal): *Fisher & Paykel Australia Pty Ltd* [79] (Kenner C), [2] (Ritter AP).

127 On the basis of the authorities referred to above, we respectfully agree with the Director General's submission so far as it goes. However, in light of the evidence of Dr Mowat and Dr Buckeridge, it would be open to conclude that Mr Kilner had an ongoing entitlement to sick leave. The evidence is clear from Dr Mowat and Dr Buckeridge that Mr Kilner was not fit to work at Busselton SHS, whereas he may have been fit to work elsewhere. This was not assessed. With the respondent not putting him to work at another school, Mr Kilner may have been entitled to payment of sick leave. We would dismiss this ground of appeal.

2019 WAIRC 00178

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)	
PARTIES		APPELLANT
	-and- DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION	
		RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL	
DATE	TUESDAY, 2 APRIL 2019	
FILE NO/S	FBA 11 OF 2018	
CITATION NO.	2019 WAIRC 00178	

Result	Appeal allowed, decision suspended and remitted to the Commission
Appearances	
Appellant	Ms R Cosentino of counsel for the State School Teachers' Union of W.A. (Incorporated)
Respondent	Mr J Carroll of counsel for the Director General, Department of Education

Order

This appeal having come on for hearing before the Full Bench on 20 February 2019, and having heard Ms R Consentino (of counsel) on behalf of the appellant, and Mr J Carroll (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 2 April 2019, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is allowed.
2. The order made by the Commission on 30 August 2018 [2018] WAIRC 00724; (2018) 98 WAIG 1162 is suspended.
3. The case is remitted to the Commission at first instance for further hearing and determination.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2019 WAIRC 00177

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	APPELLANT
	-and- THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)	
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL	
DATE	TUESDAY, 2 APRIL 2019	
FILE NO/S	FBA 12 OF 2018	
CITATION NO.	2019 WAIRC 00177	

Result	Appeal dismissed
Appearances	
Appellant	Mr J Carroll of counsel for the Director General, Department of Education
Respondent	Ms R Cosentino of counsel for the State School Teachers' Union of W.A. (Incorporated)

Order

This appeal having come on for hearing before the Full Bench on 20 February 2019, and having heard Mr J Carroll (of counsel) on behalf of the appellant, and Ms R Cosentino (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 2 April 2019, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be, and is hereby, dismissed.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

FULL BENCH—Unions—Cancellation of registration—

2019 WAIRC 00134

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	-and- LICENSED CAR SALESMEN'S ASSOCIATION, UNION OF WORKERS, OF WESTERN AUSTRALIA	
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON	
DATE	TUESDAY, 19 MARCH 2019	
FILE NO/S	FBM 1 OF 2019	
CITATION NO.	2019 WAIRC 00134	

Result	Order issued
Appearances	
Applicant	Ms J Vincent (of counsel) and with her Ms S Kemp
Respondent	No appearance
Intervener	Ms J Lee, on behalf of United Voice WA, and with her Ms C Tunney

Order

WHEREAS on 14 February 2019, the Registrar applied to the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (the Act) for the cancellation of the registration of the Licensed Car Salesmen's Association, Union of Workers, of Western Australia (the organisation) on the grounds that the organisation is defunct; and

WHEREAS, attached to the Form 23 – Application to cancel registration of organisation is a Statutory Declaration by Susan Ivey Bastian, the Registrar, in which she declares that -

1. The West Australian Industrial Relations Commission's records indicate that the last known address for the organisation is 9-11 Brewer St, East Perth WA 6004. The last correspondence forwarded to the organisation at this address in 2010 was returned and marked return to sender; and
2. A search of the organisation's records held by the Commission indicates that the organisation has failed to comply with its reporting obligations under the Act and the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) in that annual financial returns and officers and membership returns have not been received from the organisation since 1980. It is last known that in the last financial returns filed as at 31 December 1979 there were 126 members, and as at 31 August 1980 an operating loss of \$38,162; and
3. On 25 October 1984, the Industrial Registrar wrote to Hewitt, Parry and Edwards, Public Accountants for the organisation, advising of the proposed application to formally cancel the organisation's registration under the Act and was later advised they had been inactive for some 3 years and there were no funds remaining in the account; and
4. On 7 February 2018, the Registrar caused to be sent to UnionsWA an enquiry of any information about the status and/or coverage of the organisation; and
5. On 17 August 2018, UnionsWA advised that the organisation was no longer affiliated with it, it was not aware of the organisation being active and that a member of the Labour History Society recalled it being amalgamated with the *Australian Liquor, Hospitality and Miscellaneous Workers' Union* (now *United Voice WA*); and
6. On 6, 10 and 28 September 2018, the Registrar attempted to contact *United Voice WA* to enquire any information about the status and/or coverage of the organisation; and
7. On 2 October 2018, Ms Naomi McCrae, Director of Legal and Industrial from *United Voice WA* called the Commission and advised that *United Voice WA* had no comment or objection to the organisation being de-registered and would accept service of the application to de-register on the organisation's behalf; and

WHEREAS the matter was set down for hearing on Tuesday, 19 March 2019; and

WHEREAS the notice of hearing was published in the Western Australian Industrial Gazette on 27 February 2019, on the Commission's website from 28 February 2019 and in *The West Australian* newspaper on 13 March 2019; and

WHEREAS at the hearing of the matter on 19 March 2019 there was no appearance on behalf of the respondent.

The Full Bench, having considered the Statutory Declaration of Susan Ivey Bastian of 14 February 2019 and considering the requirements of s 73(12) of the Act, is satisfied that the organisation is defunct and hereby orders:

THAT the registration of the Licensed Car Salesmen's Association, Union of Workers, of Western Australia be and is hereby cancelled on and from 19 March 2019.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2019 WAIRC 00135

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION APPLICANT
	-and-
	MEAT AND ALLIED TRADES FEDERATION OF AUSTRALIA (WESTERN AUSTRALIAN DIVISION) UNION OF EMPLOYERS, PERTH RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 19 MARCH 2019
FILE NO/S	FBM 2 OF 2019
CITATION NO.	2019 WAIRC 00135

Result	Order issued
Appearances	
Applicant	Ms J Vincent (of counsel) and with her Ms S Kemp
Respondent	No appearance

Order

WHEREAS on 6 February 2019, the Registrar applied to the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (the Act) for the cancellation of the registration of the Meat and Allied Trades Federation of Australia (Western Australian Division) Union of Employers, Perth (the organisation) on the grounds that the organisation is defunct; and

WHEREAS, attached to the Form 23 – Application to cancel registration of organisation is a Statutory Declaration by Susan Ivey Bastian, the Registrar, in which she declares that -

1. Since 2003, the organisation has failed to comply with its reporting obligations under the Act and the *Industrial Relations Commission Regulations 2005* (WA) in that the last financial return was filed in May 2003, for the year ended 30 June 2002, and, the last officers and members return was filed in May 2003 and reported there were 213 members; and
2. On 26 July 2004, the Registrar received a letter from Mr Mervyn Darcy, Executive Director of the Australian Meat Industry Council (AMIC) advising that effective 13 August 2003 the organisation was absorbed by the national counterpart organisation, the AMIC. The merger of operations was confirmed at page 7 of the financial return submitted with the letter although it is unclear if the remaining assets of the organisation were transferred to AMIC at that time; and
3. After continuous attempts to follow up the filing of the annual officers and membership returns, the AMIC commenced filing the returns on behalf of the organisation, however details were those of the AMIC, and, the organisation does not hold a certificate under section 71 of the Act.
4. On 2 February 2010, the former Deputy Registrar wrote to Mr Terry Nolan, Chairman of the organisation advising that the organisation was not compliant with the Act and rules of the organisation; and she advised of options to either re-establish the organisation to ensure compliance or, alternatively, to proceed with an application to cancel the registration of the organisation. No response was received; and
5. On 8 April 2013, an email reply was received from Mr Peter Hopkins, Finance and Administration Manager of the AMIC advising that the registration was no longer required and seeking advice on how to proceed with an application to cancel the registration of the organisation; and
6. On 13 October 2011, Mr Nolan provided further details as to the status of the organisation that:
 - (a) The organisation no longer had any financial members;
 - (b) It was unknown who the current office bearers were;
 - (c) The organisation committee no longer meets; and
 - (d) The organisation has ceased to operate given its operation was then being dealt with by the AMIC; and
7. On 25 January 2019, an email was sent to the AMIC's Chief Executive Officer, Mr Patrick Hutchinson, outlining the Registrar's intention to file an application to the Full Bench to cancel the registration of the organisation and requesting the AMIC to act as respondent in this matter; and
8. On 29 January 2019, Mr Ken McKell, AMIC's Manager Employment Services, sent a reply advising that the AMIC would act as respondent in the matter and would accept service of the application, and had no objections to the Full Bench cancelling the registration of the organisation under s73(12)(b) of the Act; and

WHEREAS the matter was set down for hearing on Tuesday, 19 March 2019; and

WHEREAS by email dated 20 February 2019, Mr McKell advised the Commission that he would be unable to attend the hearing, but that AMIC supported the cancellation of the organisation's registration.

WHEREAS at the hearing of the matter on 19 March 2019 there was no appearance for the organisation.

NOW THEREFORE, the Full Bench, having considered the statutory declaration of Susan Ivey Bastian of 14 February 2019 and considering the requirements of s 73(12) of the Act, is satisfied that the organisation is defunct and hereby orders:

THAT the registration of the Meat and Allied Trades Federation of Australia (Western Australian Division) Union of Employers, Perth be and is hereby cancelled on and from 19 March 2019.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2019 WAIRC 00136

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION APPLICANT
	-and-
	WEST AUSTRALIAN PSYCHIATRIC NURSES' ASSOCIATION (UNION OF WORKERS) RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 19 MARCH 2019
FILE NO/S	FBM 3 OF 2019
CITATION NO.	2019 WAIRC 00136

Result	Order issued
Appearances	
Applicant	Ms J Vincent (of counsel) and with her Ms S Kemp
Respondent	No appearance
Intervener	Mr D Hill, as Branch Secretary of the Health Services Union WA Branch

Order

WHEREAS on 14 February 2019, the Registrar applied to the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (the Act) for the cancellation of the registration of the West Australian Psychiatric Nurses' Association (Union of Workers) (the organisation) on the grounds that the organisation is defunct; and

WHEREAS, attached to the Form 23 – Application to cancel registration of organisation is a Statutory Declaration by Susan Ivey Bastian, the Registrar, in which she declares that -

1. The West Australian Industrial Relations Commission's records indicate that the last known address for the organisation is P.O. Box 8362, Stirling Street, Perth WA 6001. The last correspondence forwarded to the organisation at this address in 2006 was returned and marked return to sender; and
2. A search of the organisation's records held by the Commission indicates that the organisation has failed to comply with its reporting obligations under the Act and the *Industrial Relations Commission Regulations 2005 (WA)* (the Regulations) in that annual financial returns and officers and membership returns have not been received from the organisation since 1994 and 1998, respectively; and
3. A file note dated 16 December 1998 made by a Registry staff member records a telephone conversation with the then Secretary, Linden MacLeod, following up the 1995-1997 financial returns, who stated that "WA Psychiatric Nurses' Union has joined the Federal body when their branch was nearly bankrupt (sic)". Further, "all financial accounts have been closed and at present they do not have any members"; and
4. The last annual return filed by the organisation indicated that as at the year ending 31 December 1994, there was an operating loss of \$82,512.44 and as at 1 January 1998 there were 332 members; and
5. On 7 February 2018, the Registrar caused to be sent to UnionsWA, a letter seeking available information on a list of organisations registered under the Act which appeared to have become defunct, including the organisation. No response from UnionsWA was received; and
6. On 21 August 2018, the Registrar caused to be sent to The Australian Nursing Federation, Industrial Union of Workers Perth an enquiry about the status and/or coverage of the organisation, who replied later that day advising that the Health Services Union of Western Australia (HSUWA) was associated with the organisation; and
7. On 21 August 2018, the Registrar caused to be sent to the HSUWA an enquiry for any information about the status and/or coverage of the organisation. A reply was received from Christopher Panizza, Assistant Secretary of the HSUWA on 6 September 2018 advising that he and Mr Dan Hill, the Secretary, were of the view that "the best outcome would be for now, as far as we are aware, defunct WA Psychiatric Nurses' Association (Union of Workers) to be wound up by the Commission of its own motion." Further, on 8 October 2018, the HSUWA advised that it would be prepared to accept service of this application FBM 3 of 2019 provided it would not involve a lot of work for it; and
8. On 10 January 2019, an officer of the Commission contacted the HSUWA and had a conversation with Mr Dan Hill, who holds the offices of both the Secretary of HSUWA and the WA Branch Secretary of Health Services Union (Federal Union). Mr Hill advised that it would be the Federal Union, and not HSUWA, that would accept service of this application; and

9. By letter dated 22 January 2019, Mr Hill, as WA Branch Secretary of the Federal Union, set out the following background of WAPNA:

- (a) After joining the Federal Union in 1992, WAPNA, by 2006, had not transitioned as a Branch of the Federal Union. It was written out of the national Rules and coverage of WAPNA was assumed by the HSUWA; and
- (b) WAPNA had ceased to operate as a State registered Union and at the State level, the rules coverage of Psychiatric Nurses has not been transferred to the HSUWA; and

WHEREAS the matter was set down for hearing on Tuesday, 19 March 2019; and

WHEREAS the notice of hearing was published in the Western Australian Industrial Gazette on 27 February 2019, on the Commission's website from 28 February 2019 and in *The West Australian* newspaper on 13 March 2019; and

WHEREAS by letter dated 15 February 2019, the Commission's Registry Services Manager served a notice of the application on Mr Hill; and

WHEREAS at the hearing of the matter on 19 March 2019 there was no appearance for the organisation.

The Full Bench, having considered the Statutory Declaration of Susan Ivey Bastian of 14 February 2019 and considering the requirements of s 73(12) of the Act, is satisfied that the organisation is defunct and hereby orders:

THAT the registration of the West Australian Psychiatric Nurses' Association (Union of Workers) be and is hereby cancelled on and from 19 March 2019.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2019 WAIRC 00145

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 86/2017 GIVEN ON 21 JANUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

FBA 2 OF 2019

PHARMACY GUILD OF WESTERN AUSTRALIA ORGANISATION OF EMPLOYERS

APPELLANT

-v-

THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH

RESPONDENT

FBA 3 OF 2019

SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH

APPELLANT

-v-

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION OF WESTERN AUSTRALIA, PHARMACY GUILD OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT

SENIOR COMMISSIONER S J KENNER

COMMISSIONER T B WALKINGTON

DATE

THURSDAY, 21 MARCH 2019

FILE NO.

FBA 2 OF 2019, FBA 3 OF 2019

CITATION NO.

2019 WAIRC 00145

Result	Direction issued	
Representation	(by written correspondence)	
Counsel:		
Pharmacy Guild of Western Australia Organisation of Employers	:	Mr A Drake-Brockman, industrial agent
Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth	:	Mr N Tindley of counsel
The Shop, Distributive and Allied Employees' Association of Western Australia	:	Mr D Rafferty of counsel
The Minister for Commerce and Industrial Relations	:	Mr R Andretich of counsel

Direction

The Pharmacy Guild of Western Australia seeks that the times for the parties to file their submissions be varied from the times set out in Practice Note 2 of 2018. The other parties to the appeal consent to these variations.

The Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs –

1. That the appellants in FBA 2 and FBA 3 of 2019 and the Minister for Commerce and Industrial Relations file written outlines of submissions, lists of authorities and legislation by no later than 4:00PM Tuesday, 16 April 2019.
2. The Respondent in FBA 2 and FBA 3 of 2019 file a written outline of submissions, list of authorities and legislation by no later than 4:00PM Tuesday, 30 April 2019.
3. At the same time as the written outlines of submissions are filed, each party is to file a list of the legislation and authorities they rely upon. Any authorities or legislation which the party intends to read from at the hearing should be marked with an asterisk.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2019 WAIRC 00160

ALLEGED BREACH OF ORGANISATION RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS
COMMISSION

APPLICANT

-v-

THE DISABLED WORKERS' UNION OF WESTERN AUSTRALIA

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT

DATE TUESDAY, 26 MARCH 2019

FILE NO/S PRES 1 OF 2009

CITATION NO. 2019 WAIRC 00160

Result	Discontinued
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Order

On 7 January 2009, the Registrar filed this application pursuant to s 66 of the *Industrial Relations Act 1979*. The grounds for the application were that the affairs of the respondent had not been conducted in accordance with its rule for a number of years and that there did not appear to be any resolve to establish the management structure required by the rules to enable valid decisions to be made. The applicant sought directions to ascertain the current membership and financial position of the union, to, if appropriate, arrange for the election of officeholders and in the meantime provide for the administration of the union.

From 2009 until 2018, various measures were put in place to enable the respondent to continue to operate, however difficulties continued to arise.

On 16 May 2018, the Registrar made an application to have the registration of the respondent cancelled on the grounds that the organisation was defunct and had not been fulfilling its obligations for many years. The application noted, amongst other things, that the respondent was only able to continue to function over the years due to extensive goodwill, assistance and support extended by numerous entities and people.

On 7 March 2018, a response to the application was filed on behalf of the respondent. Amongst other things, the response stated that the union had no financial members, the interim executive committee had not met for two years and that the union had effectively ceased to operate.

On 4 October 2018, the Full Bench ordered that the registration of the respondent be cancelled on and from 26 September 2018 ([2018] WAIRC 00766).

On 25 January 2019, the applicant filed and served a Form 14 – Notice of withdrawal or discontinuance for this matter.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2019 WAIRC 00142

INTERPRETATION OF CLAUSE 18.5 AND ASSOCIATED CLAUSES OF PUBLIC SERVICE AND GOVERNMENT OFFICERS CSA GENERAL AGREEMENT 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00142
CORAM : PUBLIC SERVICE ARBITRATOR
 SENIOR COMMISSIONER S J KENNER
HEARD : MONDAY, 3 DECEMBER 2018
DELIVERED : THURSDAY, 21 MARCH 2019
FILE NO. : P 1 OF 2018
BETWEEN : THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA
 INCORPORATED
 Applicant
 AND
 COMMISSIONER, WESTERN AUSTRALIA POLICE DEPARTMENT
 Respondent

Catchwords : *Industrial Law – Interpretation of Agreement – Dispute regarding status of employees – Whether an employee can be deemed a shift worker with no roster – Whether an employee can be deemed a shift worker without working prescribed shifts that attract a shift allowance – Whether an employee can be deemed a shift worker and day worker working prescribed hours concurrently – Whether notification and consultation is necessary for employer to change employees’ prescribed hours – Relevant principles applied – Declaration made.*

Legislation : *Industrial Relations Act 1979 (WA)*

Result : Declaration issued

Representation:

Counsel:

Applicant : Ms A Wallish

Respondent : Ms D Southcott and with her Mr A Chapple

Case(s) referred to in reasons:

Amtcor Ltd v Construction, Forestry, Mining & Energy Union [2005] HCA 10; (2005) 222 CLR 241
City of Wanneroo v Holmes [1989] FCA 369; (1989) 30 IR 362
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337
Director General, Department of Education v United Voice WA [2013] WASCA 287
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; (2014) 251 CLR 640
Fedec v Minister for Corrective Services [2017] WAIRC 00828; (2017) 97 WAIG 1595
George A Bond & Co Ltd (in liq) v McKenzie [1929] AR (NSW) 498
Kidd v The State of Western Australia [2014] WASC 99
McCourt v Cranston [2012] WASCA 60
Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451
Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd [2014] WASCA 28
Printing and Kindred Industries Union v Public Service Commissioner 1967 AILR 409
Red Hill Iron Ltd v API Management Pty Ltd [2012] WASC 323
Re Harrison; Ex parte Hames [2015] WASC 247
Re HEF (Aust) (Tas No 2) 1985 AILR 321
Shift Workers' Case (1972) 72 AR 633
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165

Case(s) also cited:

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch, Industrial Union of Worker's v The West Australian Mint (1998) WAIRC 237
Norwest Beef Industries Ltd v The West Australian Branch, Australasian Meat Industry Employees Union (1984) 64 WAIG 2121
Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1987) 67 WAIG 1097
Metal Trades Employers Association v Amalgamated Engineering Union (1936) 36 CAR 534

*Reasons for Decision***Background**

- 1 The respondent has an Intelligence Services Division which employs staff as Analysts and others, who are eligible to be members of the applicant union. Their employment is covered by the Public Service Award 1992, the Public Service and General Officers CSA General Agreement 2017 and the Western Australian Police Agency Specific Agreement 2016. The employees generally work Monday to Friday between 7.00 am and 6.00 pm each day, in accordance with cl 18.2 of the Agreement. Sometimes however, due to the nature of their work, the employees are required to attend for duty outside of these hours, in the case of an organised event or in an emergency or other extraordinary situation.
- 2 In February 2015, the respondent wrote to the Analysts in relation to their hours of work. The letter said that the Analysts are predominantly to work between Monday and Friday each week but noted the need to work outside of these prescribed hours on some occasions. Accordingly, the letter said, "In accordance with cl 17.5 of the Public Sector and Government Officers General Agreement 2014 (the Agreement) I wish to advise that your prescribed hours of duty are varied to make provisions [sic] for you to attend duties on a Saturday, Sunday or public holiday; and/or to perform shift work including work on Saturdays, Sundays or public holidays when required". The letter went on to provide that where necessary, shift rosters would be developed for employees required to work shifts in accordance with the Award.
- 3 It seemed common ground that despite this letter, the Analysts have continued to work largely as they did previously, that being Monday to Friday between 7.00 am to 6.00 pm, with the occasional requirement to work outside of these hours. No shift rosters have been developed. Analysts called into work on an organised event or an emergency, have been paid overtime however, on some occasions, the respondent has required them at short notice, purportedly relying on the shift work provisions, to swap a weekday for a weekend.
- 4 The upshot of this is there is now a dispute between the applicant and the respondent as to the status of these employees: are they "shift workers" for the purposes of the Award and the Agreement? The applicant says that the Analysts cannot be both working "prescribed hours of work" Monday to Friday and be categorised as shift workers too, when it suits the respondent. The applicant maintained that the respondent has been impermissibly seeking to rely on the letter of February 2015, to give notice of a change to prescribed working hours, when in fact the Analysts' working hours have not changed.
- 5 The issues seem to have come to a head in April 2018, when questions were raised by members of the applicant about their remuneration. The applicant contended that many Analysts did not know that the respondent had deemed them to be shift workers. The applicant contended that the Intelligence Analysts are not shift employees, as they do not work in accordance with a shift roster. The employees are not working prescribed shifts as set out in the Award. Furthermore, consultation provisions in the Agreement were not complied with by the respondent and the respondent cannot rely on the letter of February 2015, as constituting an ongoing "one months' notice" to vary the Analysts' prescribed working hours to enable them to work shift work, on an indefinite basis.

- 6 The respondent on the other hand, accepted that there is a distinction between working varied prescribed hours of work on a weekend and a public holiday, and shift work. It was submitted that the act of giving notice and invoking the relevant provision of the Agreement in relation to shift work, meant that the relevant employees are thereby deemed shift workers. The respondent contended that the presence of a roster is not necessary in this respect.
- 7 The dispute was initially referred to the Arbitrator under s 44 of the Act. The Applicant has subsequently commenced these proceedings for an interpretation of relevant provisions of the Award and the Agreement under s 46 of the Act.

Questions asked

- 8 The application poses five questions in the following terms:
1. **Question 1:** When reading clause 18.5 together with clause 20 of the General Agreement and clause 21 of the Award can an Employee be deemed a shift worker when there is no roster?
 2. **Question 2:** When reading clause 18.5 together with clause 20 of the General Agreement and clause 21 of the Award can an employee be deemed a shift worker without working prescribed shifts which attract a shift allowance?
 3. **Question 3:** By virtue of clause 18.5, can an Employee be deemed both a shift worker and a day worker working prescribed hours concurrently?
 4. **Question 4:** If an Employer wishes to vary an Employee's prescribed hours do they need to provide notification of change and consultation with Employees as per clause 49.4 of the General Agreement?
 5. **Question 5:** Can an Employer provide a one off letter to Employees varying their prescribed hours to make provisions for subsections (i), (ii) and (iii) of clause 18.5 (a) of the *General Agreement* at the Employers convenience and does providing a one off letter of this nature eliminate the requirement to give Employees one months' notice for any future changes to prescribed hours?

Agreement and Award provisions

- 9 It is convenient to set out at this point the relevant terms of the Agreement and the Award. The Agreement clauses are as follows:

18.1 The provisions of this clause shall replace the provisions of clause 20 - Hours of the Applicable Award.

Prescribed Hours

- 18.2 The prescribed hours of duty shall be 150 hours per four week settlement period, to be worked between 7.00am and 6.00pm, Monday to Friday, as determined by the Employer, with a lunch interval of not less than 30 minutes.
- 18.3 Subject to the lunch interval, prescribed hours are to be worked as one continuous period. However, Employees shall not be required to work more than five hours continuously without a break.
- 18.4 This does not preclude Employers requiring or agreeing to the working of standard hours of 7.5 hours per day with a lunch interval to be taken between 12.00 noon and 2.00pm. Where working of standard hours is required by the Employer, the requirement must be consistent with operational needs and customer service requirements.
- 18.5 (a) The Employer may vary the prescribed hours of duty observed in the Agency or any branch or section thereof, consistent with a 150 hour four week settlement period, so as to make provisions for:
- (i) the attendance of Employees for duty on a Saturday, Sunday or public holiday;
 - (ii) the performance of shift work including work on Saturdays, Sundays or public holidays; and
 - (iii) the nature of the duties of an Employee or class of Employees in fulfilling the responsibilities of their office;
- provided that where the hours of duty are so varied an Employee shall not be required to work more than five hours continuously without a break.
- (b) Employers wishing to vary the prescribed hours of duty to be observed shall be required to give one month's notice in writing to the Agency, branch, section or Employees to be affected by the change.

Ordinary Hours

- (c) Employees working during their prescribed hours of duty on a Saturday, Sunday or public holiday will attract the following payment for all ordinary hours worked:
- (i) Saturdays - time and a half.
 - (ii) Sundays - time and three quarters.
 - (iii) Public holidays - double time and a half.

Provided that subject to agreement between the Employer and the Employee, work performed during ordinary rostered hours on a public holiday shall be paid for at the rate of time and one-half and the Employee may, in addition, be allowed a

day's leave with pay to be added to annual leave or to be taken at some other time within a period of one year.

Overtime

- (d) An Employee required to work overtime on any day shall be paid the appropriate rates as set out in clause 22 - Overtime Allowance of the Applicable Award for all time so worked.

...

20. SHIFT WORK

20.1 This clause is to be read in conjunction with clause 21 - Shift Work Allowance of the Applicable Award.

20.2 Definitions

The following terms shall have the following meaning and shall replace the definitions for Day shift, Afternoon shift and Night shift contained in clause 21 (I) of the Applicable Award:

- (a) "Day shift" means a shift commencing at or after 6.00am and before 12.00 noon.
 (b) "Afternoon shift" means a shift commencing at or after 12.00 noon and before 6.00pm.
 (c) "Night shift" means a shift commencing at or after 6.00pm and at or before 5.59am.

20.3 An Employee required to work a weekday Night shift will, in addition to the Ordinary rate of salary, be paid an allowance in accordance with the following formula for each shift so worked:

$$12 \ 20$$

annual salary X

$$313 \ 10 \ 100$$

20.4 Notwithstanding clause 20.3, the minimum amount payable per shift to an Employee required to work Night shift will be the allowance payable to an Employee with an annual salary of level 1.7 Employee as per Schedule 2 - General Division Salaries of this General Agreement using the formula provided in clause 20.3.

20.5 For the purposes of this clause "annual salary" is the Ordinary rate of salary payable for the position as prescribed in Schedule 2 - General Division Salaries or Schedule 3 - Specified Calling Salaries of this General Agreement.

20.6 This Night shift allowance will be paid in lieu of the night shift allowance prescribed in clause 21 (2) (a) of the Applicable Award.

The Award provision is in the following terms:

21. - SHIFT WORK ALLOWANCE

(1) In this Clause the following expressions shall have the following meaning:

"Day shift" means a shift commencing after 6.00am and before 12.00 noon.

"Afternoon shift" means a shift commencing at or after 12.00 noon and before 6.00pm.

"Night shift" means a shift commencing at or after 6.00pm and before 6.01am.

"Public holiday" shall mean a holiday provided in Clause 24. - Public Holidays of this Award.

(2) (a) (i) An officer required to work a weekday afternoon or night shift, will in addition to the ordinary rate of salary, be paid an allowance in accordance with the following formula for each shift so worked.

$$(ii) \quad \frac{\text{Annual Salary}}{1} \quad X \quad \frac{12}{313} \quad x \quad \frac{1}{10} \quad X \quad \frac{15}{100}$$

Notwithstanding the above, the minimum amount payable per shift to an employee required to work afternoon or night shift will be the allowance payable to an employee with an annual salary of Level 1.7 using the formula at clause 21 (2) (a) (i).

(iii) For the purposes of clause 21 (2) (a), "annual salary" is the ordinary rate of salary payable for the position. Clause 66(2) of the award defines annual salary for calculation purposes.

(b) Work performed during ordinary rostered hours on the following days shall be paid for at the following rates, in lieu of the allowance prescribed in clause 21 (2) (a):

- (i) Saturdays - time and one-half;
 (ii) Sundays - time and three quarters; and
 (iii) Public holidays – double time and one half.

Provided that in lieu of the provisions of clause 21 (2) (b) (iii) and subject to agreement between the employer and the officer, work performed during ordinary rostered hours on a public holiday shall be paid for at the rate of time and one-half and the officer may, in addition be allowed a day's leave with pay to be added to annual leave to be taken at some other time within a period on one year.

- (c) Weekend Penalty Rates for Casual Employees
- (i) Notwithstanding the provisions of clause 10 (2) (a) – Casual Employment, casual employees are entitled to weekend shift penalties. Work performed during ordinary rostered hours on the following days shall be paid for at the following rates:
- Saturdays and public holidays - time and one-half (casuals are already paid a loading in lieu of public holidays); and
- Sundays - time and three quarters.
- (ii) These rates are paid in addition to but not compounded on the casual loading provided for clause 10 (1) (a) – Casual Employment.
- (d) An officer rostered off duty on a public holiday shall be paid at ordinary rates for such day or, subject to agreement between the employer and the officer, be allowed a day's leave with pay in lieu of the holiday to be added to the officer's next annual leave entitlement or taken at a mutually convenient time within a period of one year.
- (e) An officer engaged on shift work who is rostered to work regularly on Sundays and/or public holidays shall be entitled to one week's leave in addition to the officer's normal entitlement to annual leave of absence for recreation.
- (f) Additional leave provided by paragraphs (b) and (d) of this subclause shall not be subject to the annual leave loading prescribed by subclause (11) of Clause 23. - Annual Leave of this Award.
- (g) Work performed by an officer in excess of the ordinary hours of the officer's shift or on a rostered day off shall be paid for in accordance with the overtime provisions of Clause 22. - Overtime Allowance of this Award.
- (h) (i) When an officer begins or ceases a shift between the hours of 11.00 pm and 7.00 am and no public transport is available, reimbursement at the appropriate rate of hire prescribed by subclause (4) of Clause 47. - Motor Vehicle Allowance of this Award shall be made if the officer's private motor vehicle or cycle is used for the journey between the officer's residence and headquarters and the return journey.
- Provided however, that any officer who, on or after October 30, 1987, elects to be permanently retained on a fixed or non rotating shift that begins or ceases between or on the hours of 11.00 pm and 7.00 am shall not be eligible to claim this reimbursement.
- (ii) The provisions of this subclause shall only be applied to officers living and working within a radius of 50km of the Perth City Railway Station.
- (3) Hours of Duty and Rosters
- (a) An officer engaged on shifts shall work a 75-hour fortnight, exclusive of meal intervals, on the basis of not more than ten (10) shifts per fortnight of not more than seven and one half hours duration. Provided that where agreement is reached between the employer and the Association the length and/or number of shifts worked per fortnight may be altered.
- Provided that when the agreed length of a shift is extended past seven and one half hours, overtime shall be payable only for time worked in excess of the rostered shift.
- Provided also that whenever an agreed alteration to the number of hours per shift has occurred then the allowance per shift shall be varied on a pro rata basis to reflect any variation to other than seven and one half (7½) hours.
- (b) Meal breaks shall be for a period of at least thirty (30) minutes, but not greater than one hour for each meal.
- (c) Officers may be rostered to work on any of the seven days of the week provided that no officer shall be rostered for more than six (6) consecutive days.
- Provided that where agreement is reached between the employer and the Association, shift workers may be exempted from this provision.
- (d) The roster period shall commence at the beginning of a pay period and continue for fourteen (14) consecutive days. Rosters shall be available to officers at least five (5) clear working days prior to the commencement of the roster.
- (e) A roster may only be altered on account of a contingency, which the employer could not have been reasonably expected to foresee. When a roster is altered, the officer concerned shall be notified of the changed shift 24 hours before the changed shift commences. Provided that where such notice is not given, the officer shall be paid overtime in accordance with Clause 22. - Overtime Allowance of this Award, for the duration of the changed shift. This provision shall not apply to an officer who was absent from duty on the officer's last rostered shift.
- (f) An officer shall not be rostered for duty until at least ten (10) hours have elapsed from the time the officer's previous rostered shift ended. Provided that where agreement is reached between the Association and the employer the ten (10) hour break may be reduced to accommodate special shift

arrangements, except that under no circumstances shall such an agreement provide for a break of less than 8 hours.

- (g) An officer shall not be retained permanently on one shift unless the officer so elects in writing.
- (h) Officers shall be allowed to exchange shifts or days off with other officers provided the approval of the employer has been obtained and provided further that any excess hours worked shall not involve the payment of overtime.
- (i) No officer shall be on out of hours contact after the last working day preceding a period of annual leave or long service leave.

Consideration

- 10 The relevant principles in relation to the interpretation of industrial instruments are well settled. A recent summary of these principles was set out in a decision of the Full Bench of the Commission in *Fedec v Minister for Corrective Services* [2017] WAIRC 00828; (2017) 97 WAIG 1595. At pars 21-23 Smith AP and Scott CC observed:

Interpreting an industrial agreement - general principles of interpretation

21 The approach that is to be applied when interpreting an industrial agreement is well established. This is:

- (a) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.
- (b) The task of construction of an industrial agreement is to be approached in a way that allows for a generous construction: *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362.
- (c) Industrial agreements are made for industries in light of the customs and working conditions of each industry and must not be interpreted in a vacuum divorced from industrial realities: *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498; *City of Wanneroo v Holmes* (378 - 379) (French J).

22 The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement. In *Re Harrison; Ex parte Hames* [2015] WASC 247, Beech J said [50] - [51]:

The general principles relevant to the proper construction of instruments are well-known. In summary:

- (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
- (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
- (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
- (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
- (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
- (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (*Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); *Kidd v The State of Western Australia* [2014] WASC 99 [122]; *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 [106] - [112]; *Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd* [2014] WASC 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).

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

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

The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22].

Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: *Codelfa Construction Pty Ltd v State Rail*

Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337, 352; *McCourt v Cranston* [2012] WASCA 60 [23].

- 11 The generous rule of construction applies equally to an award, but even more so to an industrial agreement.
- 12 In this case, both the provisions of the Agreement and the Award, set out above, must be read and interpreted together. The Agreement prescribes hours of duty for an employee of 150 hours each “settlement period”, worked on a Monday to Friday basis between the hours of 7.00 am and 6.00 pm each day. These are plainly the “ordinary working hours” for the purposes of the Agreement.
- 13 By cl 18.5, there is provision for an employer, on the giving of one months’ notice, to change the prescribed or ordinary working hours. Three circumstances are contemplated. In cl 18.5(a)(i) employees may be required to work their ordinary hours on a Saturday, Sunday or Public Holiday. In such cases, penalty payments for working ordinary hours as set out in cl 18.5(c) apply. This does not permit any other change. Hours worked in excess of ordinary hours, on overtime, will attract the appropriate additional penalty.
- 14 Secondly, by cl 18.5(a)(ii), there can be a direction by the employer, again on the giving of one months’ notice, for employees to *perform* shift work. The exercise of this provision also enables “shift work”, so performed, to be worked on Saturdays, Sundays and public holidays. When shift work is to be performed in the exercise of this power to vary the prescribed hours of work, it is governed by cl 20 – Shift Work of the Agreement and cl 21 – Shift Work Allowance of the Award. Clause 20.2 of the Agreement, set out above, prescribes the hours of shifts, whether they be day, afternoon or night shifts. A variation to the night shift penalty, to that prescribed by the Award, is also set out. In the case of the performance of rostered shift work on a Saturday, Sunday or a public holiday, by cl 21(2)(b) of the Award, penalty rates apply in lieu of the shift allowances set out in cl 21(2)(a) of the Award. There are other consequences of work being performed on shift work too.
- 15 As to cl 21 of the Award, this plainly sets out that officers engaged on shift work are to work hours as prescribed in cl 21(3)(a). The heading to cl 21(3) is “Hours of Duty and Rosters”. By cl 21(3)(c), (d), (e), and (f) of the Award, on the ordinary and natural meaning of the words used in these provisions, an officer engaged on shift work in accordance with cl 20 – Shift Work of the Agreement and cl 21 – Shift Work Allowance of the Award, is to work in accordance with a roster. This is made clear by cl 21(3)(c) and (d) of the Award in particular. These provisions state that an officer can be rostered to work over any seven days per week up to a maximum of six consecutive days. Clause 21(3)(d) prescribes the length of a “roster period”, and a requirement on an employer to publish the roster in advance.
- 16 The concept of a “roster” in relation to working shift work in industrial parlance, is very well known and understood. A roster is an essential element of a shift work system: *Re HEF (Aust) (Tas No 2)* 1985 AILR 321. A roster sets out the pattern of shifts and hours to be worked, whether it be on a day, afternoon or night shift basis and furthermore, whether it be in accordance with a fixed, rotating or alternating shift pattern. The preparation and publication of a shift work roster also enables employees to see in advance what working pattern and working hour arrangements will apply to them over the relevant roster period. As has been previously observed, “shift work” is generally the situation where work is performed for an employer by one or more employees who immediately follow the performance of the same work by another one or more employees: *Printing and Kindred Industries Union v Public Service Commissioner* 1967 AILR 409 per Williams J.
- 17 The notions of working shift work and rostering go hand in hand. The specific arrangements to apply, will of course be governed by the terms of any relevant award or industrial agreement.
- 18 Returning then to the terms of the Agreement and Award in this case. It is plain that cl 18.5(a)(ii) of the Agreement contemplates the actual, and not hypothetical, *performance* of shift work. Also, the plain language of cl 18.5(b) reaffirms that this is so. The notice of change to the prescribed working hours to permit shift work to be performed, is to be given to “employees *affected* by the change” (my emphasis). That is, a change to working hours is to be actually made. The change will affect the employees by them working shift work in accordance with the terms of cl 21(3) in relation to their hours of duty and the working of a roster. There is no absurdity or repugnancy created by this construction of the provisions of the Agreement read with the Award. This interpretation is consistent with the ordinary and natural meaning of the language used in both instruments and is entirely consistent with industrial principle.
- 19 I return then to the questions posed for determination. As to question 1, the answer is “no”. In the absence of the working of shifts on a roster, in my view, an officer is not a “shift worker” for the purposes of the Agreement and the Award and cannot be deemed to be so.
- 20 As to question 2, the answer is “yes, but only if the employee agrees in writing”. This is because whether an employee who is working shift work is entitled to an allowance, is governed by the terms of the relevant industrial instrument. Shift loadings or penalties were generally made payable in relation to those shifts that carry with them the greatest inconvenience and disability. In most cases this is afternoon and night shift: *Shift Workers’ Case* (1972) 72 A.R. 633. That is the scheme adopted in the Agreement and the Award. It is only weekday afternoon and night shifts that attract a shift allowance. A day shift can be worked without a shift penalty applying. Weekend work and work on public holidays is different, as that attracts the higher rate for working on those days, in lieu of shift allowances. However, under cl 21(3)(g) of the Award, an officer, as a shift worker, cannot be kept on day shift, which does not attract a shift allowance, or any other shift, permanently, without the officer’s written agreement.
- 21 As to question 3, based on my earlier discussion above, the answer is also “no”. It is not permissible to work both the prescribed hours of duty in cl 18.2 and the varied prescribed hours of duty by cl 18.5(a) and (b) of the Agreement at the same time.
- 22 As to question 4, the answer is “no”. There is a specific regime for the alteration of prescribed hours of work in the Agreement, including making provision for work to be performed on a shift work basis in accordance with a roster. The specific provisions

override and displace the general consultation and change provisions of the Agreement, applying the usual rule of interpretation in this respect (see Pearce DC and Geddes RS, *Statutory Interpretation in Australia*, 4th ed par [4.24]).

- 23 The answer to question 5, in view of my earlier discussion and my answers to questions 1 to 4, must also be “no”. It is not possible to effectively designate employees, by a standing arrangement, to be shift workers under cl 18.5(a)(ii), when they are not working shifts in accordance with a roster and at the same time, contemporaneously, designate them as employees to whom the terms of cl 18.5(a)(i) of the Agreement also apply. They can be working one or the other working hours arrangement, but not both at the same time.
- 24 I declare accordingly.

2019 WAIRC 00150

INTERPRETATION OF CLAUSE 18.5 AND ASSOCIATED CLAUSES OF PUBLIC SERVICE AND GOVERNMENT
OFFICERS CSA GENERAL AGREEMENT 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

COMMISSIONER, WESTERN AUSTRALIA POLICE DEPARTMENT

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER

DATE MONDAY, 25 MARCH 2019

FILE NO. P 1 OF 2018

CITATION NO. 2019 WAIRC 00150

Result	Declaration issued
Representation	
Applicant	Ms A Wallish
Respondent	Ms D Southcott and with her Mr A Chapple

Declaration

HAVING heard Ms A Wallish on behalf of the applicant and Ms D Southcott and with her Mr A Chapple on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby declares –

THAT on their true interpretation clauses 18.1 to 18.5 and 20 of the *Public Service and General Officers CSA General Agreement 2017* and clause 21 of the *Public Service Award 1992* have the following meaning in accordance with the questions posed for determination as follows:

1. **Question 1:** When reading clause 18.5 together with clause 20 of the General Agreement and clause 21 of the Award can an Employee be deemed a shift worker when there is no roster? **Answer: No**
2. **Question 2:** When reading clause 18.5 together with clause 20 of the General Agreement and clause 21 of the Award can an employee be deemed a shift worker without working prescribed shifts which attract a shift allowance? **Answer: Yes, but only if the employee agrees in writing**
3. **Question 3:** By virtue of clause 18.5, can an Employee be deemed both a shift worker and a day worker working prescribed hours concurrently? **Answer: No**
4. **Question 4:** If an Employer wishes to vary an Employee’s prescribed hours do they need to provide notification of change and consultation with Employees as per clause 49.4 of the General Agreement? **Answer: No**
5. **Question 5:** Can an Employer provide a one-off letter to Employees varying their prescribed hours to make provision for pars (i), (ii) and (iii) of subclause 18.5 (a) of the *General Agreement* at the Employer’s convenience and does providing a one-off letter of this nature eliminate the requirement to give Employees one months’ notice for any future changes to prescribed hours? **Answer: No**

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

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2019 WAIRC 00138

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2019 WAIRC 00138
CORAM : INDUSTRIAL MAGISTRATE M. FLYNN
HEARD : WEDNESDAY, 30 JANUARY 2019
DELIVERED : WEDNESDAY, 6 FEBRUARY 2019
FILE NO. : M 120 OF 2018
BETWEEN : NAVDEEP KAUR GILL

CLAIMANT

AND

DALCHE ENTERPRISES PTY LTD (ACN: 618909041)

RESPONDENT

Legislation : *Fair Work Act 2009* (Cth)
Migration Act 1958 (Cth)

Case(s) referred to in reasons : *Miller v Miller* (2011) 242 CLR 446
Williamson v Bumford (2016) WAIRC 190
Stagnitta v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 886
Wright v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 887
Hussein v Secretary of the Department of Immigration & Multicultural Affairs (No 2) [2006] FCA 1263
Fair Work Ombudsman v Bosen Pty Ltd & Anors (unreported)
Fair Work Ombudsman v Shafi Investments Pty Ltd [2012] FMCA 1150
Gnych v Polish Club Limited [2015] HCA 23
Williamson -v- Richard and Joanne Bumford, Balayage Hair Studio [2016] WAIRComm 186
Ghimire v Karriview Management Pty Ltd and Sharma v Karriview Management Pty Ltd [2018] FCCA 2157
Tran v Hoang Trang Family Trust and Phi and Mai Family Trust Trading as Lido Restaurant [2018] WAIRComm 85

Result : Judgment for the claimant

Representation:

Claimant : Ms N. Gill (in person)
Respondent : Mr D. Cheema (director)

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by his Honour)

Introduction and Summary

- 1 'Narrogin Curry Palace' opened for business on 30 August 2017 with Ms Gill working in the business as the cook. Dalche Enterprises Pty Ltd (the Company) was the tenant of the premises from which the business operated and contributed some capital towards the commencement of the business. The Company also nominated itself as the employer of Ms Gill on an application to the Department of Immigration and Border Protection (DIBP), seeking a visa for Ms Gill pursuant to the Regional Sponsored Migration Scheme (the Regional Visa Application). Included with the Regional Visa Application was a document entitled, 'Employment Contract' (the Employment Contract Document or ECD). The ECD commenced by stating:

This document outlines the terms of contract of employment proposed by Mr Daljeet Cheema [and] Navdeep Gill [for the position of] Full Time Cook [with a commencement date of] 30 August 2017 [for] at least 2 years from the date of Visa Grant.

- 2 Mr Daljeet Cheema is the sole director of the Company. The content of the ECD resembles an unremarkable written contract of employment including terms on hours, penalty rates, remuneration (of \$47,965 per annum) leave and termination. The ECD ends by stating, 'I accept the offer of employment and agree to the terms and conditions as stated in this contract'. The ECD was signed by Mr Daljeet Cheema and Navdeep Gill on 16 August 2017 (albeit, inexplicably, Mr Daljeet Cheema signed

adjacent to 'Employee' and Ms Gill adjacent to 'Employer'). Narrogin Curry Palace ceased trading and Ms Gill ceased working on 23 October 2017.

- 3 Ms Gill alleges that the ECD accurately records the terms of a contract of employment between herself and the Company and that, in breach of that contract, the Company made *no* salary payments to her notwithstanding her work in the Narrogin Curry Palace. If proven, the breach would be a breach of an obligation imposed by the *Fair Work Act 2009* (Cth) (FW Act) (s 323) which obligation is also a 'safety net contractual entitlement' under the FW Act (s 139(1)).
- 4 Ms Gill also alleges that the Company failed to give the minimum required period of notice of termination of employment required by the FW Act (s 117) and made no payments on account of accrued annual leave as required by the FW Act (s 90). Ms Gill seeks orders for amounts that the Company was required to pay because of a safety net contractual entitlement (\$15,019.03 unpaid salary) or because of the FW Act (\$922.26 in lieu of notice of termination and \$622.52 in accrued annual leave.) If Ms Gill's allegations are proven, the Court has jurisdiction to make the orders that she seeks in these small claim proceedings: FW Act, s 548(1A).¹
- 5 The Company's response to Ms Gill's claim is twofold.
- 6 First, the Company disputes that the ECD accurately reflects the whole of the contractual arrangements between the parties. The Company alleges that the ECD was created pursuant to an oral agreement made in the period December 2016 – April 2017 between Mr Baljeet Cheema, on behalf of the Company, and Ms Gill. Under the oral agreement:
 - the Company promised to take the steps necessary to assist Ms Gill to obtain a visa pursuant to the Regional Visa Application including leasing of premises for the business and making application to the DIBP;
 - Ms Gill promised to assume responsibility for running the business and to meet *all* the expenses of the business;
 - after a reasonable time, the Company would sell the business to Ms Gill.
- 7 If the oral agreement is proven, the Company had no obligation make salary payments adverted to in the ECD because any work being done by Ms Gill in the Narrogin Curry Palace was *not* being done as employee of the Company. The effect of the agreement alleged by the Company is that, as a matter of law, any work done by Ms Gill was being done as a party to a joint venture between Ms Gill and the Company or as an independent contractor to the Company. Either way, the effect of the Company's case is that Ms Gill is not a national system employee and her claim under the FW Act must fail for want of jurisdiction (s 5, s 13).
- 8 I am satisfied that Ms Gill did engage in the hours of work as alleged in her originating claim. In support of this finding, I rely upon the uncontradicted evidence of Ms Gill and Mr Santveer Thind describing the work performed by Ms Gill and the documents adduced in evidence consistent with the Narrogin Curry Palace trading over the relevant period.
- 9 **The issue for me to determine is whether the Ms Gill has proven, on the balance of probabilities, that she was an employee of the Company on terms contained in the Employment Contract Document.**
- 10 For oral reasons to be delivered by me at the time of publication of this written summary², I have concluded that Ms Gill was an employee of the Company on terms contained in the ECD subject to the application of the doctrine of rectification to record the Company as Ms Gill's employer in place of 'Daljeet Cheema'.
- 11 Secondly, the Company observes that 'a contract whose making or performance is illegal will not be enforced': *Miller v Miller* (2011) 242 CLR 446 [24], quoted in *Williamson v Bumford* (2016) WAIRC 190. The Company alleges that work done by Ms Gill, a non-citizen, between August - October 2017 in the Narrogin Curry Palace contravened the conditions of her visa. The work was said to be an instance of the performance of a contract that was made illegal. It is an offence under the *Migration Act 1958* (Cth) (Migration Act) for a non-citizen to contravene visa conditions that prohibit or restrict the visa holder from working (s 235). It is also an offence for an employer to allow a non-citizen to contravene the same visa conditions (s 245AC). The Company argues that Ms Gill's claim to unpaid salary based on a contract of employment for work that is a contravention of a visa condition is unenforceable. The Company also argues that the statutory entitlement of employees to a minimum required period of notice of termination of employment (s 117) and to payments on account of accrued annual leave (s 90) provided by the FW Act is *qualified* as a result of the creation of the offence under the Migration Act for non-citizens to contravene visa conditions that prohibit or restrict the visa holder from working.

Two issues arise for my determination.

- 12 **First, whether the Company has proven, on the balance of probabilities, that Ms Gill's claim includes a claim for work done when she contravened a condition of her visa by working in the period August-October 2017?**
- 13 For oral reasons to be delivered by me at the time of publication of this written summary, I have concluded that insofar as Ms Gill's claim is based upon working more than 40 hours per fortnight for the period to 30 September 2017, it is a claim done for work that was in breach of her Student (Temporary) Visa conditions. The Company knew of and allowed Ms Gill to engage in this breach of her visa conditions. I have also concluded that insofar as her claim is based upon work after 30 September 2017, Ms Gill's Bridging A (Subclass 010) Visa was *not* subject to any conditions that limited her right to work for the Company.
- 14 **Secondly, I must determine the effect upon an (otherwise good) claim under the FW Act where proof of the claim involves proof of conduct which may involve offences by Ms Gill under the Migration Act (contravening a visa condition) and the Company (allowing work by a person in breach of a visa condition).**
- 15 For oral reasons to be delivered by me at the time of publication of this written summary, I have concluded that, properly construed, the Migration Act, does *not* prohibit her claim insofar as it is based upon her contract of employment with the Company or preclude her claim under the FW Act.³

M. FLYNN

INDUSTRIAL MAGISTRATE

¹This court has jurisdiction in a small claim proceeding to make orders for a claim based upon a contravention of section 323 of the FW Act where, as in Ms Gill's claim for salary in this case, the claim concerns a 'safety net contractual entitlement', see: *Stagnitta v Bechtel Construction (Australia) Pty Ltd* [2018] WAIRC 886; *Wright v Bechtel Construction (Australia) Pty Ltd* [2018] WAIRC 887.

²A transcript of the oral reasons, once completed, will be available to the parties.

³When delivering those reasons, it will be convenient to use the following terminology:

'Hussein No 2' is *Hussein v Secretary of the Department of Immigration & Multicultural Affairs (No 2)* [2006] FCA 1263; 155 FCR 304; 92 ALD 89; (2006) 157 IR 405

'Bosen's case' is *Fair Work Ombudsman v Bosen Pty Ltd & Anors* at 33 (unreported, Magistrates Court of Victoria, Industrial Division, 21 April 2011, Magistrate Hawkins)

'Gynch's case' is *Gnych v Polish Club Limited* [2015] HCA 23 (17 June 2015)

'Shafi Investments case' is *Fair Work Ombudsman v Shafi Investments Pty Ltd* [2012] FMCA 1150

'Balayage Hair Studio case' is *Williamson -v- Richard and Joanne Bumford, Balayage Hair Studio* [2016] WAIRComm 186 (5 April 2016)

'Ghimire's case' is *Ghimire v Karriview Management Pty Ltd and Sharma v Karriview Management Pty Ltd* [2018] FCCA 2157 (16 August 2018)

'Melbourne Uni Law Review Article on 7-Eleven': Berg, Laurie; Farbenblum, Bassina --- 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wages Repayment Program' [2018] MelbULawRw 3; (2018) 41(3) Melbourne University Law Review 1035

'Lido Restaurant case': *Tran v Hoang Trang Family Trust and Phi and Mai Family Trust Trading as Lido Restaurant* [2018] WAIRComm 85.

2019 WAIRC 00139

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2019 WAIRC 00139
CORAM : INDUSTRIAL MAGISTRATE M. FLYNN
HEARD : WEDNESDAY, 30 JANUARY 2019
DELIVERED : WEDNESDAY, 6 FEBRUARY 2019
FILE NO. : M 121 OF 2018
BETWEEN : SANTVEER SINGH THIND

CLAIMANT

AND

DALCHE ENTERPRISES PTY LTD (ACN: 618909041)

RESPONDENT

Legislation : *Fair Work Act 2009* (Cth)
Instrument : *Restaurant Industry Award 2010* [MA000119]
Result : Claim dismissed
Representation:
 Claimant : Mr S. Thind (in person)
 Respondent : Mr D. Cheema (director)

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by his Honour)

Introduction and Summary

1 Mr Thind is Ms Navdeep Gill's (M 120/2018) husband. He alleges that, before the opening of the 'Narrogin Curry Palace', he had a conversation with Mr Daljeet Cheema in which Mr Thind told Mr Daljeet Cheema that he was considering whether to seek employment in Narrogin (where opportunities were limited) or in Perth. Mr Daljeet Cheema responded by offering (on behalf of Dalche Enterprises Pty Ltd (the Company)) to employ Mr Thind to assist Ms Gill in operating the Narrogin Curry Palace. Mr Thind accepted the offer of employment.

- 2 The Company disputes the terms of the conversation as alleged by Mr Thind. Mr Daljeet Cheema denies that he ever made an oral offer to employ Mr Thind. Mr Daljeet Cheema states that any work done by Mr Thind in the business of Narrogin Curry Palace was done on the initiative of Mr Thind himself or of Ms Gill; without the express or implied consent or agreement of the Company.
- 3 If Mr Thind's allegation of his contract of employment with the Company is proven, the work he described would be subject to the provisions of the *Restaurant Industry Award 2010* (MA000119) (the Modern Award) and he would be entitled to a minimum wage on the basis of a classification as a 'Level 2 Food and Beverage Attendant'.¹
- 4 Mr Thind alleges that, in breach of the Modern Award, the Company made no wage payments to him. Mr Thind also alleges that the Company failed to give the minimum required period of notice of termination of employment required by the *Fair Work Act 2009* (Cth) (FW Act) (s 117) and made no payments on account of accrued annual leave as required by the FW Act (s 90). Mr Thind seeks orders under the FW Act (s 548(1A)) for amounts that the Company was required to pay because of the Modern Award, that is, a 'fair work instrument' (\$11,828.20 unpaid salary) and because of the FW Act (\$742.14 in lieu of notice of termination and \$500.94 in accrued annual leave). If Mr Thind's allegations are proven, the court has jurisdiction to make the orders that he seeks in these small claim proceedings: FW Act, s 548(1A).
- 5 **The issue for me to determine is whether the Mr Thind has proven, on the balance of probabilities, that a contract of employment was made between himself and the Company.**
- 6 For oral reasons to be delivered by me at the time of publication of this written summary, I have concluded that I am *not* satisfied that there was a contract of employment between Mr Thind and the Company.

M. FLYNN

INDUSTRIAL MAGISTRATE

¹ The Modern award would 'cover' and 'apply' to the Company and Mr Thind: FW Act, s 47(1). Clause 4 of the Modern Award provides that the award *covers* employers in the restaurant industry and their employees in the classifications listed in Schedule B. I rely upon the uncontradicted evidence of Ms Gill and Mr Thind describing the operation of Narrogin Curry Palace which is consistent with it being characterised as a restaurant and inconsistent with it being characterised as one of the industries in cl 4.8 of the Modern Award (retail, fast food, etc.). I also rely upon the uncontradicted evidence of Ms Gill and Mr Thind describing the work performed by Mr Thind and the evidence of Mr Thind as to his experience before in previous employment.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2019 WAIRC 00171

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00171
CORAM : COMMISSIONER T B WALKINGTON
HEARD : WEDNESDAY, 13 MARCH 2019
DELIVERED : FRIDAY, 29 MARCH 2019
FILE NO. : U 1 OF 2019
BETWEEN : JOHN GEOFFREY BOURKE

Applicant

AND

RICHARD EDMONDS TRADING AS PERTH PREMIER TRANSFERS AND PERTH PLATINUM TOUR

ABN 11 820 446 077

Respondent

CatchWords : Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal claim - Whether Commission has jurisdiction - Trading activities of respondent considered - Commission satisfied respondent is a trading corporation - Application dismissed

Legislation : *Industrial Relations Act 1979* (WA); s 27(1), s 29(1)(b)(i), s 33(3); *Fair Work Act 2009* (WA); s 12, s 13, s 14(1)(a), s 26

Result : *Application Dismissed*

Representation:

Counsel:

Applicant : In person

Respondent : In person by written submissions

Cases referred to in reasons:

Aboriginal Legal Service of Western Australia Incorporated v Mark James Lawrence (No 2) (2008) 89 WAIG 243; [2008] WASCA 254

Krysti Guest v Kimberley Land Council (2009) WAIRC 00668

Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

Case also cited:

Bridge Shipping Pty Ltd v Grand Shipping SA [1991] 173 CLR 231

Reasons for Decision

1 This application was lodged on 31 December 2018 by Mr John Bourke (**the Applicant**) under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (**the Act**). Mr Bourke claims that he was unfairly dismissed on 30 November 2018 by Mr Richard Edmonds, trading as Perth Premier Transfers and Perth Platinum Tours (**the Respondent**).

Name of the Respondent

2 It became apparent during the proceedings that the Respondent has been incorrectly named in this application. Given the Western Australian Industrial Relations Commission's (**the Commission**) powers under s 27(1) of the Act and as it is appropriate for the Respondent to be correctly named, I will issue an order that Richard Edmonds trading as Perth Premier Transfers and Perth Platinum Tours be deleted as the named Respondent in this application and be replaced with Richard Edmonds Enterprises Pty Ltd atf Edmonds Family Trust; *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375, 1377 - 1378; referring to *Bridge Shipping Pty Ltd v Grand Shipping SA* [1991] 173 CLR 231 (Brennan, Deane, Toohey and McHugh JJ).

3 The Respondent claims that the Commission cannot deal with this application as it is a trading corporation and therefore subject to the *Fair Work Act 2009* (WA) (**the FW Act**). As a question of the Commission's jurisdiction has been raised, the Commission is obliged to satisfy itself that it has the jurisdiction to enquire into and deal with Mr Bourke's claim.

4 The issue of the Commission's power to deal with this application was dealt with by written submission and a for mention hearing.

Is the Respondent a trading corporation?

5 Section 14(1)(a) of the FW Act defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual. Section 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines constitutional corporations as corporations which are trading or financial corporations formed within the limits of the Commonwealth. Section 26 of the FW Act states that it applies to the exclusion of all state or territory industrial laws that would otherwise apply to a national system employee or employer, including the Act. If the Respondent is a trading corporation the jurisdiction of the Commission to deal with the Applicant's unfair dismissal claim is excluded.

6 The issues to be determined in this matter, when deciding whether the Respondent is a trading corporation are: (1) whether the Respondent is incorporated; (2) the character of the activities carried on by the Respondent at the relevant time; and (3) whether the Respondent was engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation. The matter of jurisdiction was listed for hearing to provide an opportunity for the parties to be heard on this issue and both parties, as a part of putting their cases, gave evidence by way of written submissions.

Consideration

7 The Applicant submitted that he initially contacted the Fair Work Ombudsman (**FWO**) around 15 December 2018 concerning entitlements to payment for work undertaken. The Applicant stated that he was advised by FWO in a subsequent phone call on approximately 20 December 2019 that his employer was a 'sole trader', that the FWO did not have jurisdiction, and that he ought to contact WAGELINE. In turn, WAGELINE referred him to this Commission. Based on the statements of officers of FWO Mr Bourke submitted the Respondent's ABN record was altered or updated from a 'sole trader' to that of a Pty Ltd acting as Trustee sometime following his contact with the FWO.

8 The Applicant submitted a pay advice for the period 1 August 2018 to 31 August 2018 that states the employer is Perth Premier Transfers/Perth Platinum Tours A.B.N. 11 820 446 077.

9 On 29 January 2019 the Respondent submitted several documents including a letter dated 29 January 2019 from the Edmonds Family Trust Accountant stating that the Edmonds Family Trust was established by way of deed on 24 April 2012 initially with two individuals as trustees. The letter further stated that on 26 April 2012 the company, Richard Edmonds Enterprises Pty Ltd, was registered and that the sole purpose of the company was to act as trustee for the Edmonds Family Trust. The Accountant wrote that the documentation executing a change of trustees could not be located at that stage and that 'Our client is taking steps to formally document the above which will include a clause formally changing the trustee' and 'In the meantime it is submitted that in all the circumstances it should be accepted that the proper and rightful trustee of the trust is Richard Edmonds Enterprises Pty Ltd'. A reasonable inference of the contents of this correspondence is that there is an intention to change trustees and a change of trustees is yet to occur.

10 On 11 February 2019 the Respondent subsequently filed several documents including the Trust Deed for the Edmonds Family Trust and subsequent Deed of Retirement and Appointment of Trustee by which the two individuals retired as Trustees and appointed Richard Edmonds Enterprises Pty Ltd as Trustee on 1 May 2012.

11 The Respondent submitted a pay advice for the period 1 October 2018 to 31 October 2018 that states the employer is Richard Edmonds Enterprises Pty Ltd ATF Edmonds Family Trust, T/A Perth Premier Transfers and Perth Platinum Tours A.B.N. 11 820 446 077.

- 12 The Respondent was granted leave, pursuant to s 33(3) of the Act to provide evidence relating to the profits or financial position of the Respondent which would not be disclosed, except to the Commission. On 21 February 2019 the Respondent filed an affidavit by its accountant in relation to its trading activities.
- 13 A business or trading name is not a separate legal entity and cannot be an employer. As such the reference of the ABN of the business names of the trust on the pay slips is not relevant for establishing the employer in this matter.
- 14 A trust is also not a separate legal entity: Dal Pont G E, *Equity and Trusts in Australia* (6th ed, 2015) 503 - 504. It is the trustee that employs persons on behalf of the trust. If the trustee is a company which engages in significant trading activities of a commercial nature the employer will be a constitutional corporation. However, if the trustee is an individual or a group of individuals then the employment relationship may well be regulated by this Commission.
- 15 Whether a company or a corporation is a trading corporation is essentially a matter of fact *Aboriginal Legal Service of Western Australia Incorporated v. Mark James Lawrence (No 2)* (2008) 89 WAIG 243; [2008] WASCA 254; *Krysti Guest v Kimberley Land Council* (2009) WAIRC 00668, [70] – [71] (Ritter AP).
- 16 The material submitted by the Respondent establishes that the employer of the Applicant is the company, Richard Edmonds Enterprises Pty Ltd. This company engages in significant and substantial trading activities of commercial nature and its primary focus is to trade with a view to making a profit. The Respondent's core activities include chauffeur services for individuals and businesses, airport transfers, tours and transportation for special events.

Conclusions

- 17 I am satisfied and I find that the Applicant's employer is an incorporated entity and I find that its main purpose is to trade with the aim of generating a profit.
- 18 In the circumstances I find that the Respondent is a trading corporation and the Applicant was therefore an employee of a national system employer employed pursuant to the FW Act. Consequently, the Commission does not have jurisdiction to deal with the Applicant's claim for unfair dismissal.
- 19 An order will issue dismissing this application for want of jurisdiction.

2019 WAIRC 00169

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JOHN GEOFFREY BOURKE

APPLICANT

-v-

RICHARD EDMONDS TRADING AS PERTH PREMIER TRANSFERS AND PERTH
PLATINUM TOUR
ABN 11 820 446 077

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 29 MARCH 2019
FILE NO/S U 1 OF 2019
CITATION NO. 2019 WAIRC 00169

Result Application Dismissed
Representation
Applicant In person
Respondent In person, on the papers

Order

HAVING heard the applicant on his own behalf and having heard the respondent on the papers, the Commission, pursuant to powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders—

1. THAT the name of the respondent be amended to Richard Edmonds Enterprises Pty Ltd atf Edmonds Family Trust; and
2. THAT the application be and is hereby dismissed for want of jurisdiction.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2019 WAIRC 00163

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WEIQIANG LU **APPLICANT**

-v- **RESPONDENT**

HAPPY UNION RESTAURANT

CORAM SENIOR COMMISSIONER S J KENNER

DATE THURSDAY, 28 MARCH 2019

FILE NO/S B 45 OF 2018

CITATION NO. 2019 WAIRC 00163

Result Order issued

Representation

Applicant Ms M Arrowsmith of counsel

Respondent Dr R Cunningham of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Mandi Ezard	Mr Zane Charles Norman Trewin Norman & Co.	U 140/2018	Commissioner T Emmanuel	Discontinued
Peter Baird	Terry Etherton trading as Tema Services Pty Ltd	U 8/2019	Commissioner T Emmanuel	Discontinued
Peter Baird	Terry Etherton trading as Tema Services Pty Ltd	B 8/2019	Commissioner T Emmanuel	Discontinued
Shane Harley O'Reilly	Australian Workers' Union, West Australian Branch (ABN 23 613 523 164)	U 130/2018	Commissioner T Emmanuel	Discontinued
Shane Harley O'Reilly	Australian Workers' Union, West Australian Branch (ABN 23 613 523 164)	B 130/2018	Commissioner T Emmanuel	Contractual entitlements

CONFERENCES—Matters referred—

2019 WAIRC 00140

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00140

CORAM : COMMISSIONER D J MATTHEWS

HEARD : TUESDAY, 19 FEBRUARY 2019

DELIVERED : THURSDAY, 21 MARCH 2019

FILE NO. : CR 6 OF 2018

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

Applicant

AND

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

Respondent

CatchWords	:	Applicant's member alleges unfair disciplinary process - Lack of particulars - Use of "propensity evidence" - Allegation of collusion - Member's physical limitations - Inconsistencies in evidence relied upon - Failure to obtain all relevant evidence - Criticisms of process not made out - Disciplinary process fair - Application dismissed
Legislation	:	<i>Evidence Act 1906</i> section 31A
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	Mr J Theodorsen as agent and with him Ms H Olivieri
Respondent	:	Ms J Vincent of counsel and with her Mr M Staples
Solicitors:		
Respondent	:	State Solicitors' Office

Case referred to in reasons:

Shane Jamieson v The Director General, Department of Education (2018) 98 WAIG 235

Reasons for Decision

- 1 The applicant says the process conducted by the respondent against its member which resulted in its member being penalised by the respondent was unfair because:
 - (1) allegation one was not properly particularised, in that the date the misconduct was alleged to have occurred was not given with sufficient precision;
 - (2) alleged conduct was inappropriately cast by the investigator as establishing a "propensity" on the part of the applicant's member to engage in other alleged conduct;
 - (3) the respondent failed to give any, or any proper, weight to a contention that witnesses colluded against the applicant's member;
 - (4) the respondent failed to give any, or any proper, weight to evidence of the applicant's member's physical abilities and limitations;
 - (5) the respondent failed to assess, or properly assess, and act upon inconsistencies in the evidence of witnesses;
 - (6) the respondent failed to obtain evidence from certain named persons; and
 - (7) the respondent failed to obtain further and better evidence from certain named persons.
- 2 In dismissing the application I will deal with each of the grounds said to impugn the disciplinary process. Let me do so, however, against the background of a finding that the process was, on the whole, amply thorough, professional and fair.
- 3 The process had the following notable features.
- 4 It was commenced by a letter which put the allegations to the applicant's member in writing with specific details being given of the alleged wrongdoing. The letter included reference to the relevant statutory material. The letter invited the applicant's member to "provide a written or personal submission" in relation to the allegations. The letter included a link to a document entitled "*A Guide to the Discipline Process – Public Sector Management Act 1994*".
- 5 A thorough investigation into the allegations then followed, conducted by an experienced investigator within a directorate of the respondent's organisation charged specifically with doing such work.
- 6 As part of that investigation almost twenty witnesses were spoken to and extensive documentation was obtained and examined.
- 7 The investigation led to the production of a twenty-three page report in which the evidence gathered was summarised and analysed.
- 8 Importantly, the applicant's member was given the opportunity to tell her side of the story as part of the investigation.
- 9 Importantly also, the investigator made no findings, nor purported to make any findings, although the report did contain recommendations for the respondent.
- 10 A copy of the investigation report was provided to the applicant's member for her comment, along with an indication of the respondent's provisional views on penalty, if she were to find misconduct.
- 11 The response of the applicant's member was carefully analysed by the investigator who produced a six page "table form" document entitled "*Analysis of Ms Pauline Floate's Written Response to the Proposed Findings*".
- 12 Everything of relevance went to the respondent, under cover of briefing notes, for her consideration and ultimate decision.
- 13 On the face of it this is a good process. It is to be remembered that employers do not have to conduct investigations into disciplinary matters that are the equivalent of investigations into breaches of the criminal law conducted by the police. The respondent conducts investigations that tend toward such a standard, possibly because of the gravity of the decisions the respondent makes based upon them, decisions that could have grave implications for the concerns of teachers, but I repeat that she is not obliged to conduct investigations similar to police investigations.
- 14 Of course, while the respondent clearly takes disciplinary processes very seriously, this does not mean that an unfair process may not be established in a given case.
- 15 In this case, however, I do not find merit in any of the criticisms of the process put forward.

- 16 I deal with each in turn.
- 17 In relation to (1), sufficient particulars were given, when the whole of the allegation is read, for the applicant's member to know what the respondent was alleging. The name of the student concerned, the location of the alleged wrongdoing, the time of the day and the nature of the wrongdoing were all included in the allegation. The lack of precision in the date did not, in all of the circumstances, make it in any way unfair for the applicant's member to be called upon to answer the allegation.
- 18 In relation to (2), the investigation report included, at paragraph 3.16, the following:
"The evidence provided by witnesses as to the conduct of Ms Floate in respect of allegation 2 should also be considered, as it demonstrates that Ms Floate has a propensity to grab the collar of a student when managing behaviour."
- The investigation report also includes, at paragraph 3.31:
"The evidence provided by witnesses as to the conduct of Ms Floate in respect to allegation 1 should also be considered, as it demonstrates that Ms Floate has a propensity to grab the collar of a student when managing behaviour."
- 19 The whole issue of what is sometimes referred to as "propensity evidence" is a minefield in the legal arena. In criminal matters the use of such evidence is regulated by section 31A *Evidence Act 1906* and many decisions at common law and upon that section and its equivalents elsewhere.
- 20 Of course, the disciplinary process here was not one into an offence but the matters of policy and logic that have driven regulation of the area in the criminal domain remain alive in any scenario in which "propensity evidence" rears its head, or is said to do so.
- 21 The way in which the report invokes "propensity evidence" here points up many of the problems with which the law has grappled over the years.
- 22 A mention of only a couple, in question form, may suffice to illustrate the point:
- (1) is the matter of "collar grabbing" really so remarkable and unique as to qualify it as a "similar fact" where it occurs more than once?; and
 - (2) how can unproven evidence of one incident be relied upon to prove another incident and, in this case, vice versa? That is, how can an allegation prove another allegation?
- 23 These issues of (1) getting to the bottom of whether the facts here were relevantly "similar" and (2) deciding whether this was an example of "boot strapping", in that one unproven allegation was being used to prove another, were not grappled with in the "*Analysis of Ms Pauline Floate's Written Response to the Proposed Findings*" after the applicant's member criticised the passages set out at [18] above.
- 24 Instead the document stated in relation to each allegation that "propensity evidence is not relied upon" and that the evidence is "merely supportive".
- 25 While I can understand what is being said, it is a hopeless position. In any matter, so called "propensity evidence" is either "in" or "out". Reliance upon it cannot be disavowed at the same time as it is said to "support" a conclusion.
- 26 The whole issue of whether evidence has a "propensity" to support a certain conclusion should have, in fairness, been avoided by the investigator as if it were the plague.
- 27 The issues of weighing the probative value of such evidence against its prejudicial effect, and exercising discretion as to its use, are ones which vex lawyers and courts and they should only be discussed by an investigator into a disciplinary matter, let alone invoked, after careful and considered legal advice has been obtained.
- 28 Nonetheless, here the effect of the paragraphs cannot, viewed objectively, be considered so great as to render the process unfair.
- 29 The issue of "propensity" is raised by the investigator in a section of the investigation report headed "Analysis" which comprises 17 paragraphs, in relation to allegation one, and 15 paragraphs, in relation to allegation two. It is clearly not a key issue in those analyses. The cases were in no way built upon what the investigator called "propensity evidence". The case on both allegations relied upon direct evidence and not propensity evidence. If the paperwork or any other evidence had suggested in any way that the respondent had relied upon the particulars of one unproven allegation to find another unproven allegation to be made out then this may have been a problem for the respondent. However, there is nothing to suggest this occurred and I find that where there is direct evidence of the wrongdoing, and reliance upon that direct evidence is clearly the preponderant theme of the investigation report and its analysis, it would be an overabundance of caution to strike the process out because of the offending paragraphs.
- 30 In relation to (3), the applicant's member raised, during the process, that 18 students had been interviewed and that "only 6 were able to recall anything and then with significant inconsistencies." The applicant's member went on to contend that "those 6 [names of five students were provided by the applicant's member] are all close friends who have clearly colluded."
- 31 The applicant's member provided no evidence to support the assertion that the students had colluded despite asserting that it was a "clear" case and offered no explanation for how students who had colluded could arrive at versions of the event which had "significant inconsistencies."
- 32 I am not necessarily critical of the applicant's member for not providing evidence to support an allegation of collusion, as it would be difficult for a teacher accused of wrongdoing to approach students to investigate such a belief, but I do note the lack of an explanation for why the case is "clear" and for how students may both collude effectively and give inconsistent versions. Either the collusion works against a person effectively or it does not. Here the applicant's member seems to want to have it both ways; to allege collusion and point to and rely upon inconsistencies.
- 33 The applicant's member, as part of the process, pointed the finger very clearly at one named student and says that he is a proven liar and, it seems, a ringleader of the collusion.

- 34 The investigation report to its credit directly confronts the applicant's member's allegations concerning collusion and the role of the named student in it.
- 35 I say "to its credit" because, to my mind, the idea that one young boy had led five others into a grand conspiracy against the applicant's member could have been dismissed out of hand as preposterous, and especially so given there was no evidence put forward to support it. However, the respondent, through her agents, actually dealt with this issue in a very mature and professional way.
- 36 Assuming that the respondent read and relied upon the relevant parts of the investigation report dealing with the allegations made by the applicant's member, her rejection of them cannot be impugned. As I say, if the respondent had simply rejected the proposition out of hand as being preposterous this could not have been impugned.
- 37 In relation to (4), the applicant's case here involves the setting up and knocking down of a straw man. The respondent never alleged the superhuman feats of strength the applicant's member says she is physically incapable of performing.
- 38 No sensible reading of the allegations has the applicant's member lifting and/or carrying children by their collars at all, let alone over a distance.
- 39 If the applicant's member truly believed that the allegations involved the carrying of children by their collars this is unfortunate, but it is not a mistake caused by the respondent or any infelicitous or inelegant writing by the respondent or her agents. I cannot believe that any reasonable person could possibly understand the allegations to contain such particulars.
- 40 In any event, if the applicant's member was physically incapable of performing such feats it is neither here nor there given no such feats, on any reasonable reading of the allegations, were alleged to have occurred.
- 41 In relation to (5), the applicant's written submissions refer me to pages two and three of its member's letter dated 8 November 2017, which I have read along with the written submissions and the transcript of the applicant's oral submissions.
- 42 I have paid close attention to the material relating to inconsistencies in evidence because such inconsistencies should be of interest to persons charged with coming to conclusions on the basis of that evidence.
- 43 In this case, I am asked to review the respondent's conclusions and I do so on the basis that the respondent came to her conclusions on the balance of probabilities but taking into account that the allegations were of a serious nature. That is to say no more than the respondent had to take the task seriously and to make sure that the evidence truly allowed her to come to the conclusions that, on the balance of probabilities, the allegations had been proven.
- 44 As I say, in discharge of such an obligation, inconsistencies between versions will obviously be of interest. However, the effect inconsistencies ultimately have on the decision making of the respondent cannot be 'codified' by a decision of the Western Australian Industrial Relations Commission. It is not for me to prescribe a certain approach to inconsistencies. Each case will be different. Presumably, however, the respondent would be looking to see whether the inconsistencies, where established, go to material matters and will always be mindful of whether inconsistencies, where established, actually undermine evidence and if so whose evidence and in what way.
- 45 The respondent may in some cases, as here, ultimately rely upon a body of evidence which comprises the recollections of more than one person of the same event. There may be inconsistencies within that body of evidence. Sometimes those inconsistencies will be such that a review may find that it was not safe for the respondent to rely upon that body of evidence. The inconsistencies may be on material matters or be too numerous or for some other reason make reliance upon the body of evidence unsafe and unfair.
- 46 Without making any attempt to codify the correct approach in inconsistencies, and in making that comment I eschew any attempt to raise my comments in *Shane Jamieson v The Director General, Department of Education* (2018) 98 WAIG 235 to the level of legislative comment on the correct approach to inconsistencies, I do not find the inconsistencies pointed to in the material I have referred to as making the respondent's ultimate decision unsafe or unfair.
- 47 In saying this, I would have been comforted if an explanation had been sought as to why one student [initials CW] had told a teacher on 17 February 2017 that she "did not witness the event" but later gave evidence about it and I would have also been comforted if an attempt had been made to explain why another student [initials AF] said something happened at the end of 2016 having previously said it happened at the beginning of 2016. However as I say, on the whole, and taking into account all of the evidence gathered and put before the respondent, it is not possible to conclude that her reliance on the body of evidence she relied upon was, because of the inconsistencies within it, unsafe or unfair.
- 48 In assessing whether they ought reasonably be considered to have this effect I take into account the age of the witnesses, the number of students who gave evidence having a consistent theme on allegations one and two and the lack of materiality in the inconsistencies.
- 49 I note, however, that every case will turn on its own facts and that no complete approach can be dictated by the Western Australian Industrial Relations Commission to the respondent or equivalent decision maker on the question of the use and effect of inconsistencies.
- 50 In relation to (6) and (7), these attacks upon the process conducted by the respondent were tested by the applicant calling the evidence it said ought have been obtained by the respondent and was not.
- 51 This was a slightly unusual way to deal with an allegation that a process was unfair for failure to obtain such material but in the end it proved a convenient and time efficient way to deal with the assertion.
- 52 The evidence that was led contributed almost nothing to the relevant body of evidence.
- 53 Ms Floate's evidence told us nothing that was not already known or, perhaps put more accurately in the present context, could not and did not add anything to that which Ms Floate had already had the opportunity to put before the respondent.

- 54 The evidence of Ms Browne-Harmer and Ms Marinovich may have been helpful in firming up a date for allegation one, but I have found the lack of precision with the date to be neither here nor there. Their evidence did not cover the entire period in allegation one. Even if it had, this would simply mean a particular required amendment, not that there was anything unfair about the process.
- 55 I do not know what the evidence of Mr Davey was intended to add to what was already in the papers that were before the respondent, and which could have been commented on by the applicant's member in submissions to the respondent. In fact, as far as I can tell, the applicant's member commented on the evidence at the bottom of page three of her letter of 8 November 2017.
- 56 The evidence of Ms Craigie was completely irrelevant.
- 57 If an assertion is to be made that the respondent failed to gather material evidence I would have, with the greatest of respect, hoped for more when the assertion was put to the test by allowing the party making it to call the evidence the respondent is being criticised for not having herself gathered.
- 58 Finally, on this point, the applicant submitted in oral closing submissions that on allegation two "12 students were not interviewed" because they said they didn't see anything and this was not satisfactory because "even if they only stated they didn't see anything, we then have a statement in front of the decision-maker from each student which assists in corroborating Ms Floate's account of events [and which also] assists in rebutting any sense of a propensity theory but also if any one of these students had been standing next to or close to Ms Floate or the complainants at the time that would have been a very powerful bit of evidence to have."
- 59 I reject the submission. Of course, it is not simply a numbers game, but I do find that a sufficient number of witnesses from the potential pool gave accounts such that the respondent had before her a credible body of evidence. I also find that a statement from a child witness that they "didn't see anything" does not necessarily, as the applicant asserts, "assist in corroborating Ms Floate's account of events". It may be accepted, I think without controversy, that, on the facts alleged in these cases, children may not have seen anything because they were simply not looking. Evidence to the effect that the subject children "must have seen it if it occurred" or "could not possibly not have seen it" was not given and given the circumstances in which the wrongdoing occurred, could not have been sensibly given.

2019 WAIRC 00141

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM** COMMISSIONER D J MATTHEWS**DATE** THURSDAY, 21 MARCH 2019**FILE NO/S** CR 6 OF 2018**CITATION NO.** 2019 WAIRC 00141**Result** Application dismissed**Representation****Applicant** Mr J Theodorsen as agent and with him Ms H Olivieri**Respondent** Ms J Vincent of counsel and with her Mr M Staples*Order*

HAVING heard from Mr J Theodorsen, as agent, and with him Ms H Olivieri for the applicant and Ms J Vincent, of counsel, and with her Mr M Staples for the respondent on Tuesday, 19 March 2019; and

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

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby order that the application be, and is hereby, dismissed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	Chief Executive, East Metropolitan Health Service	Emmanuel C	PSAC 28/2018	15/10/2018	Dispute re alleged unfair disciplinary process	Discontinued
United Voice	East Metropolitan Health Service	Emmanuel C	C 28/2018	14/09/2018	Dispute re reimbursement of union member's personal leave entitlements	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2019 WAIRC 00167

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RUSSELL HEALY

APPELLANT

-v-

DEPARTMENT OF JUSTICE

RESPONDENT**CORAM**PUBLIC SERVICE ARBITRATOR
COMMISSIONER D J MATTHEWS**DATE**

FRIDAY, 29 MARCH 2019

FILE NO

PSA 1 OF 2018

CITATION NO.

2019 WAIRC 00167

Result	Orders issued
Representation	
Appellant	In person
Respondent	Mr F Furey

Order

HAVING heard from the appellant in person and Mr F Furey for the respondent on Friday, 29 March 2019;

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

1. The respondent file written closing submissions by close of business Friday, 12 April 2019;
2. The appellant file written closing submissions by close of business Tuesday, 23 April 2019; and
3. The parties inform the Western Australian Industrial Relations Commission by close of business Wednesday, 24 April 2019 if they wish to make oral submissions.

(Sgd.) D J MATTHEWS,
Commissioner,
Public Service Arbitrator.

[L.S.]

2019 WAIRC 00161

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 20 DECEMBER 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETROS LAZOS

APPELLANT

-v-

DIRECTOR GENERAL

DEPARTMENT OF PREMIER AND CABINET

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD

COMMISSIONER D J MATTHEWS - CHAIRMAN

MR G BROWN - BOARD MEMBER

MR M JOZWICKI - BOARD MEMBER

DATE

TUESDAY, 26 MARCH 2019

FILE NO

PSAB 1 OF 2019

CITATION NO.

2019 WAIRC 00161

Result Appeal adjourned sine die**Representation****Appellant** Ms D Arntzen as agent**Respondent** Mr R Andretich of counsel*Order*

HAVING heard from Ms D Arntzen, as agent, for the appellant and Mr R Andretich, of counsel, for the respondent on Thursday, 14 March 2019 and by consent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that this matter be adjourned sine die.

(Sgd.) D J MATTHEWS,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2019 WAIRC 00166

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MYRON SAMS

APPLICANT

-v-

DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT**CORAM**

COMMISSIONER D J MATTHEWS

DATE

THURSDAY, 28 MARCH 2019

FILE NO/S

U 121 OF 2016

CITATION NO.

2019 WAIRC 00166

Result Orders issued**Representation****Applicant** Mr V Yogendran of counsel**Respondent** Mr J Carroll of counsel*Order*

HAVING heard from Mr V Yogendran, of counsel, for the applicant and Mr J Carroll, of counsel, for the respondent on Wednesday, 27 March 2019;

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

1. The hearing dates of Wednesday, 3 April 2019 and Thursday, 4 April 2019 be vacated; and
2. The parties complete discovery by Friday, 19 April 2019.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Cultural Centre SDA General Agreement 2019 AG 4/2019	04/11/2019	Library Board of Western Australia, Board of the Art Gallery of Western Australia, Trustees of the Board of the Western Australian Museum	Shop, Distributive and Allied Employees Association of Western Australia	Commissioner T Emmanuel	Agreement registered
Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2019 AG 8/2019	04/11/2019	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
Public Transport Authority/ARTBIU (TRANSWA) Industrial Agreement 2019 AG 9/2019	04/11/2019	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
VenuesWest General Agreement 2019 AG 6/2019	03/26/2019	WA Sports Centre Trust trading as VenuesWest	Media, Entertainment and Arts Alliance, United Voice WA	Commissioner D J Matthews	Agreement registered
WA Health System – Australian Nursing Federation – Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses – Industrial Agreement 2018 AG 7/2019	04/10/2019	Child and Adolescent Health Service, East Metropolitan Health Service, Health Support Services	The Australian Nursing Federation, Industrial Union of Workers Perth	Commissioner T Emmanuel	Agreement registered

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2019 WAIRC 00157

REFERRAL OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION : 2019 WAIRC 00157
CORAM : COMMISSIONER T B WALKINGTON
HEARD : THURSDAY, 28 FEBRUARY 2019
DELIVERED : TUESDAY, 26 MARCH 2019
FILE NO. : OSHT 1 OF 2019
BETWEEN : MR STEPHANE ARMET
 Applicant
 AND
 CFC CONSOLIDATED PTY LTD (CEINTURION)
 Respondent

CatchWords	:	Occupational Safety and Health – Preliminary issue – Jurisdiction – Refusal to work – Whether employee was an elected safety and health representative
Legislation	:	<i>Occupational Safety and Health Act 1984</i> (WA) s 3(1), s 24, s 24(1), s 25, s 25(1), s 27, s 26(1), s 26(2), s 26(2a), s 28, s 28(2), s 30(6), s 30A(4), s 31(11), s 34(1), s 35(3), s 35A, s 35C, s 35D(1), s 39G(1), s 39G(2), s 39G(3), s 51A(1), s 51G(1), s 61A, Part IV, Div 1; <i>Occupational Safety and Health Regulations 1996</i> (WA) reg 2.6; <i>Criminal Code Compilation Act 1913</i> (WA); <i>Industrial Relations Act 1979</i> (WA) s 26(1)(a), s 26(1)(b), s 29(1)(b)(i), s 29(1)(b)(ii), s 32A(1); <i>Occupational Health, Safety and Welfare Amendment Bill 1987</i> (WA) s 26, s 27, s 28; <i>Workers' Compensation and Injury Management Act 1981</i> (WA).
Result	:	Application Dismissed
Representation:		
Counsel:		
Applicant	:	In person
Respondent	:	Ms K Groves of counsel by written submissions
Solicitors:		
Respondent	:	Hall and Willcox

Case(s) referred to in reasons:

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129

Mills v Meeking (1990) 169 CLR 214

Reasons for Decision

- 1 Mr Stephane Armet was employed by CFC Consolidated Pty Ltd (Centurion) from 24 November 2014 to 14 September 2015.
- 2 On 18 January 2019 Mr Armet lodged a Notice of Referral to the Occupational Safety and Health Tribunal (**the Tribunal**) citing various sections of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**); *Occupational Safety and Health Regulations 1996* (WA) (**OSH Regulations**) and the *Criminal Code Compilation Act 1913* (WA).
- 3 Following a request from the Tribunal for clarification of his claim, Mr Armet submitted that his application was made pursuant to s 28 OSH Act 'Entitlements to Continue'.
- 4 The respondent submitted that the Notice of Referral did not identify which provisions of the OSH Act upon which the applicant had standing to refer the issues.
- 5 Mr Armet further submitted that his application was made pursuant to the *Industrial Relations Act 1979* (WA) (**IR Act**) s 26(1)(a), s 26(1)(b), s 29(1)(b)(i), s 29(1)(b)(ii) and s 32A(1).
- 6 This hearing was convened to determine whether the Tribunal has the necessary jurisdiction to hear and determine the matters Mr Armet wished to refer to the Tribunal.
- 7 Prior to the hearing Mr Armet submitted his application was made pursuant to s 28 'Entitlements to Continue' and s 35D(1) 'Remedies that Tribunal may grant' of the OSH Act.
- 8 Mr Armet seeks to recover an unspecified amount that he claims is the difference between his salary and average weekly overtime payments and the weekly worker's compensation payments he has already received as a result of accessing the Workers Compensation Scheme.

Issue to Be Determined

- 9 Does the Tribunal have jurisdiction to hear and determine the referral from Mr Armet under s 28 and s 35D(1) of the OSH Act?

Relevant Principles of Continued Entitlements

- 10 The Tribunal is established under Part VIB of the OSH Act.
- 11 The powers of the Tribunal to hear and determine a matter are contained in the particular provision of the OSH Act under which the matter is referred. The powers vary from section to section of the OSH Act.
- 12 The matters which may be referred to the Tribunal and which the Tribunal has the jurisdiction to hear and determine are set out in s 51G(1) of the of the OSH Act. Section 51G(1) of the OSH Act provides that the Industrial Relations Commission, known as the Occupational Safety and Health Tribunal when exercising jurisdiction under the OSH Act, has jurisdiction to hear and determine matters that may be referred for determination under sections 28(2), 30(6), 30A(4), 31(11), 34(1), 35(3), 35C, 39G(1), (2) and (3), 51A(1) and 61A.
- 13 Mr Armet claims that he is entitled to be paid in accordance with s 28(2) of the OSH Act which states:
 - 28. Entitlements to continue**
 - (1) An employee who refuses to work as mentioned in section 26(1) is entitled to the same pay and other benefits, if any, to which he or she would be entitled if the employee had continued to do his or her usual work.
 - (1a) Subsection (1) does not apply if —

- (a) the employee leaves the workplace without the authorisation of the employer as required under section 26(2a); or
 - (b) the employee refuses to do reasonable alternative work that the employee is given under section 27.
- (2) A dispute arising as to —
- (a) whether a person is entitled to any pay or benefit; or
 - (b) the pay or benefit to which a person is entitled,
- in accordance with subsection (1), may be referred by any party to the dispute to the Tribunal for determination.

14 Section 28 of the OSH Act concerns employees who refuse to work in accordance with s 26(1) of the OSH Act which states:

26. Refusal by employees to work in certain cases

- (1) Nothing in section 25 prevents an employee from refusing to work where he or she has reasonable grounds to believe that to continue to work would expose him or her or any other person to a risk of imminent and serious injury or imminent and serious harm to his or her health.
 - (1a) In determining whether an employee has reasonable grounds for the belief referred to in subsection (1) it is relevant to consider whether an inspector has attended the workplace upon being notified under section 25(1) of the risk and whether —
 - (a) the measures, if any, required by the inspector to be taken to remedy the matters giving rise to the risk have been taken; or
 - (b) the requirements, if any, of the inspector to remedy the matters giving rise to the risk have ceased to have effect; or
 - (c) the inspector has determined that no action is required to be taken under this Act.
 - (2) An employee who refuses to work as mentioned in subsection (1) shall forthwith notify his or her employer and, if there is a safety and health representative for the workplace concerned, such safety and health representative, and the matter shall be regarded as an issue to which section 24(1) applies.
 - (2a) An employee who refuses to work as mentioned in subsection (1) shall not leave the workplace concerned until the employee has notified the employer under subsection (2) and that employer has authorised the employee to leave that workplace.
 - (2b) Subsection (2a) does not apply if the employee has reasonable grounds to believe that to remain at the workplace concerned would expose the employee to a risk of imminent and serious injury or imminent and serious harm to his or her health.
 - (3) An employee who contravenes subsection (2) or (2a) commits an offence.
- 15 An employee who refuses to work must comply with the notification requirements in s 26(2) of the OSH Act. The employee is required to immediately notify their employer that they are refusing to work because they hold the belief that to undertake the work would expose them to a risk of imminent and serious injury or imminent and serious harm to their health.
- 16 The notification of refusal to work to the employer and safety and health representative (if there is one) then invokes the issue resolution process provided in s 24 OSH Act in accordance with an agreed procedure or reg 2.6 of the OSH Regulations:

24. Resolution of issues at workplace

- (1) Where an issue relating to occupational safety or health arises at a workplace the employer shall, in accordance with the relevant procedure, attempt to resolve the issue with —
 - (a) the safety and health representative; or
 - (b) the safety and health committee; or
 - (c) the employees,
 whichever is specified in the relevant procedure.
 - (2) For the purposes of subsection (1), the relevant procedure means the procedure agreed between the employer and the employees as applying in respect of the workplace concerned or, where no procedure is so agreed, the procedure prescribed for that purpose in the regulations.
 - (3) Where attempts to resolve an issue as mentioned in subsection (1) do not succeed and there is both a safety and health representative and a safety and health committee in respect of the workplace concerned, the safety and health representative shall refer the issue to the safety and health committee for it to attempt to resolve the issue.
 - (4) If a person contravenes subsection (1) or (3), the person commits an offence.
- 17 By these provisions the OSH Act sets out a scheme or process for resolving disputes that relate to occupational safety and health at the workplace. The process involves the employer attempting to resolve issues by utilising a procedure which the employer and the employees have agreed to apply to the workplace or in the absence of an agreed procedures, the scheme set out in reg 2.6 of the OSH Regulations.

18 Where the process fails to resolve the safety and health concerns and there is a risk of imminent and serious injury to, or imminent and serious harm to the health of any person, an inspector may be notified, pursuant to s 25 OSH Act, by the employer, a safety and health representative or, if there is no safety and health representative, an employee:

25. Inspector may be notified where issues unresolved

- (1) Where attempts to resolve an issue as mentioned in section 24 are unsuccessful, and where there is a risk of imminent and serious injury to, or imminent and serious harm to the health of any person, the employer, a safety and health representative or, if there is no safety and health representative, an employee may notify an inspector thereof.
- (2) An inspector, upon being notified under subsection (1), shall attend forthwith at the workplace and either —
 - (a) take such action under this Act as he or she considers appropriate; or
 - (b) determine that in the circumstances no action is required to be taken under this Act.

19 Taken together, these provisions establish a mandatory process for resolving health and safety issues at the workplace, which include circumstances in which a worker may cease work without loss of wages and entitlements.

20 When interpreting legislation, the OSH Act in this case, the focus is to be on ‘the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole...in its ordinary and natural sense’; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 162 (Higgins J). With the literal meanings checked against its purposive meaning a preference must be given to ‘a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act’; *Mills v Meeking* (1990) 169 CLR 214 at 235 (Dawson, J).

21 In the Second Reading Speech for the Occupational Health, Safety and Welfare Amendment Bill 1987 (WA) which resulted in the OSH Act, Mr Peter Dowding, Minister for Labour, Productivity and Employment indicated that sections 26, 27 and 28 of the Bill were designed to protect an employee’s common law right to a safe working environment in situations where there was an immediate and serious threat to health and safety; ‘[I]n addition, and only upon the adherence of strict procedures as detailed, the Bill will enable a health and safety representative to direct that work shall cease.’; Western Australia, *Parliamentary Debates, Legislative Assembly*, 9 April 1987, 547 (Mr Peter Dowding, Minister for Labour).

The Bill provides that where work is halted as a result of a direction from a health and safety representative or by the employee exercising his common law right the employer is able to assign the employees involved to reasonable alternative work with the same pay and benefits applying as if he or she had continued in their normal work; Western Australia, *Parliamentary Debates, Legislative Assembly*, 9 April 1987, 547 (Mr Peter Dowding, Minister for Labour).

22 The purpose of these provisions is to enable employees who believe that to undertake a task or remain in a location will be a serious risk to their health or risk of injury to remove themselves from the risk and engage in a process to remediate the risk. It is necessary for the employee wishing to enforce an entitlement to pay and benefits to demonstrate that they refused to work or remain at the workplace and notified the employer of their belief of the risk to their safety and health at that time.

Consideration of Continued Entitlements

23 The application was listed for mention to provide Mr Armet with an opportunity to show how the Tribunal has jurisdiction to deal with the matters to which he refers.

24 Mr Armet made submissions and gave oral evidence concerning two occasions during his work on which he experienced severe pain, on the first occasion to his back, and on the second occasion in his legs. He believes both occasions were a result of manual handling tasks undertaken at work. Mr Armet also claims that he contracted tinnitus during his employment.

25 Mr Armet’s evidence is that he reported the first occasion which occurred 18 March 2015 to an Occupational Safety Representative in his immediate work area.

26 In early September 2015 Mr Armet incurred a further injury.

27 Mr Armet accessed sick leave and annual leave for absences for treatment and recovery.

28 Mr Armet’s last day at work was 14 September 2015.

29 On 25 January 2016 Mr Armet contacted an officer from Worksafe.

30 There is no evidence that Mr Armet ‘refused to work’ on the grounds that he believed that to continue to work would expose him to a risk of imminent and serious injury as set out in s 26 of the OSH Act. Mr Armet’s evidence is that he incurred injuries, consulted a general practitioner and a specialist, took time off work for treatment and recovery utilising sick leave and annual leave and at some stage submitted a claim pursuant to the *Workers’ Compensation and Injury Management Act 1981* (WA).

31 Mr Armet submitted that he was required to use an electric Hyster pallet jack on 18 March 2015 and between 2 - 4 September 2015. Mr Armet states in his application that this equipment is not suitable for outdoor functions as required by the employer. Mr Armet did not provide any evidence that at any time he notified his employer that he believed using the Hyster pallet jacks would expose him to risk of injury and initiate the process of resolution of this safety issue. Mr Armet did not provide any evidence that he refused to work with this equipment on the occasions he was directed to use the jack.

32 Mr Armet stated that he was not provided with ear protection and therefore contracted tinnitus. Mr Armet did not provide any evidence that he requested ear protection and, if that had not been provided, refused to continue to work on the tasks requiring ear protection or remove himself from the location of the cause of the risk to his hearing.

33 Mr Armet did not provide evidence that he left the workplace because he believed to remain at the workplace would expose him to a risk of imminent and serious injury or imminent and serious harm to his health.

34 Mr Armet’s evidence is that he did contact an officer from Worksafe six months after the second occasion of an injury and some months after his last day of employment.

Discrimination Against Safety and Health Representatives in Relation to Employment

- 35 Mr Armet also makes a claim under s 35D(1) of the OSH Act and seeks payment of the difference between his workers compensation payments and his pay rate under his contract of employment and average weekly overtime from 15 September 2015 until the present day.
- 36 Section 35D(1) OSH Act provides the Tribunal the power to order that payment of adequate compensation for the loss of earnings be made to a claimant if the Tribunal is satisfied that an employer has contravened s 35A of the OSH Act.
- 37 Section 35A OSH Act is concerned with the treatment of persons who are safety and health representatives or persons who are performing or have performed any function as a safety and health representative:
- 35A. Discrimination against safety and health representative in relation to employment**
- (1) An employer or a prospective employer must not cause disadvantage to a person for the dominant or substantial reason that the person —
- (a) is or was a safety and health representative; or
- (b) is performing or has performed any function as a safety and health representative.
- (2) For the purposes of subsection (1) an employer causes disadvantage to a person if the employer —
- (a) dismisses the person from employment; or
- (b) demotes the person or fails to give the person a promotion that the person could reasonably have expected; or
- (c) detrimentally alters the person's employment position; or
- (d) detrimentally alters the person's pay or other terms and conditions of employment.
- 38 The role of safety and health representative is a position as defined in s 3(1) of the OSH Act. That is, to be a safety and health representative for the purposes of the Tribunal's jurisdiction a person is required to be elected in accordance with the scheme set out in Div 1 of Part IV of the OSH Act.
- 39 Mr Armet did not provide any evidence that he was at any time a safety and health representative duly elected as prescribed by the legislation. As such Mr Armet is not able to avail himself of the protections afforded health and safety representatives under the OSH Act.

Conclusion

- 40 The Tribunal is satisfied that Mr Armet's notice of application does not refer to the Tribunal a matter which is within its jurisdiction to hear and determine and accordingly an order will issue that the application be dismissed for want of jurisdiction.

2019 WAIRC 00159

REFERRAL OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES

MR ARMET STEPHANE

APPLICANT

-v-

CFC CONSOLIDATED PTY LTD (CEINTURION)

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON

DATE

TUESDAY, 26 MARCH 2019

FILE NO/S

OSHT 1 OF 2019

CITATION NO.

2019 WAIRC 00159

Result

Application Dismissed

Representation**Applicant**

IN PERSON

Respondent

MS K GROVES OF COUNSEL BY WRITTEN SUBMISSIONS

Order

- 1 HAVING heard the applicant on his own behalf the Occupational Safety and Health Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984* (WA) hereby orders –
- 2 THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2016 WAIRC 00136

DISPUTE RE ALLEGED BREACH OF CONTRACT
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

RAM HOLDINGS PTY LTD, MICHAEL ITALIANO

APPLICANT

-v-

KELAIR HOLDINGS PTY LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 10 MARCH 2016
FILE NO/S RFT 9 OF 2015
CITATION NO. 2016 WAIRC 00136

Result Order issued
Representation
Applicant Mr K Trainer as agent
Respondent Mr D Fletcher of counsel

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr D Fletcher of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the herein application be and is hereby adjourned sine die and the hearing dates of 14 March 2016 and 15 March 2016 be and are hereby vacated.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2017 WAIRC 00106

DISPUTE RE ALLEGED BREACH OF CONTRACT
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION : 2017 WAIRC 00106
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : MONDAY, 10 OCTOBER 2016, MONDAY, 27 FEBRUARY 2017, TUESDAY, 28 FEBRUARY 2017
DELIVERED : MONDAY, 27 FEBRUARY 2017
FILE NO. : RFT 9 OF 2015
BETWEEN : RAM HOLDINGS PTY LTD, MICHAEL ITALIANO
Applicant
AND
KELAIR HOLDINGS PTY LTD
Respondent

Catchwords : *Industrial Law (WA) - Road Freight Transport Industry Tribunal - Application for leave to intervene - Principles applied - Union has an indirect interest in the matter which constitutes a sufficient interest for the purposes of s 27(1)(k) of the Industrial Relations Act 1979 (WA) - Leave granted on a limited basis*

Legislation : *Industrial Relations Act 1979 (WA)*
Owner-Drivers (Contracts and Disputes) Act 2007 (WA)

Result : Leave to intervene granted

Representation:

Counsel:
 Applicant : Mr K Trainer as agent
 Respondent : Mr J Parkinson of counsel
 Intervenor : Mr J Clarke
 Solicitors:
 Respondent : K&L Gates

Case(s) referred to in reasons:

R v Ludeke; Ex parte Customs Officers' Association of Australia (1985) 155 CLR 513

Case(s) also cited:

J. Gairns and P. Dempsey v The Royal Australian Nursing Federation Industrial Union of Workers, Perth (1989) 69 WAIG 2343
Hospital Salaried Officers Association of Western Australia v Civil Service Association of Western Australia (Incorporated) (1996) 40 AILR 13-066
Inghams Enterprises and The Food Preservers' Union of Western Australia, Union of Workers and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers [1999] WAIRComm 131
Re Federated Miscellaneous Workers Union (WA Branch) (1993) 35 AILR 145
Re Media, Entertainment and Arts Alliance; Ex parte Arnel & Ors (1994) 119 ALR 193
Scolaro & Ors v Twentieth Superpace Nominees P/L ATF Byrns Smith Unit Trust T/a SCT Logistics [2015] WAIRC 00995
Shacam Transport Pty Ltd v Damien Cole Pty Ltd [2013] WAIRComm 278
Steve Burke Transport Pty Ltd v Toll Transport Pty Ltd T/As Toll IPEC [2016] WAIRComm 718
The Civil Service Association of Western Australia Incorporated v Commissioner of Police, Western Australia Police Service [2011] WAIRComm 164

*Reasons for Decision**Ex Tempore*

- 1 The Tribunal has before it an application by the Transport Workers' Union of Australia Western Australia Branch for leave to intervene under section 27(1)(k) of the Industrial Relations Act 1979 (WA) as adopted and applied in section 43(1)(c) of the Owner-Drivers (Contracts and Disputes) Act 2007 (WA). The Tribunal has considered the written submissions of the TWU as a proposed intervenor and also the opposition of the respondent. The Tribunal notes there is no opposition by the applicant. Having regard to the well settled principles discussed in *R v Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513 a decision of the High Court, the Tribunal is satisfied that the TWU has no direct interest in these proceedings. Secondly, the Tribunal is however satisfied that the TWU has an indirect interest in the matter which in my view in light of the matters raised by the Union in its written submissions, constitute a sufficient interest for the purposes of section 27(1)(k).
- 2 Accordingly, what the Tribunal will do is grant the TWU leave to intervene but that leave will be on a limited basis. The leave will be limited to submissions on the scope of s 40(a) of the OD Act only.

2017 WAIRC 00107

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

RAM HOLDINGS PTY LTD, MICHAEL ITALIANO

APPLICANT

-v-

KELAIR HOLDINGS PTY LTD

RESPONDENT**CORAM**

SENIOR COMMISSIONER S J KENNER

DATE

MONDAY, 27 FEBRUARY 2017

FILE NO/S

RFT 9 OF 2015

CITATION NO.

2017 WAIRC 00107

Result

Order issued

Representation**Applicant**

Mr K Trainer as agent

Respondent

Mr J Parkinson of counsel

Intervenor

Mr J Clarke on behalf of the Transport Workers' Union Western Australian Branch

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr J Parkinson of counsel on behalf of the respondent and Mr J Clarke on behalf of the Transport Workers' Union Western Australian Branch the Tribunal pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

1. THAT pursuant to section 27(1)(k) of the Industrial Relations Act 1979 as applied by section 43(1)(c) of the Owner-Drivers (Contracts and Disputes) Act 2007 the Transport Workers' Union Western Australian Branch be and is hereby granted leave to intervene in the herein matter.
2. THAT the grant of leave is limited to submissions on the scope of s 40(a) of the Owner-Drivers (Contracts and Disputes) Act 2007.
3. THAT the intervenor file and serve a written outline of submissions by 4pm Wednesday 1 March 2017.
4. THAT any written submissions in reply by the applicant and the respondent be filed and served by 4pm Friday 3 March 2017.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00114

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

RAM HOLDINGS PTY LTD, MICHAEL ITALIANO

APPLICANT

-v-

KELAIR HOLDINGS PTY LTD

RESPONDENT**CORAM**

SENIOR COMMISSIONER S J KENNER

DATE

FRIDAY, 3 MARCH 2017

FILE NO/S

RFT 9 OF 2015

CITATION NO.

2017 WAIRC 00114

Result

Order issued

Representation**Applicant**

Mr K Trainer as agent

Respondent

Mr J Parkinson of counsel

Intervenor

Mr J Clarke on behalf of the Transport Workers' Union Western Australian Branch

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr J Parkinson of counsel on behalf of the respondent and Mr J Clarke on behalf of the Transport Workers' Union Western Australian Branch the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT par 4 of the order issued on 27 February 2017 be and is hereby revoked.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00712

DISPUTE RE ALLEGED BREACH OF CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RAM HOLDINGS PTY LTD, MICHAEL ITALIANO

APPLICANTS

-v-

KELAIR HOLDINGS PTY LTD

RESPONDENT**CORAM**

SENIOR COMMISSIONER S J KENNER

DATE

MONDAY, 7 AUGUST 2017

FILE NO.

RFT 9 OF 2015

CITATION NO.

2017 WAIRC 00712

Result	Direction issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr J Parkinson of counsel

Direction

HAVING heard Mr K Trainer as agent on behalf of the applicants and Mr J Parkinson of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby directs –

THAT the applicant file and serve a witness statement in reply to the witness statement of Mr J Miniello dated 22 June 2017 by no later than Thursday, 17 August 2017. Copies of any documents referred to in the witness statement should be annexed.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.**2017 WAIRC 00715**

DISPUTE RE ALLEGED BREACH OF CONTRACT
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	:	2017 WAIRC 00715
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	MONDAY, 7 AUGUST 2017
DELIVERED	:	FRIDAY, 11 AUGUST 2017
FILE NO.	:	RFT 9 OF 2015
BETWEEN	:	RAM HOLDINGS PTY LTD, MICHAEL ITALIANO
		Applicant
		AND
		KELAIR HOLDINGS PTY LTD
		Respondent

Catchwords	:	<i>Industrial Law (WA) - Interim application for further and better discovery and production of documents - Whether documents are relevant to the issues to be determined by the Tribunal - Whether request is oppressive - Principles applied - Order issued</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA)</i> <i>Owner-Drivers (Contracts and Disputes) Act 2007 (WA)</i>
Result	:	Order issued
Representation:		
Counsel:		
Applicant	:	Mr K Trainer as agent
Respondent	:	Mr J Parkinson of counsel
Solicitors:		
Respondent	:	K&L Gates

Case(s) referred to in reasons:

Australian Gas Light Company v Australian Competition & Consumer Commission [2003] FCA
Dorajay Pty Ltd v Aristocrat Leisure Limited [2005] FCA 588
Hamilton v Oades [1989] HCA 21; (1989) 166 CLR 486 at 502
McIlwain v Ramsey Food Packaging Pty Ltd [2005] FCA 1233
Oceanic Sun Line Special Shipping Company Inc v Fay [1988] HCA 32; (1988) 165 CLR 197
Seven Network Limited v News Limited (No 5) [2005] FCA 510; (2005) 216 ALR 147

Case(s) also cited:

Griebart v Morris [1920] 1 KB 659

Hennessy v Wright (1888) 21 QBD 509

John Flower Diddams v Commonwealth Bank of Australia [1998] FCA 497

Reasons for Decision

- 1 The substantive claim in these proceedings is relisted for hearing before the Tribunal on 24 August 2017. The purpose of the relisting is to enable the parties to further address issues raised by the Tribunal at a For Mention hearing on 31 May 2017, following the conclusion of the parties' substantive cases. Those issues go to the use of guideline rates prepared by the Transport Workers Union of Australia, Western Australian Branch; the basis of the piece work rates established by Kelair Holdings Pty Ltd, and a preliminary analysis by the Tribunal of RAM Holdings Pty Ltd gross hourly income derived from total gross revenue and total hours of work as set out in the "Mercer Report" tended as exhibit A16.
- 2 In response to the issues raised by the Tribunal, Kelair has filed further written submissions regarding the issue of sustainable rates. These are supported by a witness statement of Mr Miniello, along with annexures.
- 3 Arising from this, RAM Holdings has made an application to the Tribunal for production of documents and seeks two orders. The first order is described as an order for the production of "source documents for the statement prepared by Mr Miniello and filed in the Tribunal". On the hearing of the application for production on 7 August 2017, RAM Holdings informed the Tribunal that it no longer pursues that order, given the annexures to Mr Miniello's witness statement and the undertakings given by counsel for Kelair, that all source documents have been provided to RAM Holdings.
- 4 As to the second order sought, RAM Holdings seeks the production within seven days, of run sheets for five other owner-drivers over various periods between 2011 to 2015 inclusive. It was submitted by RAM Holdings that the run sheets were necessary to enable it to test the assumptions contained in Mr Miniello's statement. This is particularly in relation to his assessment of RAM Holdings' working hours relative to that put before the Tribunal by RAM Holdings in its evidence, when compared with another owner- driver, Crestflow Pty Ltd.
- 5 Order 2 was resisted by Kelair. A number of submissions were made. Firstly, the submission was that the documents sought were not relevant to the issues to be determined by the Tribunal. Furthermore, any such request cannot be oppressive or amount to a fishing expedition. As to relevance, in reliance on *McIlwain v Ramsey Food Packaging Pty Ltd* [2005] FCA 1233 per Greenwood J at pars 25 and 35-37, the submission was that documents sought through production must have a legitimate forensic purpose. In this case, no such legitimate forensic purpose had been demonstrated: *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2005] FCA 588 at par 34. Secondly, Kelair submitted that to produce all of the run sheets for the five owner-drivers concerned over the number of years claimed, within seven days, would be manifestly burdensome, prejudicial, damaging and productive of serious and justifiable trouble and harassment for Kelair: *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 502; *Oceanic Sun Line Special Shipping Company Inc v Fay* [1988] HCA 32; (1988) 165 CLR 197; *Seven Network Limited v News Limited (No 5)* [2005] FCA 510; (2005) 216 ALR 147 at 12.
- 6 Kelair contended in this respect that to produce what could be potentially thousands of documents at such short notice, with questionable relevance, in circumstances where such a request could have been made some weeks ago, would be quite unjustified and unreasonable.
- 7 There was a further submission made by Kelair that in any event, the documents sought in relation to the proposed order 2, are commercial in confidence and are not necessary to support RAM Holdings' claim against Kelair that it was not paid a safe and sustainable rate. It was submitted that in the circumstances, it would be inappropriate to require the production of documents relating to the businesses of third parties of the kind in question, particularly when their relevance has not been clearly established: *Australian Gas Light Company v Australian Competition & Consumer Commission* [2003] FCA 1101 at 8.
- 8 For those reasons, Kelair submitted that the documents requested in relation to the proposed order 2 should not be ordered to be produced by the Tribunal.
- 9 From a consideration of Mr Miniello's witness statement and the supporting annexures, reference to a comparison with Crestflow's working hours' calculations, is for the purposes of verifying the methodology used by Mr Miniello to assess Ram Holdings' hours and income evidence. That is, Mr Miniello appears to have taken the example of Crestflow, to cross check and confirm his working hours and hourly revenue calculations as being reasonable, in respect of RAM Holdings.
- 10 The central issue in these proceedings is whether RAM Holdings was paid a safe and sustainable rate. Indeed, it was a part of the submissions made by RAM Holdings itself, that it is only the circumstances of RAM Holdings and the nature of its operations, that was a relevant consideration for the Tribunal to determine whether the rates paid by Kelair to RAM Holdings were safe and sustainable. Therefore, the relevance of run sheets for other owner-drivers can be called into question. The request made, for what could be thousands of documents, to be produced within seven days is, in the circumstances in my view, quite oppressive. Accordingly, the Tribunal does not propose to grant the order as sought by RAM Holdings.
- 11 However, Mr Miniello has referred to, and will no doubt be relying on, the working hours and revenue calculations for Crestflow, as a comparator. It would therefore be reasonable for Kelair to be required to provide at least a "snapshot", along the lines of exhibit R3, to enable at least some assessment of working patterns to be made. Exhibit R3 is a system generated document, showing the suburbs, drivers, job types and numbers etc on two days, they being 22 September 2014 and 24 February 2015. Both RAM Holdings and Crestflow amongst other owner drivers, appear in the documents.
- 12 In my view a representative sample of one day per month being the 15th day of each month in the period over 12 months from 1 July 2011 to 30 June 2012 would provide a reasonable snapshot of work activity over that period. For those days where the 15th of each month falls on a weekend, the date to be provided should be the following working Monday. In the case of a

public holiday, the date should be the next working day. This approach will strike a reasonable balance between enabling some comparison of the work activity of the comparator, Crestflow, with RAM Holdings, on dates selected at random by the Tribunal, without being unreasonably burdensome on Kelair. The Tribunal so orders.

2017 WAIRC 00716

DISPUTE RE ALLEGED BREACH OF CONTRACT
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

RAM HOLDINGS PTY LTD, MICHAEL ITALIANO

APPLICANT

-v-

KELAIR HOLDINGS PTY LTD

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE FRIDAY, 11 AUGUST 2017
FILE NO/S RFT 9 OF 2015
CITATION NO. 2017 WAIRC 00716

Result Order issued
Representation
Applicant Mr K Trainer as agent
Respondent Mr J Parkinson of counsel

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr J Parkinson of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the respondent provide to the applicant by no later than 17 August 2017 screenshots of the scheduler's views, as in exhibit R3, for the 15th day of each month or the next working day where appropriate, over the period 1 July 2011 to 30 June 2012.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00156

DISPUTE RE ALLEGED BREACH OF CONTRACT
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION : 2018 WAIRC 00156
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : MONDAY, 10 OCTOBER 2016, MONDAY, 27 FEBRUARY 2017, TUESDAY, 28 FEBRUARY 2017, WEDNESDAY, 1 MARCH 2017, MONDAY, 13 MARCH 2017, WEDNESDAY, 31 MAY 2017, MONDAY, 7 AUGUST 2017, TUESDAY, 14 NOVEMBER 2017

WRITTEN SUBMISSIONS - THURSDAY, 2 MARCH 2017, WEDNESDAY, 21 JUNE 2017, THURSDAY, 22 JUNE 2017

DELIVERED : TUESDAY, 6 MARCH 2018

FILE NO. : RFT 9 OF 2015
BETWEEN : RAM HOLDINGS PTY LTD, MICHAEL ITALIANO
Applicant
AND
KELAIR HOLDINGS PTY LTD
Respondent

Catchwords	:	<i>Industrial Law (WA) - Owner-driver contract - Breach of contract - Unconscionable conduct - Safe and sustainable rates - Principles applied - Application upheld in part</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA)</i> <i>Independent Contractors Act 2006 (Cth)</i> <i>Industrial Relations Act 1988 (Cth)</i> <i>Interpretation Act 1984 (WA)</i> <i>Limitation Act 2005 (WA)</i> <i>Owner Drivers and Forestry Contractors Act 2005 (VIC)</i> <i>Owner-Drivers (Contracts and Disputes) Act 2007 (WA)</i> <i>Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010 (WA)</i> <i>Retail Trading Hours Act 1987 (WA)</i> <i>Workplace Relations Act 1996 (Cth)</i>
Result	:	Application upheld in part
Representation:		
Counsel:		
Applicant	:	Mr K Trainer as agent
Respondent	:	Mr J Parkinson of counsel
Intervenor	:	Mr A Dzieciol of counsel on behalf of the Transport Workers Union, Western Australian Branch (by written submissions)
Solicitors:		
Respondent	:	K & L Gates

Case(s) referred to in reasons:*AB v Western Australia* (2011) 244 CLR 390*Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113*Derrick v Thiess Pty Ltd* [2017] WADC 41*Dickins v Herald and Weekly Times Ltd* (1994) 124 ALR 308*Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627*Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] AC 757*Gerrard and Anor v Mayne Nickless Ltd* (1996) 135 ALR 494*Harding v EIG Ansvar Ltd* (2000) 95 IR 349*Hochester De la Tour* (1853) 2 E & B 678*Holden v Nuttall* (1945) VLR 171*Inco Europe Ltd and Others v First Choice Distribution (A Firm) and Others* [2000] 2 All ER 109*Jones v Dunkel* (1959) 101 CLR 298*Keldote Pty Ltd v Riteway Transport Pty Ltd* [2008] FMCA 1167*Mersey Steel and Iron Co Ltd v Naylor, Benzons and Co* (1884) 9 App Cas 434*Pelka v Sundquist* [2005] WASC 52*Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355*Public Transport Authority of Western Australia v Yoon* [2017] WASCA 25*R v Gee* (2003) 212 CLR 230*Re Bolton; Ex Parte Beane* (1987) 162 CLR 514*Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323*Re Transport Workers Union of Australia* (1993) 50 IR 171*Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323*Saeed v Minister for Immigration and Citizenship* [2010] HCA 23*SP & S Scolaro T/AS SPS Transport and Ors v Twentieth Superpace Nominees P/L ATF Byrns Smith Unit Trust T/A SCT Logistics* [2015] WAIRC 00995

State of NSW v Amery (2006) 230 CLR 174

Steve Burke Transport Pty Ltd v Toll Transport Pty Ltd t/as Toll IPEC [2016] WAIRC 00718

Summersands Pty Ltd t/as Chase Hauliers v BGC (Aust) Pty Ltd t/as BGC Transport [2007] WAIRC 00144

Supaworld Pty Ltd (t/as Cousins Transport) v LN Price Partners Pty Ltd (ACN 053 962 299) (t/as Busselton Freight) (2015) 95 WAIG 649

Sydney Water Corporation Ltd & Anor v Industrial Relations Commission of NSW & Anor [20014] NSWCA 436

Taylor v The Owners of Strata Plan No 11564 & Ors (2014) 88 ALJR 473

The City of Subiaco v Local Government Advisory Board [2011] WASC 322

Van Dongen and Ors v Sims Metal Management Ltd [2016] WAIRC 00327

Case(s) also cited:

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

Amcov v The Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241

CFMEU v The Australian Industrial Relations Commission (2001) 178 ALR 61

ING Administration Pty Ltd v Jajoo (2006) 158 IR 239

King v Patrick Projects Pty Ltd [2015] FWCFB 6323

Seiffert v Patrick Projects Pty Ltd [2014] FWC 7019

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

Reasons for Decision

- 1 The applicant, Ram Holdings Pty Ltd entered into a written owner-driver contract with the respondent, Kelair Holdings Pty Ltd on 20 December 2010. The contract was for a period of five years to run until 19 December 2015. The contract was contained in a document called "Deed of Agreement for Waste Disposal", a copy of which was exhibit A1. Mr Italiano, the sole director of Ram Holdings, provided driving services for Ram Holdings to Kelair under the contract. The vehicle provided by Ram Holdings was a 22.4 tonne Hino truck fitted with a lifter owned by Kelair. There was no dispute on the evidence that Ram Holdings was an owner-driver and an owner-driver contract, in accordance with the terms of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA), was formed. I am satisfied on the evidence that this was so. The work performed involved the picking up and delivery of skip bins for both residential and commercial customers throughout the metropolitan area.
- 2 Ram Holdings maintained that it diligently provided these services under its contract with Kelair. On 24 March 2015 Kelair terminated the contract with Ram Holdings summarily without notice for breach. The reasons for the summary termination of the contract, were set out in a letter from Kelair to Ram Holdings dated 24 March 2015 which, formal parts omitted, was in the following terms:

Termination of Deed of Agreement for Waste Disposal

I refer you to the meeting between yourself, Sam Mangione and myself at 50 Clune Street, Bayswater on 23 March 2015.

This meeting was held as a direct result of a request by you to meet with Sam, following my instruction to have our trade staff remove our Skip Lifter from your truck.

I can confirm as a result of that meeting, we have terminated the Deed of Agreement for Waste Disposal between Ram Holdings Pty Ltd and Kelair Holdings Pty Ltd dated 20 December 2010.

We particularly refer you to clauses 6 and 16 concerning your obligations under the deed and our rights to terminate the deed without notice.

It is our contention that:

1. Since 1 July 2014 you have not made your truck available to carry out services for Instant Waste Management for 11 weeks (this includes 6 weeks in the last 6 months);
2. You refuse to carry out services for Instant Waste Management on Saturdays;
3. On 22 September 2014, I sent out an e-mail to all subcontractors (including yourself) specifically stating that all leave for periods in excess of 1 week had to follow specific procedures. The email required all subcontractors to confirm receipt.
4. On 25 September 2014, I sent a follow up e-mail to all subcontractors (including yourself) reminding subcontractors to reply to the e-mail of 22 September 2014 in relation to the new leave policy.
5. On 3 October 2014, Bridgette Jacob (from our office) contacted you to follow up on the above two mentioned e-mails to have you reply and acknowledge that you received the e-mails. Bridgette e-mailed me on 3 October 2014 indicating you were rude to her and that you would not reply back.
6. Following your discussion with Bridgette, I personally called you to discuss the new policy that applied to all leave going forward from 23 September 2014. You indicated you would not reply to my e-mail and you made it clear to that you did not intend to comply with the new policy (eg. you specifically stated you would not have a replacement driver in the truck). I finished off our discussion to say that if you failed to apply to the policy you may face disciplinary action.

7. Despite the specific instruction to seek and receive from me approval to take leave (and not make alternative arrangements such as have a replacement driver), you commenced to undertake leave on 23 March 2015 for approximately three (3) weeks in direct contravention of the "leave" policy in place.

As you continually demonstrated your reluctance to comply with your obligations under the deed relating to having a truck on the road, we believe we had no[t] option but to terminate the deed.

We believe you may have a number of our skip bins on or around your property. Please advise the location of these bins and when it would be suitable to have these bins picked up.

Finally, there are outstanding amounts owed to the company. We retain the right to recover these amounts pursuant to the terms of the deed.

Should you have any queries, please contact me.

- 3 The reasons for the summary termination of the contract are disputed by Ram Holdings. It has referred its dispute to the Tribunal in accordance with s 40(a)(i) and (b)(i) of the OD Act. Several issues are raised by Ram Holdings in these proceedings, in response to Kelair's decision to summarily terminate the contract and they include:
- that Kelair failed to comply with its obligation under the contract to give notice to Ram Holdings of its default and to give it an opportunity to remedy any alleged breaches of the contract;
 - that Ram Holdings maintained that it was not in breach of contract by failing to comply with Kelair's leave policy and that all leave taken or proposed to be taken by Mr Italiano was approved by Kelair; and
 - that Ram Holdings, in not working Saturdays after the first two years of performance under the contract, did so with the knowledge of and acquiescence by Kelair and Kelair cannot now complain.
- 4 Additionally, Ram Holdings maintained that Kelair engaged in unconscionable conduct in the way it allocated work to Ram Holdings which was said to be unfair. This was said by Ram Holdings to have deprived it of earning income comparable to that earned by other owner-drivers engaged by Kelair. Ram Holdings further alleged that Kelair engaged in unconscionable conduct by the way the contract was terminated, which according to Ram Holdings, involved deception by Kelair. A further claim made by Ram Holdings in these proceedings, is that the rates paid by Kelair to Ram Holdings under the contract were not "safe and sustainable rates" for the purposes of the OD Act and the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* (WA).
- 5 A range of declarations and orders are sought by Ram Holdings including damages for breach of contract in the sum of \$99,523.90, being the amount that Ram Holdings would have earned had the contract continued to its date of termination on 19 December 2015. Additionally, unspecified damages for unconscionable conduct are sought. Furthermore, an order is sought by Ram Holdings that Kelair pay it at a "sustainable rate" as set out in Appendix B to Ram Holdings' amended particulars of claim. In the alternative as to this claim, Ram Holdings sought the referral of the issue of sustainable rates to the Road Freight Transport Industry Council under the OD Act. This latter course is not one open as the resolution of disputes is for the Tribunal.
- 6 Kelair denied Ram Holdings' claims in their entirety. Furthermore, Kelair also maintained that the Tribunal has no jurisdiction to deal with Ram Holdings' sustainable rates claim and to make the orders which it seeks.
- 7 A further preliminary issue for the Tribunal to determine is whether it can hear Ram Holdings' claim for breach of contract under s 40(a)(i) of the OD Act. This is because at the time of the referral of the matter to the Tribunal, Ram Holdings was no longer a party to an owner-driver contract, as it had already been terminated. The Tribunal will turn to consider this issue first.

Jurisdiction – s 40(a)(i) OD Act

- 8 In relation to this issue, the Transport Workers' Union of Australia Industrial Union of Workers (WA Branch) was granted leave to intervene in these proceedings and by written submissions, addressed the issue of jurisdiction. The TWU referred to the decision of the Tribunal as presently constituted in *SP & S Scolaro T/AS SPS Transport and Ors v Twentieth Superpace Nominees P/L ATF Byrns Smith Unit Trust T/A SCT Logistics* [2015] WAIRC 00995; (2017) 97 WAIG 398 in which it was held by the Tribunal, by way of obiter, that for a matter to be validly referred to it under s 40(a)(i) of the OD Act, a party to an owner-driver contract needed to be a party to an existing owner-driver contract and not one that had been terminated. The TWU also referred to a later decision of the Tribunal as otherwise constituted, in *Steve Burke Transport Pty Ltd v Toll Transport Pty Ltd t/as Toll IPEC* [2016] WAIRC 00718; (2016) 96 WAIG 1652 in which it was held that a party to an owner-driver contract can refer a dispute to the Tribunal under s 40(a)(i) of the OD Act, despite the contract having come to an end. In neither *Scolaro* nor *Steve Burke Transport* was there an appeal to the Full Bench of the Commission. The submission was made that given that the Tribunal is not bound by its previous decisions, then the Union invited the Tribunal in this matter to revisit the issue of the interpretation of s 40(a)(i) of the OD Act based on its submissions.
- 9 The first point raised by the TWU, was that s 8 of the *Interpretation Act 1984* (WA) provides that "a written law shall be considered as always speaking and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to every part of the law according to its true spirit, intent, and meaning." In this respect, the TWU referred to *Pelka v Sundquist* [2005] WASC 52 in which McKechnie J applied the terms of s 8 of the *Interpretation Act* to s 39(g) of the *Retail Trading Hours Act 1987* (WA). In that case, McKechnie J at par 33, considered that s 8 provided "sufficient authority" to read the word "belongs" in s 39(g) to encompass the past tense of the word as reading "belonged". The view was taken by McKechnie J in that case, that a contrary interpretation would not give the law its true spirit, intent and meaning, when regard was had to the purpose of the relevant provision of the statute under consideration.
- 10 The second point made by the TWU in its written submissions, was that the purpose of the OD Act is "to promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport

- goods in heavy vehicles and persons who hire them to do so ...” It was submitted that adopting the approach of the Tribunal in *Scolaro*, to limit the referral of matters to the Tribunal only in cases where a person is a party to an extant owner-driver contract, would not be consistent with this purpose and object. As was recognised in both *Scolaro* and in *Steve Burke Transport*, to limit the application of s 40(a)(i) in this manner, may allow an unscrupulous hirer to take advantage of the limitation by terminating a contract before an owner-driver has an opportunity to refer a dispute to the Tribunal.
- 11 It was therefore submitted, that the interpretation of a statutory provision that would enable a person to take advantage of his or her own wrongdoing, should be resisted: *Holden v Nuttall* (1945) VLR 171.
 - 12 Having regard to the terms of relevant parliamentary materials, in view of s 18 of the *Interpretation Act*, the TWU submitted that in considering the second reading speech and the explanatory memorandum referring to the OD Act on its introduction into Parliament, it is doubtful that Parliament would have intended what the TWU described as an “odd” consequence.
 - 13 As to the purpose and object of the legislation, the TWU referred to the well-known and oft cited decision as to the approach to the interpretation of statutes in *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355. In this respect, the Union submitted that the Tribunal should not adopt a narrow reading of s 40(a)(i) of the OD Act, when considering its purpose as an object, and the relevant Parliamentary materials referred to above.
 - 14 The third point raised by the TWU in its written submissions was the acceptance by the Tribunal in *Steve Burke Transport*, that the OD Act should be regarded as beneficial legislation and therefore should be construed liberally: *State of NSW v Amery* (2006) 230 CLR 174. The submission was that when dealing with beneficial legislation, a court or tribunal should avoid a literal or technical interpretation and the construction which should be afforded is “fair, large and liberal”: *AB v Western Australia* (2011) 244 CLR 390. In this regard, the Union submitted that the Tribunal should adopt a construction to s 40(a)(i) of the OD Act consistent with the object of the legislation, to provide a means of disputes between owner-drivers and hirers being resolved in a manner that is expeditious and inexpensive. It was contended that a narrow construction of s 40(a)(i) is not consistent with this purpose.
 - 15 Finally, the TWU submitted that it is accepted that in certain situations, it would be permissible for a court or tribunal to add, omit or substitute words into a statute: *Inco Europe Ltd and Others v First Choice Distribution (A Firm) and Others* [2000] 2 All ER 109. In this case, three conditions were stated that needed to be met in order for a court to consider reading words into legislation, they are the intended purpose of the provision and the legislation; that by error the provision in question does not give effect to that purpose; and the provision Parliament would have used had it been aware of the error.
 - 16 Thus, the submission of the Union was that the intended purpose of the OD Act was to give the Tribunal a wide jurisdiction in relation to owner-driver disputes. The use of the word “is” in s 40(a)(i) appears to be out of step with the wide definition of “dispute” and also the insertion of the words “in relation to” in the section. The submission was it can be reasonably concluded that had this matter been drawn to the attention of Parliament, then it would have included in this provision, words that made it clear that parties to an owner-driver contract that was no longer extant, could refer disputes to the Tribunal. Finally, the further submission was that if consistent with the object of a statute, and only simple grammatical rectification is required, then a court can read additional text into legislation: *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 639.
 - 17 Ram Holdings adopted the submissions of the TWU.
 - 18 On behalf of Kelair, it was submitted that the approach of the Tribunal to this issue adopted in *Scolaro* rather than in *Steve Burke Transport* is to be preferred. Kelair emphasised in its submissions that interpretation is a text based activity and the focus must always be on the words used in the statute in question. Reference was made by Kelair to the observations of the High Court in *Taylor v The Owners of Strata Plan No 11564 & Ors* (2014) 88 ALJR 473, referred to by the Tribunal in *Scolaro*.
 - 19 As to s 40(a) specifically, Kelair submitted that the introductory words may appear to be wide in scope, however the following sub-pars in (i) and (ii) condition the scope of the matters that may be referred to the Tribunal. The terms of s 40(a)(i), construed in its ordinary and natural sense, refer to “a person who is a party” to the owner-driver contract. The meaning of “is” is clear. Kelair submitted that it extends to those contracts on foot or in existence as at the time of the referral. The scheme of language in s 40(a)(i) also refers to a person who is “a party” to the owner-driver contract. A person can no longer be characterised as a “party” to an instrument when it is no longer on foot. Kelair further contended that this on foot and operative quality to s 40(a)(i) is maintained in s 40(a)(ii). This aspect of the referral provision deals with the capacity of a transport association to refer a matter to the Tribunal on behalf of a person eligible to be a member, as “a party to the owner-driver contract”.
 - 20 Again, consistent with its earlier submissions, Kelair submitted that the statutory scheme is consistent in requiring the on foot and operative quality of the contract for a dispute in respect of it to be referred to the Tribunal. Thus, in the case of both ss 40(a)(i) and (ii), the language of the legislation focuses on the individual at the time of the referral, as being a party to an extant owner-driver contract. On the submissions of Kelair, this is a clear part of the statutory scheme. Consistent with this broad approach, Kelair also referred to the powers of industrial inspectors under s 32(1) of the OD Act. These powers, in relation to the investigation of whether an owner-driver contract “is” being complied with, are also expressed in the context of an extant owner-driver contract, consistent with the terms of ss 40(a)(i) and (ii).
 - 21 On the broader question of the purposes and objects of the legislation, it was Kelair’s contention that this approach to the interpretation of ss 40(a)(i) and (ii) was consistent with the purposes of the OD Act. The long title to the legislation refers to the OD Act as:

An Act –

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

- 22 Having regard to the first point in the long title, Kelair contended that it was a clear purpose of the OD Act to “regulate the relationship” between owner-drivers and hirers whilst the relationship is on foot. For there to be any regulation of the relationship by the legislation, Kelair contended that the relationship must be in existence. Consistent with this proposition, the Tribunal can remain able to deal with matters referred to it despite the subsequent termination of an owner-driver contract, after a referral. I will comment on this latter submission further below.
- 23 Even accepting that the legislation should be described as remedial or beneficial in nature, the submission of Kelair was that giving the terms of the OD Act a “large and liberal interpretation”, must be within the confines of the limits expressed by the High Court in *Taylor*, as observed by Gageler and Keane JJ in that case. Thus, such an approach does not permit speculation as to what Parliament may have intended or seek to engage in statutory repair.
- 24 As to the other heads of referral under ss 40(b) and (c), Kelair in its submissions distinguished these as dealing with a different subject matter and there being no requirement expressly, by the language of the statute, for an ongoing contractual relationship. It was submitted that no support for the contentions of the applicant and the TWU as intervenor, can be found in either ss 40(b) or (c).
- 25 As a general point of principle, Kelair also submitted that given there is no time limit specified in the OD Act for the referral of matters to the Tribunal under s 40(a)(i), and the Tribunal is not, as opposed to the Commission, a court, the *Limitation Act 2005* (WA) has no application. Accordingly, claims could be potentially made to the Tribunal many years after the termination of an owner-driver contract, on the interpretation advanced by the TWU. Kelair submitted that this could not have been the intention of Parliament, for there to be such an open-ended situation.
- 26 As to the reference by the TWU to s 8 of the *Interpretation Act 1984* (WA) and the decision in *Pelka*, Kelair submitted that this case was distinguishable from the present circumstances. In *Pelka*, McKechnie J read “belongs” as “belonged” in reliance on s 8 of the *Interpretation Act*. Kelair submitted that this did not involve reading words into legislation. The TWU’s submission sought to rewrite the OD Act using the reasoning in *Pelka* and this goes beyond the permissible application of this approach to construction.
- 27 As the Tribunal observed in *Scolaro* at par 10:
- 10 The issues of jurisdiction arising in these proceedings turns essentially on matters of statutory interpretation. The relevant principles in relation to this are well settled. It is always to be borne in mind that at its essence, statutory interpretation is a text based activity and it is to the text of the statute to which primary emphasis must be given: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 per Hayne, Heydon, Crennan and Kiefel JJ at par 47; *Amcort Ltd v CFMEU* (2005) 222 CLR 241 per Kirby J par 67. Additionally, a construction that is consistent with the purpose of a statute is to be preferred to one that is not: s 18 *Interpretation Act 1984* (WA). Furthermore, a statutory provision is to be construed in the context of the statute as a whole: *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355. Most recently, as Gageler and Keane JJ said in *Taylor v The Owners – Strata Plan No 11564* (2014) 88 ALJR 473 at par 65:
- [65] Statutory construction involves attribution of legal meaning to statutory text, read in context. “Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning ... But not always.”¹¹² Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation.¹¹³ The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.
- 28 I also adopt the reference to the statutory scheme set out in pars 11-21 in *Scolaro* and I need not repeat it for the purposes of these reasons.
- 29 As to the question of the OD Act being beneficial or remedial, as was recently said by the Industrial Appeal Court in *Public Transport Authority of Western Australia v Yoon* [2017] WASCA 25; (2017) 97 WAIG 249 at par 56 as follows:
- 56 The general principles of statutory construction were not in contest. They have been set out, relatively recently, by the Court of Appeal in, eg, *City of Kwinana v Lamont*¹⁹ and *Director General of Department of Transport v McKenzie*.²⁰ Ms Yoon also relied upon the principle that remedial legislation should be construed beneficially. That principle, where it applies, requires that the provision in question be construed so as to give the fullest relief which the fair meaning of its language will allow, but not that its true signification should be strained or exceeded: *Bull v Attorney-General (NSW)*,²¹ *Khoury v Government Insurance Office (NSW)*.²² The court is not at liberty to give the provision a construction that is unreasonable or unnatural: *IW v City of Perth*.²³ Further, in *Victims Compensation Fund Corporation v Brown*²⁴ it was said that to commence the process of construction by posing the type of construction to be afforded - liberal, broad or narrow - may obscure the essential question regarding the meaning of the words used in the text.
- 30 The task of a court or tribunal is to always commence with the text of the legislation, read in its ordinary and natural sense. It is erroneous to begin this task of construction through the lens of whether a statute should be regarded as beneficial or remedial. As the authorities above refer, to do so may obscure the issue of the proper meaning of the language used in the statute.
- 31 Also, while it is the case that reference may be made to extrinsic materials such as Parliamentary debates and explanatory memoranda as an aid to the construction of legislation, it is “erroneous to look to extrinsic materials before exhausting the ordinary rules of statutory construction”: *The City of Subiaco v Local Government Advisory Board* [2011] WASC 322 per Edelman J at par 90 citing *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252, 265. In *Saeed*, it was said by the plurality (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) at pars 31-33 as follows:
- 31 As Gummow J observed in *Wik Peoples v Queensland*, it is necessary to keep in mind that when it is said the legislative “intention” is to be ascertained, “what is involved is the ‘intention manifested’ by the legislation.” Statements as to

legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

- 32 In *Re Bolton; Ex Parte Beane* the question was whether a statutory provision concerned with "visiting forces" applied to deserters from the armed forces of the United States. Mason CJ, Wilson and Dawson JJ said:
- "[T]he second reading speech of the Minister ... quite unambiguously asserts that Pt III relates to deserters and absentees whether or not they are from a visiting force. But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."
- 33 Regard was had by the Full Court in this case to what was said in *Re Bolton; Ex Parte Beane*. Nevertheless, it is apparent that the Court did not consider the actual terms of s 51A and its application to the provisions of the subdivision. As was pointed out in *Catlow v Accident Compensation Commission* it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.
- 32 In any event, in my view, from a review of the relevant Parliamentary materials, I do not consider them to be of much assistance in the determination of the present issue. There appears to be nothing in either the Second Reading Speech or the Explanatory Memorandum accompanying the owner-driver legislation, that sheds direct light on the issue to be considered in this matter, as to the proper construction of s 40(a)(i) of the OD Act. Even if it did so, having regard to the observations of the High Court in *Re Bolton; Ex Parte Beane* (1987) 162 CLR 514 cited above in *Saeed*, it is the language of the statute itself that must be taken as expressing Parliament's intention.
- 33 Adopting the above approach, I have come to the following conclusions in view of the submissions made by the parties and the intervenor. Firstly, I do not consider that s 8 of the *Interpretation Act* provides the refuge sought in this case by the TWU and Ram Holdings. I disagree with respect, with the conclusions of the Tribunal in *Steve Burke Transport* and more recently in *Summersands Pty Ltd t/as Chase Hauliers v BGC (Aust) Pty Ltd t/as BGC Transport* [2007] WAIRC 00144, to the extent that the Tribunal in those cases reached a contrary view. Section 8 refers to the "law always speaking" approach to the interpretation of legislation, which is principally concerned with the changes in the meaning of words used in legislation over time. Thus, words in legislation may be deliberately drafted in ambulatory language, to cover changes in subject matter in the future: *R v Gee* (2003) 212 CLR 230; *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113. Furthermore, and relevantly to the present matter, this principle of interpretation, along with the application of the *Interpretation Act* provisions generally, is subject to any contrary intention as expressed in the statute concerned. This is expressly acknowledged in s 3.
- 34 In *Pelka*, the issue in that case was the status of a certificate issued under s 39(g) of the *Retail Trading Hours Act 1987* (WA), which is an "evidentiary" provision by which the CEO of the Department of Consumer and Employment Protection may sign a statement, stating the class of shop to which a retailer "belongs". The matter before the court involved an appeal from a decision of the Court of Petty Sessions dismissing complaints against certain retailers for allegedly trading on Sundays, contrary to the legislation. A contention was put on the appeal that it was not open to give a s 39(g) certificate retrospective effect. McKechnie J held that s 8 of the *Interpretation Act* was sufficient authority to read "belongs" as "belonged", to extend it to the class of shop at the time of the alleged offence.
- 35 The present matter before the Tribunal is of a different kind. There is no scope to simply read "is" as "was" in s 40(a)(i). This would be nonsensical. It is not just a case of reading a word in the statute in the past tense, to apply to the circumstances as they arise before the Tribunal. The contention advanced by the TWU and Ram Holdings, requires words to be inserted into the legislation that are not there. Furthermore, *Pelka* concerned the interpretation of a facilitative evidentiary provision as a part of the evidentiary background to support a prosecution under the relevant legislation. The question in this case is far more fundamental. It concerns the standing and status of persons to refer matters to the Tribunal to invoke its jurisdiction.
- 36 In the case of s 40(a)(i), Parliament chose quite different language to that used in ss 40(b) and (c). Parliament could have referred to "an owner-driver or hirer" in (i) without reference to the words "is a party to the owner-driver contract". To do this would have still made it clear from the introductory words in s 40(a), that the dispute referred by such an owner-driver or hirer, is one "arising under or in relation to an owner-driver contract". This would still give full effect to the expansive words used in the introductory part of s 40 itself. The key to the capacity to refer in such a case, if the legislation is read in this way, would be the person's status as an owner-driver or hirer. This is the scheme used in the comparable Victorian legislation, the *Owner Drivers and Forestry Contractors Act 2005* (VIC). It is notable that the legislation in this State uses quite different language.
- 37 Whilst not referred to in the submissions in this matter, nor raised and considered in either *Scolaro* or *Steve Burke Transport*, an issue of a similar kind has arisen in cases under federal legislation dealing with independent contractors. From my research the cases under s 127A of the *Workplace Relations Act 1996* (Cth) and the *Independent Contractors Act 2006* (Cth) include *Keldote Pty Ltd v Riteway Transport Pty Ltd* [2008] FMCA 1167; *Harding v EIG Ansvar Ltd* (2000) 95 IR 349; *Dickins v Herald and Weekly Times Ltd* (1994) 124 ALR 308; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323; *Gerrard and Anor v Mayne Nickless Ltd* (1996) 135 ALR 494 and *Re Transport Workers Union of Australia* (1993) 50 IR 171.
- 38 In *Re TWU*, an application made under s 127A of the then *Industrial Relations Act 1988* (Cth) came before Munro J of the Australian Industrial Relations Commission. An issue arose as to the jurisdiction of the AIRC to deal with the matter, on the basis that on the ordinary and natural meaning of the words used in the relevant parts of the legislation, the jurisdiction of the AIRC only existed in respect of a contract on foot at the time of the exercise of powers to make any orders by the AIRC. Munro J accepted that there was doubt as to the application of the legislation, given the use of the present tense in the language in the sections concerned. However, in relying on two earlier decisions of the NSW Industrial Relations Commission, albeit the legislation in those cases containing different language in the statutory provisions, Munro J came to the view at 195, that the

AIRC had jurisdiction because, despite the subsequent termination of the contracts, the contracts were on foot at the time of the commencement of the relevant legislation and *at the time of the lodgement of the application*.

- 39 In *Re TWU*, and in the subsequent decision of the NSW Court of Appeal in *Sydney Water Corporation Ltd & Anor v Industrial Relations Commission of NSW & Anor* [2014] NSWCA 436 dealing with jurisdictional challenges to the NSW Industrial Commission under the s 106 unfair contracts jurisdiction, it was held that termination of a contract, after the commencement of a claim, did not preclude the AIRC's or the NSW Industrial Relations Commission's jurisdiction to review it.
- 40 Following *Re TWU*, consideration of the scope of ss 127A and 127B of the then *Industrial Relations Act 1988* (Cth) came before the Industrial Relations Court of Australia in *Dickins*. In this case, an application was made to the court on the basis that a contract for services was "unfair and/or harsh". At the time of the application, the relevant contract had come to an end. The respondent moved a motion that the application be dismissed on two grounds. The first was that s 127A did not permit a review of a contract no longer in existence as at the time the application was made. The second ground was that in any event, the legislation conferring jurisdiction on the court came into effect after cessation of the contract and the presumption against retrospectivity applied.
- 41 As to the first ground, it was argued that the use of the present tense in the legislation made it clear that the court's jurisdiction was limited to contracts that had not been terminated. Keely J, at 311, accepted these arguments and dismissed the application. His Honour referred to earlier decisions including *Re TWU*, but was not persuaded the court could exercise powers in relation to a contract that had come to an end. To this extent, *Dickins* must be taken to have overruled *Re TWU*.
- 42 *Harding* was an application to the Federal Court under s 127A of the *Workplace Relations Act 1996* (Cth). Section 127A was relevantly in the following terms:

127A Unfair contracts with independent contractors: Court's powers

- (1) In this section and in section 127B:
contract means:
- (a) a contract for services that:
- (i) *is binding* on an independent contractor; and
 - (ii) relates to the performance of work by the independent contractor, other than work for the private and domestic purposes of the other party to the contract; and
- (b) any condition or collateral arrangement relating to such a contract.
- (2) Application may be made to the Court to review a contract on either or both of the following grounds:
- (a) the contract is unfair;
 - (b) the contract is harsh.
- (3) An application under subsection (2) may be made only by:
- (a) *a party to the contract*; or
 - (b) an organisation of employees of which the independent contractor is (or has applied to become) a member, if it is acting with the written consent of the independent contractor; or
 - (c) an organisation or association of employers of which the person contracting for the services is (or has applied to become) a member, if it is acting with the written consent of the person.
- (4) In reviewing the contract, the Court may have regard to:
- (a) the relative strength of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and
 - (b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; and
 - (d) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
 - (e) any other matter that the Court thinks relevant.
- (5) If the Court forms the opinion that a ground referred to in subsection (2) is established in relation to the whole or part of the contract, it must record its opinion, stating whether the opinion relates to the whole or a specified part of the contract.
- (6) The Court may form the opinion that a ground referred to in subsection (2) is established in relation to the whole or part of the contract even if the ground was not canvassed in the application.
- (7) The Court must exercise its powers under this section in a way that furthers the objects of this Act as far as practicable.

...

(My emphasis)

- 43 The matter came before Spender J for interim relief and his Honour expressed the view that s 127A "contemplates an application to review a *presently subsisting contract* on the grounds that it is unfair or harsh": at 350. Spender J expressed doubt as to the court's jurisdiction to grant relief if the relevant contract had come to an end. However, his Honour was prepared to proceed on the basis that the court could deal with the matter, because of a concession as to jurisdiction made by the respondent in those proceedings.

- 44 Not long after, similar issues arose again before the High Court in *Re Dingjan; Ex parte Wagner* (1995) 58 IR 138. In this case, challenges were made to the constitutional validity of ss 127A, 127B and 127C. In doing so, the court also considered arguments as to whether the provisions had application in circumstances where independent contracts have come to an end. In the proceedings before the AIRC at first instance, it was held that it did have power to do so and that the powers of review and variation under ss 127A and 127B, applied to contracts that were on foot when the application to the AIRC was made.
- 45 The prosecutors before the High Court challenged that decision and contended that the legislation properly construed, was confined to current contracts. The challenge to the AIRC's powers in relation to ss 127A and 127B, was based on the use of the present tense in those provisions. In particular, attention was focused on the relevant definition of "contract" in s 127A(1), set out above, which referred to a contract that "*is binding on an independent contractor*". Furthermore, the same reference to the present tense was in s 127A(2) in relation to grounds of review, when referring to a contract that "is unfair", or "is harsh", and "is against the public interest". The contention advanced by the prosecutors was that the use of the present tense in ss 127A and 127B must be interpreted so that the powers of the AIRC to vary and review contracts only applied to those on foot at the time that orders were to be made.
- 46 In her judgement, Gaudron J (Mason CJ, Deane and Toohey JJ agreeing) in addressing this issue, said at 162-163:

The present tense may be used descriptively or it may be used to signify contemporaneity. Although there is no fixed rule, the use in a statute of the present tense, simpliciter, generally indicates that it is being used descriptively (the "simple present"), whereas "is" followed by a present participle (the "continuous" or "progressive" present) usually indicates contemporaneity.⁹² The descriptive use of the present tense can be seen in s 127B(4) where the words "takes effect" do not indicate that an order then takes effect but, rather, describe and, thus, prescribe the way in which an order must take effect.

The power of the Commission under s 127B(3) to make interim orders "to preserve the position of a party to the contract" does not, in my view, provide any reliable guide to the construction of ss 127A and 127B. The power to make interim orders is not confined to orders which operate to keep a contract on foot. Moreover, it is power that might usefully be invoked even if the Commission has power to vary contracts that have come to an end.

The most persuasive of the matters relied on for the argument that the Commission has no power to vary contracts that have come to an end is the definition of "contract" in terms of a contract that "is binding on an independent contractor".⁹³ As earlier indicated and although there is no fixed rule in that regard, the present participle often imports contemporaneity. However, the use of "binding" as a participle adjective meaning "enforceable" is also well recognised⁹⁴ and, when so used, "is binding" is a descriptive use of the simple present, rather than a use of the continuous or progressive present.

No question arises in this case as to whether the Commission's jurisdiction is confined to contracts that are current when application is made to it under ss 127A and 127B. That question may raise a different issue from that involved in this case. In particular, it may raise the issue whether ss 127A and 127B were intended to have retroactive operation. Whatever the position in that regard, ss 127A and 127B are not, in my view, confined to contracts which are current when the particular power of review or variation comes to be exercised. That construction would allow the Commission to review a contract that is current when the review takes place, but not to vary the contract if it comes to an end or, as is more likely, if it is brought to an end before an order is made under s 127B. It cannot be supposed that Parliament intended that consequence, particularly in the context of contracts relating to the performance of work by an independent contractor where, in the nature of things, the power to terminate without notice or on short notice may well be the very matter which makes the contract unfair, harsh or against the public interest.⁹⁵ That being so and given that "binding" is often used to mean "enforceable", the use of the present tense in ss 127A and 127B is merely descriptive of the nature of the contracts which may be the subject of the Commission's powers, namely, contracts enforceable against an independent contractor and whose terms or operation may be described as unfair, harsh or against the public interest. Contrary to the argument advanced on behalf of the prosecutors, its use does not signify that the Commission's powers under ss 127A and 127B are confined to contracts that are current when it comes to exercise those powers.

- 47 In considering the same question, Brennan J came to a different conclusion. His Honour was unable to conclude that a contract which has come to an end, could provide the foundation for the exercise of any power to set aside or vary such a contract by way of orders to be made as a remedy. In this respect, Brennan J said at pp 145-146 as follows:

3. Can the power to set aside or vary the terms of a contract conferred by s 127B(1) be exercised in relation to a contract that has been discharged?

In my opinion the answer to this question turns not on the tense of any verb in s 127A or s 127B but on the existence of a contract amenable to being set aside or varied by an exercise of the power conferred by s 127B(1). With great respect to the opposite view, I am unable to see how it is possible to set aside or vary a contract that is sterile of any enforceable right or obligation. A contract, created by the mutual agreement of the parties to be bound by its terms, is a source of mutual rights and obligations. By definition in the Act,²⁷ a contract must be "binding" on the independent contractor, that is, enforceable against that party. However, when a contract is terminated, one or more of the parties may have a cause of action against the other party or parties²⁸ but, generally speaking,²⁹ no contractual right or obligation survives termination so as to be enforceable as such.³⁰ It is true to say that the contract, viewed as a source of enforceable rights and obligations, has ceased to exist.³¹ The terms of a terminated contract will govern the measure of damages for its breach, if there has been a breach, but the very hypothesis on which damages are awarded is that the innocent party has not had, and is no longer entitled to, performance of the executory terms of the contract.³²

It may be that it would be beneficial to one of the parties to a discharged contract if s 127B(1) were construed to authorise the subsequent setting aside or variation of the contract but the language of s 127B does not permit such a construction. By subs (4) an order under subs (1) takes effect "from the date of the order or a later date". The order which takes effect is made so as to place the parties as nearly as practicable "on such a footing that the ground [of unfairness, harshness or contrary to the public interest] on which the opinion is based no longer applies": subs (2). Subsection (4) precludes the

backdating of that alteration in the position of the parties to a time when the condition of unfairness, harshness or contrariety to public policy was being produced by the contract then subsisting. Ex hypothesi, once the contract is terminated, it no longer produces such a condition. I would mention a further point — though not to base my decision upon it, for the point was not raised by the parties and was not fully argued. The point would require consideration if a retrospective operation were attributed to s 127B(1). Once a contract is discharged and the rights of the parties inter se depend not on contract but on property,³³ would a power to alter retrospectively the rights of the parties under the contract amount to an acquisition of property within s 51(xxxi) of the Constitution and be subject to the requirement of just terms? On the view I take of ss 127A and 127B, this question does not need to be answered. I would hold that those sections have no application to a contract that has been terminated.

As s 127C(1)(b) fails to attract the support of s 51(xx) of the Constitution, I would make absolute the order nisi for writs of prohibition and certiorari made by Dawson J.

- 48 The question of whether the Commission's powers under ss 127A and 127B can be exercised to vary a contract that was terminated prior to referral was left open in *Re Dingjan*. This issue was considered in *Gerrard*. In this case, the Full Court of the Industrial Relations Court, on issues of law referred to it, was asked whether the court had power to deal with an application made to the court after the termination of the contract. In considering this issue, the Full Court (Wilcox CJ, Ryan and Marshall JJ) referred to the arguments of senior counsel, to the effect that the language of ss 127A and 127B was compelling; the absence of any indication the provisions were intended to have retrospective effect; and the absence of any prescribed limitation period, which meant that contractors could seek to reopen contracts long after their termination and seek orders having substantial retrospective operation. The court, at 506, found the latter contention to be a "telling point" in favour of the challenger's submissions and that if the legislation did not require an application to be made prior to the termination of a contract, it would enable a party to "reopen issues seemingly dead and buried" (at 506). However, the Full Court was persuaded to adopt the underlying approach taken by the majority in *Re Dingjan*, that the court's jurisdiction could be enlivened even if the contract had been terminated prior to the referral. The court also referred to the history of the legislation, and that it was intended to operate in a similar way to the long standing New South Wales unfair contracts legislation. That is not the case with the OD Act in this State.
- 49 The conclusions reached by the Tribunal in *Scolaro*, as to the scope of s 40(a)(i), were strictly obiter, as it was not necessary to finally decide that point for the purposes of the final disposition of those proceedings. In *Scolaro*, it was found by the Tribunal on the facts, that the contract in question had not in fact been terminated prior to the referral of the matter to the Tribunal. The cases presently under consideration were not the subject of submissions in *Scolaro*, nor was the Tribunal's attention in that case drawn to s 8 of the *Interpretation Act*.
- 50 With respect, I retain considerable reservations as to the conclusions reached by the Tribunal in *Steve Burke Transport*, and the contentions advanced on the submissions of the TWU. Apart from the cases to which I have referred above, one such reservation, if the TWU's submissions should now be accepted, is the fact that a referral to the Tribunal under s 40(a)(i) is completely open-ended in time. There are no time limits imposed for the bringing of such an application under the OD Act. Given that the Tribunal, as identified by Kelair, as opposed to the Commission, is not a court for the purposes of the *Limitation Act 2005*, this means it would be open for an owner-driver or former owner-driver to refer a dispute to the Tribunal under s 40(a)(i) many years after the termination of an owner-driver contract. This could expose a respondent hirer to those proceedings, to the possibility of orders being made against it under s 47 of the OD Act.
- 51 By s 43(1) of the OD Act, ss 22B and 26(1)(a) and (b) of the IR Act are adopted provisions. These require the Tribunal to proceed to deal with matters with all due speed and in accordance with equity, good conscience and the substantial merits of the case without regard to legal form and technicality. These provisions sit uncomfortably with an open-ended capacity to refer matters to the Tribunal under s 40(a)(i) and (ii), where there is no time limit under either ss 40(b) or (c). It will remain an argument for another day, as to whether the equitable defence of laches has any application to the Tribunal's jurisdiction. This is particularly so where, as opposed to the federal independent contractor legislation, parties may refer owner-driver contract disputes to the civil courts for relief, as s 49 of the OD Act makes clear.
- 52 In view of my reservations, but for the decisions in *Re Dingjan* and more appositely *Gerrard*, I would not be prepared to alter the views I expressed in *Scolaro*. I would prefer the approach of Keely J in *Dickins*. With respect, whilst not binding on the Tribunal and in considering somewhat different legislation, the conclusions in *Gerrard* appear to be based in part on matters of policy, and the possibility of inconvenience of a contrary conclusion. I also remain less than convinced that there is scope to read words into s 40(a)(i) and (ii) as contended by the TWU. I refer to the observations of Gaudron J in *Re Dingjan*, to the use of the present tense in a statute as being descriptive or contemporaneous. In this case, the language of s 40(a)(i) and (ii) is not just expressed in the present tense simpliciter. The word "is" is followed by the words "a party to an owner-driver contract". The words used are relational. They refer to a particular relationship. In this case, that relationship ended a long time before the referral to the Tribunal.
- 53 However, despite my apprehension, I am prepared to accept in this case, that the Tribunal has jurisdiction to deal with Ram Holdings' claim for breach of contract.

The Agreement

- 54 Before turning to the evidence in relation to the alleged breaches of the Agreement, I will briefly set out some relevant provisions of it.
- 55 Under the Agreement, a copy of which was exhibit A1, Ram Holdings would provide waste disposal services to Kelair for a period of five years from 20 December 2010 to 19 December 2015. As specified in cl 1, the provision of services by Ram Holdings to Kelair was to be on an exclusive basis. It was a further term of the Agreement in cl 4(a), that Ram Holdings was required to purchase a truck from Kelair.

- 56 By cl 6(a) Ram Holdings was to provide the services to Kelair on request by Kelair, between the hours of 4:00 am to 6:00 pm Monday to Saturday and to work after hours as required. Ram Holdings was required to comply with reasonable requests and directions from Kelair as specified in cl 6(c). Ram Holdings was further required to deliver and pick up all sizes of bins from any location as directed by Kelair in cl 6(e). The definition of “services” was specified in cl 1.
- 57 Furthermore, as to the performance of the work, Kelair was to provide work to Ram Holdings in designated areas, where possible given market conditions and as determined by Kelair at its discretion, as specified in cl 10(a). As usual for such arrangements, Ram Holdings was required to hold and maintain all relevant insurance cover, including workers’ compensation for its employees as set out in cl 13(a). By cl 14(a), a default under the Agreement would occur if Ram Holdings did not remedy a breach of the Agreement within five days of Kelair giving written notice of such breach. Notices of default under the Agreement were required to be in writing and served either personally or by sending it by post or fax.
- 58 By cl 15, Kelair had a discretion to allocate work to any contractor or employee in any designated area to ensure the collection of waste. As to termination of the Agreement, either party to it could terminate the contract for default or other specified reasons as set out in cl 16. On termination of the Agreement, there was an obligation on Ram Holdings to return property to Kelair and the costs of the removal of a skip lifter were to be borne by Ram Holdings.
- 59 In relation to the entering into the Agreement, Ram Holdings acknowledged that there was no guarantee of any specified return; there was no inducement for it to enter into the Agreement and furthermore, an acknowledgement that Ram Holdings had legal advice as to the terms of the Agreement, as specified in cl 31. In relation to rates of remuneration, they were specified in the Schedule to the Agreement. It was common ground in this case, that the rates for the waste removal contractors were negotiated between Kelair and the TWU.

Breach of contract

- 60 There were two bases for Ram Holdings’ breach of contract claim. The first was that the summary termination of the Agreement by Kelair was not justified, as Ram Holdings was not in breach of its obligations under the Agreement. Specifically, Ram Holdings contended that it did not fail to comply with Kelair’s new leave policy dealt with below. Furthermore, Ram Holdings contended that it was not in breach of the Agreement by ceasing to work on Saturdays after the first 18 months or so of the performance of services under the Agreement. It was contended in this respect, that the relevant provision of the Agreement does not require all contractors to work hours which include Saturdays each week.
- 61 The second contention of Ram Holdings that Kelair breached its obligations under the Agreement, was that Kelair failed at any time during the performance of services by Ram Holdings under the Agreement, to serve a default notice as required by the Agreement, and to give Ram Holdings a reasonable opportunity to remedy the alleged default.

Saturday work

- 62 There was no dispute on the evidence that for the first year and a half or so of services under the Agreement, Ram Holdings performed work for Kelair on Saturdays. Mr Italiano testified that by mid-2012, he came to the view that it was no longer financially viable for Ram Holdings to continue to do this. He testified that in performing Saturday work, Ram Holdings was earning less income than if the work had been performed as an employee of Kelair. According to Mr Italiano, from about this time he ceased working on Saturdays for this reason. In response to this situation, Mr Italiano testified that no one from Kelair required or directed him to resume Saturday work, especially the general manager of Kelair, Mr Miniello. It was Mr Italiano’s evidence that after stopping Saturday work for the reasons specified, he heard nothing further about this issue until he received the letter from Kelair, set out above, terminating the Agreement.
- 63 Mr Miniello described Ram Holdings’ reluctance to work Saturdays as consistent with Kelair’s overall experience with Ram Holdings in the performance of services under the Agreement. This was described by Mr Miniello as being a general reluctance to work the available hours to be worked, as opposed to other owner-drivers who regularly maximised their working hours and hence their earnings. It was Mr Miniello’s evidence that Ram Holdings’ failure to continue work on Saturdays contributed to its inability to earn income comparable to other owner drivers. Mr Miniello did accept however, that Ram Holdings was never told by Kelair that it would be in breach of the Agreement by not continuing to perform services on Saturdays.

Leave and the new policy

- 64 It was common ground that Mr Italiano had extensive time off work because of an injury which he sustained in or about September 2013. This injury led to two periods of absences of three weeks each in 2014. The absences were covered by medical certificates and Kelair took no issue with them at the time.
- 65 The issue that did arise in the proceedings was in relation to the taking of holidays and annual leave. Tendered as exhibit A10, were various leave requests made by Ram Holdings to Mr Sims the then Operations Manager of Kelair. These leave requests covered the periods of leave in August 2014 and March to April 2015. It is the latter period that was the most controversial for present purposes.
- 66 According to Mr Italiano, on 19 June 2014 he made a request for leave to be taken from 23 March 2015 to 10 April 2015 to attend his son’s wedding. This request was sent by email to Mr Sims. Mr Sims replied on 23 June 2014 to the effect that whilst no rosters had yet been developed for this period, in other respects, “this request should be fine”. Mr Italiano’s evidence was that he assumed therefore, having received this response from Mr Sims, that the taking of leave on these dates would be in order. In the interim period however, Kelair introduced a new leave policy. This was set out in an email from Mr Miniello to all owner-drivers dated 22 September 2014. In it, Mr Miniello announced a new approach to the issue of owner-drivers taking leave. As it assumed some significance in these proceedings, and was a substantial basis for the decision of Kelair to terminate the Agreement, I set out the email of 22 September 2014, contained at exhibit A11, formal parts omitted, as follows:

Dear Instant Waste Subcontractor

Historically, we have allowed subcontractor drivers *take extended leave and have their truck off the road*.

As we have been extremely busy over the past 12 months *and foresee a very busy 12 months ahead, we cannot continue with this policy*.

As a result, effective immediately subcontractors are not permitted to take leave for periods extending beyond 1 week except in the following circumstances:

You are able to organise a replacement driver who will be able to drive your truck while you are on leave;

You **pre-arrange (before 31 October)** leave over the Christmas break between approximately 20 December to 5 January each year; or

You have been granted special leave which has specifically been agreed by the General Manager (which is currently me).

In all cases, you should provide, as a matter of professional courtesy, at least 4 weeks notice of a request to take any leave.

So that there is no misunderstanding, please bear in mind that just because you have applied for special leave does not necessarily mean you will be granted leave. This will be decided on a case by case scenario, *however, by way of example, if you have taken extended leave (say for 2 or more weeks) in the last 24 months, it is unlikely special leave will be granted. Consideration for special leave is really designed for such things as personal health related issues and major truck repairs*.

In some cases there will be unplanned issues (eg. sickness and truck breakdowns) and we will work with you on these, however, in most cases, these unplanned issues would typically take less than 1 week to sort out.

Failure to adhere to the above policy and procedures may lead to disciplinary action including applying the provisions relating to breach of contract for failure “to perform services for 7 consecutive days”.

If you have any queries please contact me.

Would you please confirm receipt of this e-mail, so that it can be placed on your file.

regards (*My emphasis*)

- 67 The rationale for this different approach to the taking of leave by owner-drivers was explained by Mr Miniello. He testified that by about the end of 2013, the workload at Kelair started to approach a “boom period”. Over the course of 2014 this further developed. As Kelair’s business is very customer focused, Mr Miniello said there was a need for as many trucks to be on the road as possible at any one time. The practise in the past had been that many owner-drivers had taken their trucks off the road when taking leave and this impacted on Kelair’s ability to deliver services to its customers. The new policy sought to address this. If an owner-driver was to be on leave for an extended period (more than one week) they must have a replacement driver or otherwise be given a special dispensation by Mr Miniello. To ensure the new policy was received by all owner-drivers, a follow up email was sent to them from Mr Miniello on 25 September 2014. As no response was received from some of the owner-drivers, a further follow up reminder email was sent from Ms Jacob of Kelair on 2 October 2014.
- 68 There was no dispute that Mr Italiano received a copy of the new policy. It was further common ground that as Mr Italiano did not reply to Mr Miniello’s earlier emails or the follow up by Ms Jacob, Mr Miniello telephoned him to discuss the matter with him. Mr Italiano accepted that such a discussion took place.
- 69 Mr Italiano also testified that when he spoke to Mr Miniello he requested an exemption from the policy. This was because of the cost to Ram Holdings obtaining workers’ compensation insurance cover for a replacement driver. A quote received by Mr Italiano from his insurance broker, suggested that given Ram Holdings’ claims history, any insurance cover cost premium would be exorbitant. Mr Miniello agreed that in his telephone call with Mr Italiano, the issue of costs of workers’ compensation cover was raised. Mr Miniello denied however, that Mr Italiano requested an exemption from the policy. Mr Miniello testified further that the estimate for workers’ compensation cover that Mr Italiano received, sounded very high based on his own knowledge of such matters and based on information that Mr Miniello had obtained from an insurance broker himself.
- 70 It was also common ground that, somewhat surprisingly, in the conversation between Mr Italiano and Mr Miniello referred to above, Mr Italiano made no mention of his email communications with Mr Sims, about his proposed leave for the following March to April 2015, and Mr Sims’ qualified approval. It was Mr Miniello’s evidence that at no time was he made aware of this prior communication from Mr Sims. In this connection, Mr Italiano further said however, that no one from Kelair followed up with him or informed him that this prior qualified approval was no longer valid given the new policy. However, given Mr Miniello’s lack of knowledge of it, and that Mr Sims was no longer employed by Kelair, it would not be surprising that there may not have been any such follow up. Mr Miniello conceded however, that given Mr Sims’ earlier response to Mr Italiano about him taking leave in 2015, it would have been reasonable for Mr Italiano to assume that it had been approved at that time.
- 71 According to Mr Miniello the owner-drivers agreed to the new policy and it was only Ram Holdings that raised issues with it.
- 72 Events moved on. Mr Miniello testified that from this point on he was very reluctant to give any leave approvals to owner-drivers for the reasons he had identified. At a time not determined on the evidence, but prior to 23 March 2015, Mr Miniello said he became aware of further proposed leave to be taken by Mr Italiano. Mr Miniello prepared a note for himself setting out all the leave that Ram Holdings had taken over the period 1 July 2014 to 13 March 2015 (exhibit R6). Including the period of absence of Mr Italiano for injury, referred to above, this totalled some 11 weeks, with a further three weeks commencing 23 March 2015.

Removal of lifter

- 73 Another contention advanced by Ram Holdings was that the removal of the skip lifter by Kelair on 23 March 2015 constituted a breach of the contract. It was said that this had the effect of terminating the contract because without it, Ram Holdings was not able to perform the services. It was also submitted that the actions of Kelair were unfair and deceptive, when knowing Ram Holdings was taking its truck into the workshop for servicing, Kelair took the opportunity to remove the lifter. This was part of Ram Holdings' claim in relation to unconscionable conduct. Mr Italiano also testified that when he spoke to Mr Miniello on 23 March 2015 and asked whether the skip lifter would be put back on if he produced the email from Mr Sims approving his leave, Mr Miniello said that it would not go back on.
- 74 On the other hand, Kelair maintained that even though the lifter was removed to protect the assets of the business, it could be easily refitted to the truck. Thus, no real damage was caused to Ram Holdings. Furthermore, Kelair maintained in any event, as Mr Italiano was proposing to go on leave for three weeks and was not engaging a replacement driver, the truck was not going to be used to perform the services so no loss would be sustained by Ram Holdings.

Termination of the Agreement

- 75 Mr Miniello testified that he also became aware of Ram Holdings' truck being booked in for servicing and maintenance on 23 March 2015. This request was set out in an email dated 13 March 2015 from Mr Lorisio of Kelair to Kelair's maintenance section (exhibit A14). Mr Italiano testified that on 23 March 2015 he duly took his truck in for maintenance, expecting the work to be performed to take some two to three days. On his arrival to the workshop, Mr Italiano was informed by the workshop manager that the job would probably only take half a day to complete. Mr Italiano then left the premises for a short period and while out, received a telephone call from the workshop manager, advising him that the job may take longer.
- 76 When he returned to the premises, Mr Italiano testified that he saw the workshop manager operating a forklift around his truck. The manager told Mr Italiano that he had been directed by Mr Miniello to remove the skip lifter from the truck. In accordance with the terms of the Agreement, the skip lifter, as noted earlier in these reasons, remained the property of Kelair. Mr Italiano described the work done in the removal of the skip lifter as a very quick job, and he said that wires and bolts were simply cut through.
- 77 On seeing this occur, Mr Italiano went to see Mr Miniello straight away. Mr Miniello informed Mr Italiano that Ram Holdings was in breach of the Agreement and the leave policy, because he was proposing to take further extended leave without his approval. When Mr Italiano told Mr Miniello that the prior operations manager Mr Sims had approved the leave, Mr Miniello responded to the effect that he had not approved it, as the general manager of Kelair. When Mr Italiano said he mentioned that he had a copy of the approval from Mr Sims, Mr Miniello told him to go home and get it. Mr Italiano's response was that if he did do so, would the skip lifter be put back on the truck to which Mr Miniello replied that it would not. Mr Miniello also told Mr Italiano he had some 11 weeks off work in the preceding 12-month period.
- 78 The decision to instruct the workshop to remove the skip lifter from Ram Holdings' truck was confirmed by Mr Miniello. He said that there may be a difficulty in removing it from the truck if the truck was returned to Ram Holdings' possession. It was Mr Miniello's evidence that he acted to protect Kelair's business interest. Mr Miniello considered that Ram Holdings was in breach of the Agreement because it had generally failed to work co-operatively with the work schedulers; it had failed to work on Saturdays in accordance with the terms of the Agreement; and there had been a failure to follow Kelair's new policy on the taking of leave by owner-drivers.
- 79 A meeting then took place between Mr Miniello, Mr Italiano and Mr Mangione, a director of Kelair. Mr Miniello informed Mr Mangione of his views and that in his opinion, Kelair should terminate the Agreement. Mr Miniello confirmed that the skip lifter had been removed. He informed Mr Mangione that Mr Italiano had planned to go on leave again and no replacement driver had been arranged. Mr Italiano said that he told Mr Mangione that it was too expensive for Ram Holdings to obtain a relief driver. It was Mr Mangione's evidence that he asked Mr Italiano whether he was sure that he was not going to comply with the policy and Mr Italiano responded to the effect that "no he would not do it". Mr Mangione's evidence was that there was no reference made by Mr Italiano to any prior approval of leave by Mr Sims, or any period of absence from the workplace because of injury in the meeting.
- 80 It appears on the evidence that there was some discussion of the purchase by Kelair of Ram Holdings' truck at the end of the meeting, but that matter was not further pursued.

Notification of breach and opportunity to rectify

- 81 It was common ground that at no time did Kelair serve notice on Ram Holdings of an alleged breach of Ram Holdings' covenants or other terms of Agreement as required by cl 14 of the Agreement. Mr Miniello did say in his evidence, that had Ram Holdings not taken its truck in for repairs on 23 March 2015, he would have considered issuing such a notice, in the circumstances.

Consideration

- 82 I refer to the terms of cl 16(a) of the Agreement which was in the following terms:

16. **Termination**

This Deed may be terminated by:

- (a) either party may terminate this Deed on the occurrence of an event of default;

- 83 As mentioned, it was common ground that through the evidence of Mr Miniello, at no time did Kelair serve notice of default under cl 14(a) of the Agreement on Ram Holdings. In these circumstances, it was in my view not open to Kelair to rely on any default by Ram Holdings of its covenants or other obligations under the Agreement to terminate it. As matters transpired however, the case for Kelair in relation to termination of the Agreement, seemed to come down to its contention that by

proposing to proceed on leave on 24 March 2015 for three weeks, contrary to Kelair's new leave policy, Ram Holdings failed to comply with Kelair's reasonable requests and directions as to the performance of services, contrary to cl 6(c) of the Agreement.

84 In relation to the alleged failure by Ram Holdings to consistently work on Saturdays, it was not open for Kelair to rely on this as a justification for termination of the Agreement. This is despite any failure to comply with its default notice obligations. Clause 6(a) of the Agreement provided:

6. **Contractor must provide Services**

The Contractor covenants and agrees that the Contractor must:

- (a) provide the Services to Kelair when requested by Kelair during normal trading hours from 4.00am to 6.00pm Monday to Saturday inclusive and if necessary the Contractor is required to work after hours to complete the work allocated by Kelair to the Contractor;

85 As noted earlier, Ram Holdings ceased providing services on Saturdays after about the first one and a half years under the Agreement. The reason for this was because it was not economic for Ram Holdings to continue to do so. Thereafter, Ram Holdings did not perform services on Saturdays and there was no evidence before the Tribunal that anyone in authority from Kelair directed or requested Ram Holdings to resume doing so. As a matter of construction of cl 6(a), the obligation to work hours specified within the range of 4 am to 6 pm Monday to Saturday inclusive is not to be construed in my view, as independent of any request or direction by Kelair to do so. The language of cl 6(a) construed in its ordinary and natural sense, includes reference to "when requested by Kelair". These are words of clear qualification. In the absence of the evidence of any further request or direction to Ram Holdings to perform such services on Saturdays, then in my view, no breach of cl 6(a) is made out.

86 In any event, even if such a direction or request had been given by Kelair to Ram Holdings, the failure by Kelair to give Ram Holdings a notice of default under cl 14(a) of the Agreement, and an opportunity for Ram Holdings to remedy the default, means it could not provide a basis for the termination of the Agreement under cl 16(a). There would also be no ground for termination open to Kelair on such a basis in cl 16(b) either, due to Ram Holdings ceasing to work Saturdays, in my view.

87 The obligations imposed on Kelair by cl 14 of the Agreement are important. They were not just matters of mere procedure. Kelair was required to give Ram Holdings notice of an alleged breach of any covenants or obligations it had under the Agreement and an opportunity to remedy any default. The importance of this requirement is underscored by Kelair's right under the Agreement to terminate the Agreement without notice, as seems to be the scheme contemplated by cl 16, under a contract to run for five years. Kelair, through the evidence of Mr Miniello, seemed to regard such obligations as "hoo-hah" and to be treated somewhat dismissively (186 ts). They were not.

88 Therefore, to the extent that Kelair sought to rely on the Saturday work issue at point 2 on page 1 of its letter of termination of 24 March 2015, this was erroneous. Kelair was not able to do so on the facts of this case.

89 Returning to the issue of annual leave, which as noted above, seemed to become the main basis for the justification to terminate the Agreement, Kelair relied upon cl 6(c) of the Agreement, which was in the following terms:

- (c) comply with all reasonable requests and directions of Kelair in relation to providing the Services;

90 The argument of Kelair was to the effect that the new leave policy produced by Mr Miniello in September 2014, constituted a reasonable direction to Ram Holdings. It was further contended that the effect of Ram Holdings proposing to go on leave from 23 March 2015 was, in effect, an anticipatory breach of Ram Holdings' obligations under the Agreement. As the argument went, this entitled Kelair to terminate the Agreement without notice: *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] AC 757. The evidence relied on by Kelair was the policy and Ram Holdings' awareness of it for some time prior to proposing to take leave and Ram Holdings' refusal to comply with its terms. In effect, on Kelair's case, while not put in these precise terms, Ram Holdings' express refusal to perform constituted a repudiation of its obligations under the Agreement: *Hochester De la Tour* (1853) 2 E & B 678; *Mersey Steel and Iron Co Ltd v Naylor, Benzon and Co* (1884) 9 App Cas 434.

91 In cases of anticipatory breach of contract, it generally needs to be established that the breach is certain; is serious; and would give rise to the right to terminate the contract by the other party. Even if one were to look at this issue in this way, it would necessarily require a finding of breach and a right, without more, in Kelair to terminate the Agreement without notice.

92 As to the first issue, Mr Miniello conceded that given Mr Italiano had sought and obtained approval to take leave in March 2015, many months prior to it being due to be taken, it was reasonable for him to assume that it was sanctioned by Kelair at the time of the response from Mr Sims. However, it is also the case that at the time of the new leave policy and up to the meeting with Mr Mangione on 23 March 2015, Mr Miniello was not aware of the prior approval by Mr Sims. Despite email and telephone communications between Mr Miniello and Mr Italiano, somewhat inexplicably, Mr Italiano never raised the prior approval with Mr Miniello. This is especially surprising given the quite strident language used in Mr Miniello's email to the owner-drivers of 22 September 2014, and the follow-up. It was clearly an important issue for Mr Miniello and Kelair. One would have thought that Mr Italiano, in view of the prior indication from Mr Sims some months earlier, which was in fact qualified, would have sought to at least query whether the prior provisional approval still stood. Nonetheless he did not do so. This almost seems to be a case of wilful blindness on the part of Ram Holdings. The issue is however, what is the consequence of all of this?

93 It was not entirely clear, as noted above, when Mr Miniello became aware that Mr Italiano was proposing to take a further three weeks' leave. It was at least sufficiently prior to 23 March 2015 however, so Mr Miniello could prepare a summary of leave taken by Ram Holdings over the course of the prior year or so. It was also clear on the evidence that prior to Ram Holdings taking its truck into the workshop for repairs and servicing, Mr Miniello had directed the manager of the workshop to remove the skip lifter. It seemed also to be the case on the evidence, that Mr Mangione was aware of this, prior to him meeting with Mr Italiano on 23 March 2015.

94 Accepting Kelair's contention that the new leave policy set out in Mr Miniello's email constituted "a reasonable request and direction of Kelair", for the purposes of cl 6(c) of the Agreement, then that does not of itself, get Kelair home on the termination of the Agreement point. This is because Kelair still needed to satisfy the requirements of cl 16. Clause 16(b) contemplated the termination of the Agreement other than in circumstances of default. This seems clear enough from the language of cl 16(a) and (b) when read together. The matters set out in cl 16(b)(iii) to (ix) largely concern events independent of the covenants and obligations imposed by the Agreement, except perhaps for sub-par (viii). The only possible provision that could be argued to apply to the annual leave issue, would be cl 16(b)(iii) which provided as follows:

16. **Termination**

...

(b) ...

(iii) the Contractor is unable, whether through a defect in the Motor Vehicle or otherwise, provided that such inability is not attributable to any act or omission of Kelair, to perform the Services for 7 consecutive days or an aggregate of 10 days in any 6 month period of the Term;

95 This provision, not uncommon in contracts of this kind, provides for the ability of a party to terminate a contract, through the other party's inability to perform its obligations. This may be some frustrating event which precluded Ram Holdings from performing its services. This could be for example, catastrophic failure of Ram Holdings' truck, or the permanent incapacity of Mr Italiano, or some such similar event. In the present circumstances before the Tribunal, Ram Holdings was not, least as at 23 March 2015, *unable* to perform the services. At best, on the evidence, Ram Holdings, through Mr Italiano, had expressed an *unwillingness* to do so because of the dispute over the taking of leave, and the cost of workers' compensation cover for a replacement driver. As at 23 March 2015, Mr Italiano could conceivably simply have changed his mind and kept working and not proceeded on leave, or proceeded on leave for a shorter period.

96 Accordingly, in my view, in the context of the parties' rights and obligations under the Agreement, any failure by Ram Holdings to comply with the annual leave policy would more properly be characterised as a breach of Ram Holdings' covenant in cl 6(c). This being so, the obligation would fall on Kelair to give notice to Ram Holdings under cl 14(a) of an alleged default and give Ram Holdings an opportunity to remedy the default. This is despite Mr Miniello saying he was very busy at the time and not wanting to deal with issues regarding Mr Italiano, from the tenor of Mr Miniello's evidence given in the proceedings.

97 Before reaching this conclusion however, consideration must be given to whether on the facts, Ram Holdings was in breach of its obligation under cl 6(c) of the Agreement. If not, then Kelair was in breach of the Agreement and the termination of it would be unlawful. If so, then the admitted failure by Kelair to serve a default notice brings into play the impact of cl 14, and the consequence of such failure to comply, including how any damages for breach may have to be assessed.

98 As to whether Ram Holdings breached cl 6(c) of the Agreement, I first observe that there was no question that Ram Holdings' request for leave made on 19 June 2014 (exhibit A10) was in accordance with the leave policy of Kelair in place at that time. By a memo of 5 September 2012 (exhibit A9) Mr Sims informed all owner-drivers of the venue policy for leave requests. At least four weeks' notice was to be given and leave was to be granted on a "first in first served" basis. Ram Holdings' request for leave was plainly in accordance with this policy.

99 As for the request made for leave for March to April 2015, Mr Italiano accepted in his evidence that Mr Sims' response was qualified, due to his reference to rosters not yet being prepared for 2015. However, importantly for present purposes, Mr Miniello accepted in his evidence that it was reasonable for Mr Italiano to assume, from Mr Sims' response, that leave for 2015 was approved, at least at that time. This must be the starting point. The question therefore is whether the policy introduced by Mr Miniello, countermanded Mr Sims' approval given previously on 23 June 2014. In my view, for the following reasons, it did so. Mr Miniello accepted that he made no enquiries as to prior approvals and Mr Italiano did not tell him of Mr Sims' response.

100 Firstly, the context of the new policy was important. This was referred to in the second paragraph. It was made clear that the prior policy of extended leave without trucks being on the road would not continue. Reference was made to a busy period in the 12 months ahead, which would cover the period that Ram Holdings proposed to be absent for three weeks. Secondly, in this context, the new policy was to be effective immediately. No leave was to be taken for greater than one week unless the conditions in the policy were met. Thirdly, the reference to possible disciplinary action was a clear sign of the importance of the new approach.

101 On any reasonable view of the matter, and coming from the general manager of Kelair, it was quite clear that this represented a major change in approach. Any variation would need special dispensation. The policy also referred to the taking of leave of more than two weeks in the prior 24 months (which Ram Holdings had done) and said this was also a clear indication of the constraints to be imposed.

102 Furthermore, Mr Italiano's evidence that he spoke to Mr Miniello and requested an exemption from the new policy, and explored the cost of a replacement driver, was inconsistent with Ram Holdings' contention that it did not need to comply with the new policy because of the prior approval by Mr Sims. It ultimately came down to the costs of compliance with the policy, in terms of workers' compensation premiums for a replacement driver, and not any issue of prior approval. Ram Holdings made it clear that it was not able to comply and was unwilling to do so. Accordingly, I am satisfied that Ram Holdings did fail to comply with cl 6(c) of the Agreement in relation to leave.

- 103 Returning then to the issue of the termination of the Agreement for breach of cl 6(c). In these circumstances, and in view of the preceding discussion, Ram Holdings committed an act of default for the purposes of cl 14(a) of the Agreement. Kelair was therefore obliged to serve a notice of default on Ram Holdings and give it the opportunity, within five days, to remedy the default. As it transpired on the evidence, this seemed to be, according to Mr Miniello in any event, what Kelair may have had in mind and may have done, had Ram Holdings not brought in its truck for repairs on 23 March 2015.
- 104 As to the removal of the lifter, in my view its removal on the instructions of Mr Miniello was plainly a breach of the Agreement. By cl 17(a), the lifter, being the property of Kelair, could only be removed following termination of the Agreement. Kelair had no right to do so prior to this event, regardless of whether Mr Miniello thought he was acting to protect the property of Kelair. It was not for Kelair to take matters into its own hands, and to ignore Ram Holdings' contractual rights. I am also satisfied that Kelair used the opportunity of the return of Ram Holdings' truck for servicing, to remove the lifter in a deceptive way. Kelair took unfair advantage of this situation without any notice to Mr Italiano. The first Mr Italiano knew about the matter was when he saw the lifter in the process of being removed by the workshop manager.
- 105 The conduct of Kelair towards Ram Holdings in this respect was consistent with the general tenor of Mr Miniello's evidence towards Ram Holdings. I have no doubt that Mr Miniello regarded Mr Italiano as somewhat of an irritant and someone who was always complaining. The scheduled maintenance of Ram Holdings' truck and the proposed leave by Mr Italiano, provided the opportunity for Kelair to rid itself of the problem. Accordingly, the Tribunal also regards this conduct by Kelair as unconscionable.

Damages for breach

- 106 In *Supaworld Pty Ltd (t/as Cousins Transport) v LN Price Partners Pty Ltd (ACN 053 962 299) (t/as Busselton Freight)* (2015) 95 WAIG 649, in relation to the approach of the Tribunal to an award of damages, I said:

69 By s 47(4) of the OD Act, the Tribunal has the power to order the payment of a sum of money by way of damages, in the determination of a dispute before it. The approach of the Tribunal to the assessment of damages is to apply the established common law contractual principles. In this respect, the Full Bench of the Commission on an appeal from a decision of the Tribunal in *Shacam Transport Pty Ltd v Damien Cole Pty Ltd* (2014) 94 WAIG 1835, recently observed at par 22:

22 The relevant legal principles governing an assessment of damages were summarised by Buss JA in *Australian Goldfields NL (In liq) v North Australian Diamonds NL* [2009] WASCA 98; (2009) 40 WAR 191. At [276] his Honour observed:

The general contractual principle governing the measure of damages is that the innocent party suing for breach of contract is to be placed in the same position, so far as money can do it, as if the contract had been performed: see *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13] per French CJ, Gummow, Heydon, Crennan and Kiefel JJ; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 per Mason CJ and Dawson J; *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225 at 237 per Gibbs CJ; *Wenham v Ella* (1972) 127 CLR 454 at 471 per Gibbs J. The innocent party is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss): see *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11 - 12 per Mason, Wilson and Dawson JJ. The innocent party should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss suffered by reason of the breach of contract. Ordinarily, this involves a comparison between the position in which the innocent party would have been if the breach of contract had not occurred and what, relevantly, represents the position in which the innocent party is in after the occurrence of the breach: see *Amann Aviation* (at 116) per Deane J.

- 107 I adopt that approach in this case. The issue therefore is, what would have been the position of Ram Holdings had Kelair complied with its obligations under the Agreement? For Kelair to comply with its obligations, would have required it to give to Ram Holdings a notice under cl 14(a) to the effect that Mr Italiano, in proceeding on leave as planned, without Ram Holdings arranging for a replacement driver to keep its truck on the road, was in breach of the Agreement. Further, that Kelair proposed to terminate the Agreement under cl 16(a), unless the default was rectified within five days.
- 108 Whilst regrettably cl 16 is not clearly drafted as to the notice to be given by either a contractor or Kelair in the event of a default, it would be reasonable to assume, considered objectively, that a reasonable person in the position of the parties, would apply the same notice as is specified in cl 16(b) in the case of termination for default in cl 16(a): *Supaworld* at par 28 (citing *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 per Beech J at pars 106-123).
- 109 Thus, the Tribunal needs to consider Ram Holdings' likely response to Kelair serving a notice of default on it, based on the evidence. The evidence before the Tribunal was to the effect that Ram Holdings saw major problems in compliance with the new leave policy because of workers' compensation costs for a replacement driver. Ram Holdings saw this as prohibitive. It was also clear on the evidence, after discussions between Mr Italiano, Mr Miniello and Mr Mangione, that Mr Italiano informed Kelair that Ram Holdings would not be complying with the policy because it felt it could not do so.
- 110 On this evidence, the Tribunal must assess the likely response of Ram Holdings to a default notice for non-compliance with the policy, as best it can. For the Tribunal to grant the relief sought by Ram Holdings, would require the conclusion that Ram Holdings would have continued to perform the services under the Agreement, for the remainder of its term. However, I consider that the only reasonable conclusion that the Tribunal can reach on the evidence is that Ram Holdings' response to the issue of notice of default would be no different to Ram Holdings' response to Kelair's new leave policy. That is, it was not feasible for Ram Holdings to comply with it and Ram Holdings accordingly, would not put a driver in its truck for the period of Mr Italiano's intended absence on leave. I have also considered the possibility of Ram Holdings deciding that Mr Italiano

would not proceed on leave as planned and continue to work and provide services under the Agreement. Given however, the reason for Mr Italiano being absent is that he had to go away to attend his son's wedding, understandably, I consider the prospect of a major change to Ram Holdings' intentions in this regard to be remote.

- 111 I also need to consider the issue of whether damages flow from the breach of the Agreement by Kelair in removing the skip lifter from Ram Holding's truck. As already mentioned, the truck was to be off the road and not earning revenue under the Agreement for about three weeks while Mr Italiano went on leave to attend his son's wedding. As there could in those circumstances be no loss of revenue, there is no basis to establish compensable loss.
- 112 Damages may be awarded for breach of contract based on contingencies. However, before a court will award damages based on a chance that a plaintiff may make a profit or achieve a benefit under a contract, there must be evidence of a "substantial" or a "not minimal chance (more than a mere speculative possibility)" that the plaintiff would have acquired the benefit or made the profit": *Chitty J, Chitty on Contracts: General Principles* (2012) par 26-003.
- 113 The Tribunal in this case cannot be satisfied that Ram Holdings would have continued to work and provide services under the Agreement in response to the default notice. It is therefore most likely that in the circumstances, Kelair would have in any event, exercised its right to terminate the Agreement under cl 16 without notice. There was also no compensable loss established in relation to the unlawful removal by Kelair of the skip lifter. However, in recognition of the rights held by Ram Holdings under the Agreement in respect of these matters and of the breaches by Kelair, the Tribunal will award nominal damages, with the quantum to be agreed or as assessed by the Tribunal: *Chitty* at par 26-004.

Unconscionable conduct

- 114 Ram Holdings' unconscionable conduct claim was based on three main propositions. Firstly, it was contended that the conduct of Kelair was unconscionable in relation to the formation of the Agreement. Ram Holdings contended that Kelair offered the Agreement on a "take it or leave it" basis and therefore this constituted a failure to negotiate, for the purposes of s 30(2)(i) of the OD Act. There was a further submission that at the time of the provision of the Deed to Ram Holdings, a copy of the then current Guideline Rates, as required by the Code, was also not provided.
- 115 The second basis for the unconscionable conduct claim as the Tribunal understood it, was that in the performance of the services under the Agreement, Ram Holdings was treated differently to other owner-drivers. Specifically, as I understood the claim, Ram Holdings was not allocated work in such a way that it could maximise the efficient performance of its work. Also, Ram Holdings was disadvantaged, in that other owner-drivers were given access to more beneficial runs, closer to tipping points, therefore being more advantageous to them in terms of potential earnings.
- 116 Finally, was the contention that the circumstances of the removal of the lifter and the manner of the termination of the Agreement was also unconscionable. I have already dealt with the issue of the removal of the lifter above.
- 117 The issue of unconscionable conduct for the purposes of the OD Act was dealt with by the Tribunal in *Van Dongen and Ors v Sims Metal Management Ltd* [2016] WAIRC 00327; (2016) 96 WAIG 598. After referring to the Tribunal's decision in *Supaworld*, in relation to ss 30 and 31 of the OD Act, I said at pars 13-18 as follows:

13 Whilst ss 30(1) and 31(1) of the OD Act do not say, as does s 21(4)(a) of the ACL, that they are "not limited by the unwritten law relating to unconscionable conduct" (which means the Australian common law), given the expansion of the concept of unconscionability by the factors to be considered in ss 30(2) and 31(2) and its correspondence with s 22(1) of the ACL, I also consider that the OD Act provisions are not to be limited to the common law concepts of unconscionability. I therefore accept the submissions made by the applicants in this regard: *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253. I also consider, as for ss 21 and 22 of the ACL, that the concept of "unconscionable" in both ss 30(1) and 31(1) is not to be read down in accordance with equitable principles. However, the relevant conduct must still be characterised as unconscionable and based on intentional or reckless acts: *ACCC v 4WD Systems Pty Ltd* (2003) 200 ALR 491. As was said by Selway J in discussing the scope of the former s 51AC of the TPA in *4WD Systems* at pars 184-185:

[184] The ordinary or dictionary meaning of the word "unconscionable" was explained in *Hurley v McDonald's Australia Ltd* (2000) ATPR 41-741 at [22]:

For conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable, must be demonstrated — *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 179. Whatever "unconscionable" means in s 51AB and s 51AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable— *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term "unconscionable" import a pejorative moral judgment— *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 283-4 and 298.

[185] In order to find that conduct is "unconscionable" it is necessary to do more than merely show that the behaviour is misleading or deceptive, or otherwise in breach of some other provision of the TPA. What is necessary is to show that the conduct is so unacceptable that it can properly be described as "unconscionable". Normally it might be expected that behaviour would only be "unconscionable" if some moral fault or responsibility is involved. Normally it might be expected that this would involve either a deliberate act, or at least a reckless act. Mere unreasonableness or unfairness may not be sufficient, at least in the absence of some moral fault. This is why it was critical to the conclusion he reached in *Simply No-Knead* that Sunberg J was able to find an "overwhelming case of unreasonable, unfair, bullying and thuggish behaviour". Of course, those words are not a definition of "unconscionable". But having made that finding it is quite apparent that the behaviour could properly be characterised as "unconscionable".

- 14 Taking appropriate guidance from the TPA and ACL cases, it is first necessary for a hirer under s 30(1) to "engage in conduct". Unlike in the former TPA, in s 4(2)(a) of the CCA there is a definition of "engage in conduct" which includes "doing or refusing to do any act". I consider that such a definition provides some assistance and is generally consistent

with the ordinary and natural meaning of the phrase to “engage in conduct”. I therefore propose to adopt this approach for present purposes. Also, for the purposes of ss 30(2) and 31(2) of the OD Act, the Tribunal “may have regard to”, without in any way being limited by them, the various factors set out. This simply means the Tribunal may consider or take these matters into account: *ACCC v Leelee Pty Ltd* [1999] FCA 1121.

- 15 For the purposes of s 30, I also take guidance from the TPA and ACL cases as to the general notion of “unconscionable” as referring to conduct or behaviour that is not done in good conscience: *ASIC v National Exchange Pty Ltd* [2005] FCAFC 226. The courts have, in applying the terms of ss 21 and 22 of the ACL, attempted to describe unconscionable conduct in various ways. In *Lexis Nexis Halsbury’s Laws of Australia* (at 7 January 2015) “(C) Unconscionable Conduct” [100-263] it is observed that:

Judges have described unconscionable conduct under section 21 of the ACL as ‘serious misconduct, something clearly unfair or unreasonable’,¹⁷ ‘[s]howing no regard for conscience; irreconcilable with what is right and reasonable’,¹⁸ revealing ‘a high level of moral obloquy’,¹⁹ being conduct ‘of such a type as to be deserving of significant moral opprobrium’.²⁰ It follows that mere unreasonableness or unfairness is unlikely to be sufficient, at least in the absence of some moral fault.²¹ Mere reliance on the terms of a contract,²² or a mere breach thereof,²³ cannot, without something more, therefore constitute unconscionable conduct; a contravention requires some circumstance other than the mere terms of the contract itself that renders reliance on, or breach of, those terms unconscionable.²⁴ Similarly, debt collection processes, including the threat of proceedings, are not of themselves unconscionable (including when carried out by a debt collector), but may traverse into unconscionability where they involve false assertions.²⁵

In each case, the relevant conduct against conscience must be assessed by reference to the norms of the society in issue,²⁶ which conduct is not divorced from the context wherein it occurs.²⁷

- 16 Additionally, whilst it is made in relation to s 20(1) of the *ACL*, I consider some regard can be had to the following commentary in *Lexis Nexis Halsbury’s Laws of Australia* (at 7 January 2015) “(C) Unconscionable Conduct” [100-260] when considering the conduct of the parties in this case. It is said:

In any event, consistent with the ‘unwritten law’, there can be no finding of unconscionable conduct in this context where the parties are experienced operators, accustomed to making commercial judgments, and acutely aware of their own interests and how to advance them.¹² A distinction exists between parties who adopt an opportunistic approach to strike a hard bargain and those who act unconscionably.¹³

- 17 As to the requirement imposed on the parties to negotiate “fairly and in good faith” under s 6 of the Code, no definition is included in the Code in relation to these concepts. However, given that s 6 applies to the negotiation, variation or termination of an OD contract, I consider that the relevant contractual principles in relation to what has become regarded as the “duty of good faith” can provide some assistance. In short, in appropriate cases, this principle imposes a general obligation on parties to a contract to act fairly and reasonably: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 per Priestley JA at 268. Importantly, and as is recognised in s 6(1) of the Code itself, this does not mean that a party cannot act in its own self-interest: *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611.

- 18 In terms of remedies, on a finding of unconscionable conduct by a hirer or an owner-driver under ss 30 or 31 of the *OD Act*, the Tribunal has a broad range of powers available to it under s 47(4). These include damages (including exemplary damages), and orders in the nature of mandatory or prohibitory injunctions.

118 I adopt and apply this approach for the purposes of addressing this limb of Ram Holdings’ claims.

- 119 Turning first to the issue of negotiations for the Agreement. A complete copy of the Deed of Agreement (as tendered by consent after the conclusion of the initial hearing) was exhibit A1. The circumstances leading up to the formation of the Agreement were outlined by Mr Italiano in his evidence. He testified that he saw an advertisement for the sale of a skip truck. Mr Italiano contacted the owner of the vehicle, a Mr Ross. Mr Ross told him that if he was interested to take the matter further, he should go and see a Mr Green, who was the then general manager of Kelair.

- 120 Mr Italiano did go and see Mr Green. He spoke to him about the job and the purchase of the truck. Mr Italiano’s evidence was that Mr Green offered him a five-year contract with Kelair, if Mr Italiano agreed to purchase a new truck. If so, Kelair would make a new skip lifter to fit to the truck. At the same meeting, Mr Green gave Mr Italiano a copy of the Deed. Mr Italiano said that he took it away and spent some time looking at it. He had some questions for Mr Green about it, after considering its terms.

- 121 Mr Italiano met Mr Green for a second time. At that meeting, he asked Mr Green about the skip lifter maintenance fee and whether it was payable when an owner-driver goes on holiday. Also discussed was the clause in the Deed in relation to a contractor failing to work seven consecutive days in a six-month period and how this affected the taking of holidays. Mr Italiano also said that he was given a copy of a separate document, which set out the three rate increases of 5% for each year, starting on 7 March 2011. It seemed common ground that the rates of pay, which were struck on a piecework basis, were negotiated between Kelair and the TWU.

- 122 The evidence of Mr Italiano was that some other matters were discussed with Mr Green. These included the working hours. There was some suggestion on Mr Italiano’s evidence that despite reference in the Deed to the span of hours commencing 4.00 am to 6.00 pm Monday to Saturday inclusive, that he would not be required to work those actual times. Mr Italiano said he made notations and markings on his copy of the Deed, which appear on exhibit A1. Mr Green was not called to give evidence.

- 123 Having considered the terms of the Deed and the issues discussed with Mr Green, Mr Italiano then signed the Deed on behalf of Ram Holdings.
- 124 The contention of Ram Holdings essentially was that because Kelair gave a copy of the Deed to Mr Italiano, and did so on what it said was a "take it or leave it" basis, for the purposes of s 30(2)(i) of the OD Act, this was evidence of a lack of willingness by Kelair to negotiate. This submission must be rejected. It was clear on the evidence that Ram Holdings was provided a copy of the Deed for its consideration. It is a comprehensive document covering terms applicable to the engagement and the performance of services. Mr Italiano took a copy of it and took time to examine it. He had issues which he wished to raise with Mr Green of Kelair. He did subsequently raise those issues with him and they were discussed.
- 125 There was no suggestion on the evidence that Kelair was not prepared to discuss the issues with Mr Italiano. Indeed, the evidence of Mr Italiano was quite to the contrary. Mr Italiano was also given a copy of the rate increases to apply for the ensuing three years. He was offered a five-year term if Ram Holdings would buy a new truck. A new lifter was to be manufactured and installed. These matters were all part of the negotiations between Ram Holdings and Kelair and the bargain that they ultimately struck. These discussions having taken place, Mr Italiano was then content to enter into the Agreement on behalf of Ram Holdings, which he did.
- 126 There was some faint suggestion that Mr Italiano was not that experienced in the transport industry and this in some way impacted on the evaluation of the Deed and the terms of the ultimate Agreement. I do not accept this proposition. The evidence of Mr Italiano was that he had some 10 years' experience and Ram Holdings was incorporated in 1998. Mr Italiano was far from a novice.
- 127 Finally, it was put on behalf of Ram Holdings that it was also unconscionable for Kelair to fail to provide the information as set out at Appendix 1 to the Code of Conduct. This included the Information Pamphlet and the then current Guideline Rates published by the Road Freight Transport Industry Council. Kelair admitted that this information was not provided to Ram Holdings. To that extent, this constituted a failure to comply with the Code. By s 30(2)(g) of the OD Act, the Tribunal may have regard to the requirements of the Code of Conduct in any claim of unconscionable conduct. A similar provision exists in s 22(2)(h) and (3)(h) of the ACL.
- 128 In accordance with the ordinary and natural meaning of this provision, s 30(2)(g) is directed to the content of the Code and the substantive obligations it imposes on owner-drivers and hirers. These matters, amongst others, such as good faith in negotiations etc., require the documents as specified in s 7 of the Code to be given by a hirer to an owner-driver, prior to the entering into of a contract.
- 129 As noted, Kelair admitted it did not comply with this obligation. It is to be noted that by s 7(2)(a) of the Code, a copy of the Guideline Rates is to be given to an owner-driver by a prospective hirer, irrespective of whether they will apply to the circumstances of the proposed contract. This is plainly intended to enable an owner-driver to undertake a comparison between the method of payment under a proposed contract and an alternative method of payment, such as an hourly payment basis. The consequences of such non-compliance must be assessed by the Tribunal on a case-by-case basis. Section 30(2)(g) does not require a finding of unconscionability in every case of a failure to comply. In this case, the failure to provide the Code requirements of the Information Pamphlet and the Guideline Rates was not merely a technical breach.
- 130 As to the Guideline Rates, given that they are based on per kilometre and hourly rates for various types of heavy vehicles, they would not have provided immediate assistance to Ram Holdings in assessing Kelair's offer of a contract. This is because Kelair's business is structured on a piecework payment basis, with owner-drivers paid by the number and type of skip bin movements each day. However, once the performance of the services had commenced, the Guideline Rates could certainly provide a resource to assess the viability of the work performed, by comparing revenue calculated on an hourly basis for example. If hourly revenues are substantially below the Guideline Rates, this may give an owner-driver a legitimate cause for concern as to the ongoing viability of their business.
- 131 Secondly, as to the content of the Information Pamphlet itself, there was nothing on the evidence led by Ram Holdings that not receiving a copy of it, rather than Kelair's compliance with the obligations imposed by the Code generally, led to any damage or disadvantage to Ram Holdings. The Information Pamphlet is a very general summary of what the hirer/owner-driver regime is about. Whilst useful for parties, for the failure of it to be provided to be a basis of a finding of unconscionability, there would need to be in my view, evidence as to the consequences of the failure to comply. Other than the issue of the failure to provide the Guideline Rates, there was no contention advanced or evidence led in this case, of the consequences of failing to provide the Information Pamphlet. In any event, it seemed that Mr Italiano, from the general tenor of his evidence, had some awareness of what might be Ram Holding's rights under the OD Act.
- 132 I am therefore persuaded there was an element of unconscionability in relation to the formation of the Agreement, in terms of s 30(2)(g) of the OD Act, in relation to no-compliance with the Code. The Guideline Rates should have been provided to Ram Holdings and they were not. The Tribunal cannot discount the possibility such information would have assisted Ram Holdings in its operations. Otherwise the Tribunal is not persuaded there was any unconscionable conduct by Kelair in relation to the entering into the Agreement.
- 133 The second leg of unconscionability alleged by Ram Holdings was as I have mentioned, in relation to the allocation of work and their locations, relative to other contractors.
- 134 As part of this limb of the argument, Mr Italiano testified that in discussions with Mr Green in relation to the terms of the Deed, prior to signing the Agreement, there was some reference made to areas of work. According to Mr Italiano, the discussion was to the effect that he would start work in the area in which he parked his truck. In Ram Holdings' case, as Bibra Lake was the area where the truck was parked, he understood work would commence from this location. Mr Italiano understood that "his work area" would generally be from Booragoon up towards Bayswater and the surrounding suburbs. Kelair's head office is in Bayswater and a disposal site is also located there.

- 135 Mr Italiano described the process of allocation of jobs to contractors by the scheduler, which was not in dispute. He testified that at approximately 5 – 6 pm each day he would receive an email containing “run sheets” for the following day. The run sheets set out the name of the contractor, the date and the customer details with any notations. If all the jobs on the run sheets are completed, a driver could go back to the dispatcher for more work. Additionally, a driver may also get some jobs coming up during the day, in addition to those jobs set out in the run sheets received the previous evening. It was also common ground that it was up to each contractor to plan their day and to make the runs as efficient as possible. “Carry forwards” were entered on the run sheet, where a bin job was not able to be completed on any given day, and it would be completed the following day. Because of the impact of carry forwards on customers, they were to be avoided where possible.
- 136 The allocation system was overseen by the scheduler. Mr Miniello testified that there were four types of services provided by Kelair to customers. They are a delivery bin; an empty/return “deliver and pick up”; an off hire “removal of a full bin”; and callout. On any given day Mr Miniello estimated that drivers may do between six to 10 allocated jobs.
- 137 One of Mr Italiano’s complaints was that on some occasions, he had to travel between one and one and a half hours to get to his first job for the day. Ram Holdings tendered as exhibits A3 to A8, bundles of run sheets. A covering table prepared by Mr Italiano to exhibit A3, was a list of days that he said he had to travel between 30 minutes and one hour to commence work. In the bundles of run sheets tendered into evidence, Mr Italiano said that some contain notations where he had been given extra allocations during a day. Some also contained notations made by Mr Italiano where he had received carry forwards from other drivers, that had been re-allocated to him. He testified that he raised some concerns in relation to his earnings with Mr Mangione in about June 2011. Mr Italiano testified that Mr Mangione told him to speak to the dispatcher about it. At about the same time, Mr Italiano said he happened to see the run sheets of another driver, which showed jobs being much closer together. Mr Italiano said he also spoke to Mr Green, who said that he would “fix” the issue of allocations.
- 138 In about mid-2012, Mr Italiano said he became aware of another tipping station called ECO Resources, which he understood was in the Naval Base area. He testified if he could tip there also, this would substantially reduce his driving distances between jobs, as opposed to using the Bayswater tip. Mr Italiano said that he spoke to the then general manager and was told that the ECO tip was only used by drivers working in the south of the river area. Mr Italiano said that he did do this type of work and said that he was given the address for the ECO tip location. This was about mid-2012. It is fair to assume therefore, that Ram Holdings would have had access to this location as with other drivers from about this time. Also, according to Mr Miniello, he confirmed that Ram Holdings did in fact use the ECO tipping location.
- 139 The upshot of all of this was that Ram Holdings maintained that its efficiency was compromised by these types of allocations, and the scheduling system, which impacted on its revenue and profit.
- 140 In relation to the management of workload generally, Mr Italiano accepted that it was up to owner-drivers to arrange their work day as they saw fit, based on the run sheets given to them by dispatch. He also accepted that the two key aspects of earnings capacity were the rate paid for each type of work and secondly, the volume of work performed. Mr Italiano also accepted that on occasions, he did write words on his run sheets such as “not my area” to indicate some jobs that he considered were outside of the area discussed between himself and Mr Sims. He generally understood from his discussions with Mr Sims, that “his area” would not be past Leach Highway. Mr Italiano denied that he flatly declined to do work allocated outside of this area. However, when it was put to him in the form of exhibit R1, a run sheet for 24 February 2015, that he had written “not my area” on the first two jobs on the sheet, Mr Italiano accepted this is what he wrote. He endeavoured to explain however, that the problem with the two jobs in question was a lack of bins, and not his refusal to perform the work.
- 141 There were two jobs in Palmyra where he handwrote “not my area” on the run sheets, which resulted in those jobs being carry forwards for the next day. He was questioned further about a job in Bibra Lake where Mr Italiano said he was not able to complete the work, because of a lack of bin stock.
- 142 Whilst of the view that Ram Holdings did most of its work south of the river, as he was aware that Mr Italiano lived in the Coogee area, Mr Miniello testified that it did make commercial sense to allocate work to drivers either broadly across south of the river areas or north of the river areas. This was the purpose of cl 10(a) of the Agreement. It is to be noted however, that this is subject to market conditions and was at Kelair’s discretion. Notably also, the terms of cl 10(a) must be read with Ram Holdings’ obligations under cl 6(c), (e) and (f) of the Agreement, requiring it to comply with the directions and requirements of Kelair in relation to the performance of services.
- 143 At the end of the day, Mr Miniello said that it was for Kelair’s scheduler to allocate work to drivers who get the work done. Despite not performing a detailed analysis of Ram Holdings’ run sheets himself, Mr Miniello maintained that from his general knowledge of the manner of performance of work by Ram Holdings over about two years, in conjunction with reports of schedulers, his impression was that Mr Italiano tended to “pick and choose” the work that he performed, at least to some extent. Mr Miniello said in effect, that many of the difficulties alleged by Mr Italiano came back to poor run management and the hours that Ram Holdings chose to work, compared to other drivers.
- 144 In relation to the run sheets and Mr Italiano’s evidence about work allocations, the Tribunal has closely examined the content of exhibits A3 to A8. These documents were the run sheets tendered in evidence by Ram Holdings. There were a lot of them and considerable duplication in the materials tendered. From this analysis, contrary to Mr Italiano’s evidence, it seems to me that most of the jobs on the run sheets in evidence, including the extra handwritten jobs, appeared to be in the southern suburbs or related areas not too far distant. From these run sheets, only a small percentage of them, as a proportion of the overall number of jobs performed on the evidence, reflected work done in the northern suburbs. Furthermore, this work, only appeared on some days in the months from February to August 2011.
- 145 There was no material before the Tribunal over those months, about work done on days other than those which have been selected and tendered in evidence. I note also, that this period in 2011, reflects the evidence which Mr Italiano gave, when he said that he spoke to both Mr Green and Mr Mangione about difficulties he was experiencing with his runs. From the documentary evidence before the Tribunal, it does not appear that this incidence of northern suburbs jobs continued after 2011.

If it did, evidence of it is not before me. That is, based on the evidence before the Tribunal, through the run sheets, it does not appear that the same number of northern suburbs jobs appear on run sheets over the period 2012 to March 2015. The only inference that can be reasonably drawn from this is that any discussions that Mr Italiano had with Kelair about his runs at the time in 2011, must have had some influence on subsequent work allocations. If this were not the case, and if Mr Italiano's concerns about his runs had continued beyond 2011, then the Tribunal would have expected to see pages of run sheets for the latter years, reflecting this.

- 146 The evidence before the Tribunal in relation to the run sheets is broadly consistent with Kelair's covenant in cl 10(a) of the Agreement. This is qualified as I have mentioned above, having regard to market conditions, and Kelair would provide work to contractors in designated areas as determined by Kelair at its sole discretion. However, it is important also to bear in mind that this covenant of Kelair, is also to be read with and subject to the overriding obligation in cl 6(c), (e) and (f) of the Agreement, which generally requires a contractor to comply with Kelair's directions in relation to the performance of services in any location as directed by Kelair.
- 147 Returning to Ram Holdings' contention in relation to this aspect of its claim, it appears to the Tribunal that the allegation may give rise to consideration of ss 30(2)(d), (f) and (j) of the OD Act. Section 30(2)(d) deals with any unfair tactics being used against an owner-driver by a hirer; s 30(2)(f) refers to the consistency in conduct of a hirer to an owner-driver relative to other owner-drivers; and s 30(2)(j) provides generally for the obligation on a hirer to act in good faith. These parts of the unconscionable conduct provisions in s 30, are in addition to the general notion of unconscionability dealt with in s 30(1), all of which were considered by the Tribunal in some detail in *Sims*, as set out above.

Consideration

- 148 There are considerable difficulties facing Ram Holdings in relation to this allegation on the evidence. In relation to the allocation of work generally, the Tribunal only has before it the direct evidence of Ram Holdings as to the allocation of work to it. There was some general reference in Mr Italiano's evidence to having occasionally seen other drivers' run sheets, and observed some of them, which he sought to describe as having more favourable work allocations. However, there was no direct evidence before the Tribunal of the actual work activities and run allocations of other owner-drivers engaged by Kelair at the material time, relevant to Ram Holdings' claims. Mr Italiano's general evidence about these matters must also be regarded as largely hearsay in any event. It could not be tested by Kelair in any meaningful sense. Furthermore, for the Tribunal to undertake a proper and thorough analysis of the contentions, by way of a comparator, such evidence would be necessary.
- 149 That is, to the extent that Ram Holdings alleges Kelair engaged in unfair tactics or different conduct towards it or in some way acted in bad faith, begs the question, relative to what or to whom? In the absence of a comparator(s), involving evidence as to the activities, allocations etc. of other owner-drivers, the Tribunal is put in the position of having to assess Ram Holdings' contentions largely in a vacuum. For example, if there was direct evidence, obtained in the usual way, as to the work of other owner-drivers engaged by Kelair at the material time, which showed that in all or most cases they were consistently limited to specific work areas and never worked outside of them and all were given very close and convenient jobs, throughout their entire engagements, then the Tribunal may be able to infer a deliberate pattern of conduct towards Ram Holdings, to single it out in relation to the allocation of work. In the absence of such comparative evidence, the Tribunal is simply unable to make any proper or thorough assessment of the evidence to reach such a conclusion.
- 150 Furthermore, in any event, even though Mr Green was not called to give evidence, if the Tribunal accepted that Mr Green, prior to the engagement of Ram Holdings under the Agreement, gave some indication of the area of work to be performed by Ram Holdings, that was always going to be subject to the express terms of the Agreement, which I have referred to above. In all the circumstances, the Tribunal simply cannot reach the conclusion that the method or type of work allocated to Ram Holdings by Kelair supports a conclusion that it acted unconscionably.
- 151 There was also a submission made by Ram Holdings that Kelair's failure to call its scheduler Mr Loriso in relation to the allocation of work, gave rise to a *Jones v Dunkel* inference. The submission was made that Kelair did not call Mr Loriso because his evidence would not assist its case. In my view, no *Jones v Dunkel* inference is open in this case. There are principles which apply to the rule in *Jones v Dunkel* (See Heydon JD, *Cross on Evidence (Australian Edition)* (2002) par [1215]. One of them is that the rule only applies in the event where a party is "required to explain or contradict something": *Jones v Dunkel* (1959) 101 CLR 298 at 321. As the learned authors of *Cross on Evidence* point out, "if there was no issue between the parties on a matter, there is nothing to answer; and if there is an issue between them, but the party bearing the burden of proof has tendered no evidence of it, the opponent is not required to answer."
- 152 Similarly, if an opponent reaches the view that the party carrying the burden of proof has failed to establish and make good its contentions, on the evidence before a court or tribunal, then that party is entitled to not call a witness it considers unnecessary to call, and no *Jones v Dunkel* inference should be drawn from that situation. In any event, counsel for Kelair informed the Tribunal that the evidence that was to be led from Mr Loriso had been adequately dealt with in the evidence of Messrs Miniello and Mangione and it was not therefore necessary to call him. This is another basis for resisting the drawing of a *Jones v Dunkel* inference.

Safe and sustainable rates

- 153 The final aspect of the case advanced by Ram Holdings relates to an allegation that Kelair failed to pay Ram Holdings safe and sustainable rates. The Tribunal turns to consider that issue now.

Jurisdiction

- 154 In Kelair's submissions before the Tribunal, an issue was raised as to the Tribunal's jurisdiction to hear and determine a claim by an owner-driver in relation to safe and sustainable rates of pay. I first turn to the relevant statutory provisions. By s 27(1)(b) of the OD Act, regulations prescribing a code of conduct that are made by the Governor, may require a hirer to pay an owner-driver for services provided under a contract at a "safe and sustainable rate of payment". The Code may further provide for

how a safe and sustainable rate of pay may be determined. By s 27(1)(f), a code of conduct may enable the Council to publish guideline rates of pay for purposes including the purpose of assisting the Tribunal in determining whether payments to an owner-driver that have been made were or are at a safe and sustainable rate. Furthermore, ss 27(3) and (4) of the OD Act specifies the content of the guideline rates to be made by the Council under the Code.

155 Firstly, the guideline rates are to specify the class of owner-driver and the type of vehicle and equipment operated and secondly, to incorporate information regarding typical fixed and variable overhead costs for that class of owner-driver, vehicle and equipment and the base hourly rate of pay that would typically apply to that class of work performed if done by an employee driver. The concept of “fixed and variable overhead costs” is expanded upon in s 27(4), setting out the components to be included, without limitation.

156 By s 40(b) of the OD Act, an owner-driver or hirer with a sufficient interest in the matter, may refer a “dispute” arising “under or in relation to” the OD Act, the Code or an allegation of a breach of either. By s 37(1) a “dispute” means one arising “under or in relation to” (which are words of great breadth) the OD Act, the Code or an owner-driver contract and includes an allegation that a person has contravened any or all such obligations. By s 38(1)(a) of the OD Act the Tribunal is empowered to “hear and determine disputes” (as defined in s 37(1)).

157 It is also relevant to have regard to the purposes and objects of the legislation. As noted earlier in these reasons, the long title to the OD Act includes a purpose of the legislation “to promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so; ...” Sections 26 and 27 of the OD Act are clearly intended to be directed to that purpose. Furthermore, depending upon the circumstances of the case, the failure to pay a safe and sustainable rate may be “unconscionable conduct” for the purposes of ss 30(1); 30(2)(e), (g) and (k) of the OD Act.

158 As on the facts of this case, the contract between Ram Holdings and Kelair must be taken to have included the agreed rates of pay to apply for the first three years of the Agreement, such rates of pay must be regarded as part of the dispute “between one or more owner-drivers and one or more hirers arising under or in relation to ... an owner-driver contract”. The relevant dispute for the purposes of ss 37 and 38 of the OD Act, is whether the rates paid were “safe and sustainable”.

159 Turning to the Code, the terms of s 2 provide that the purpose of the Code is to give effect to ss 26 and 27 of the OD Act. As I have already mentioned, s 27(1)(f)(ii) provides for the guideline rates to assist the Tribunal in determining whether a rate paid is a safe and sustainable rate. Furthermore, by s 7 of the Code, certain information is to be given by a hirer to an owner-driver before a contract is formed. That information includes current guideline rates, whether applicable to the proposed contract or not, and the information pamphlet at Appendix 1. By s 8 of the Code, reference is made to the publication of guideline rates by the Council, contemplated by s 27 of the OD Act, and their use by the Tribunal “when it is determining whether payments have been made at a safe and sustainable rate; ...”

160 Therefore, I am satisfied that the Tribunal has ample jurisdiction and power to deal with the dispute as to whether rates of pay payable by Kelair to Ram Holdings under the Agreement were safe and sustainable rates.

What is “a safe and sustainable rate”?

161 There is no definition in either the OD Act or the Code as to the meaning of a “safe and sustainable rate”. “Guideline Rates” are defined in s 3 as “rates of payment published in accordance with section 27(1)(f)”. Given the purposes and objects of the OD Act and the Code, and having regard to the provisions to which I have already referred, it would be reasonable to conclude, as a general proposition, subject to what I say immediately below, that a “safe and sustainable rate” is a rate of payment for an owner-driver that provides a competent business operator a reasonable income allowing for the owner-driver’s fixed and variable costs of operation.

162 Whilst the Appendix 1 – Information Pamphlet, attached to the Code, also does not refer to the concept of “safe and sustainable rates” in definitional terms, further published material by the Department of Transport, in support of and as an expansion of the information contained in the Pamphlet, is of some assistance. The “Information Booklet” described as a “more detailed version” of the Information Pamphlet, contains a useful summary of the provisions of the OD Act and the Code of Conduct. It also provides useful guidance to owner-drivers and hirers in relation to operating a business as an owner-driver. Part A – The Act and Code of Conduct at pages 13-15, discusses the concept of “safe and sustainable rates”. The Tribunal regards that discussion as useful and intends to adopt and apply some of it for the purposes of these reasons. I therefore consider that for the purposes of the OD Act and the Code, “a safe and sustainable rate” for an owner-driver will generally–

- (a) provide a fair return for the owner-driver’s labour;
- (b) enable the recovery of an owner-driver’s fixed and variable costs reasonably incurred in the performance of services; and
- (c) provide a reasonable return on the owner-driver’s capital investment.

163 As to the first element of a fair return on an owner-driver’s labour input, this may be usefully assessed against the relevant rate of pay payable for an employed driver undertaking the same kind of work. As noted earlier in these reasons, the employee rate of pay is a matter to be considered in the preparation of guideline rates in any event. As to the second element of fixed and variable costs, this is specified in s 27(4) of the OD Act, also referred to above. As to the final element of a reasonable return on an owner-driver’s capital investment, this would usually include matters such as the amount of capital invested in vehicles and equipment; the length and security of any contractual arrangement with a hirer; and how efficient the owner-driver is in the conduct of its operations, amongst other matters.

- 164 What is a safe and sustainable rate in any given case, will depend upon the nature of the road transport work to be performed. The role of guideline rates is not to set minimum or maximum rates to be paid to owner-drivers. Agreed rates are a function of the market. However, as the legislation and the Code make clear, guideline rates are available to be used as a guide by the Tribunal, to determine if rates paid are safe and sustainable, in any case before it. The Tribunal will be required to take different factors into account in its assessment.
- 165 Based on the requirements of ss 27(3) and (4) of the OD Act, guideline rates encompass the first two elements of the assessment of a safe and sustainable rate discussed above and are a good starting point to assess the claims made by Ram Holdings in these proceedings.

The claim

- 166 Ram Holdings' claim in relation to safe and sustainable rates was to the effect that the rates paid, in conjunction with the methodology of work allocation meant that Ram Holdings' business was for much of the term of the Agreement, not sustainable. Furthermore, Ram Holdings contended that the position in relation to rates of pay was compounded by the fact that the Agreement contained no provision for adjustments of rates to reflect changes in costs over the life of the five-year Agreement. In this respect, Ram Holdings contended that when the request to adjust rates was made in 2014, Kelair refused to consider any changes.

The evidence

- 167 The safe and sustainable rates claim was in most parts supported by a report prepared by Mercia Taxation and Accounting Pty Ltd and the evidence of Mr Lambe, Mercia's managing director. A copy of the Report was tendered as exhibit A16. The Report was dated 21 February 2017 and was prepared from materials provided by Ram Holdings including financial accounts prepared on behalf of Ram Holdings and the Italiano Family Trust prepared by Star Tax & Accounting Services Pty Ltd. Star Tax & Accounting has been responsible for the preparation of Ram Holdings' accounts in the usual course of business.
- 168 Mr Lambe gave evidence in relation to the Report. Mr Lambe is a Certified Practising Accountant and has a degree in economics and 20 years' experience in accounting practice. Mr Lambe is also experienced in the preparation of financial statements and reports for use in proceedings such as these. Mr Lambe testified that he has prepared similar material for example, for use in family court proceedings in relation to the valuation of assets, businesses and loan arrangements. The Tribunal is satisfied from the subject matter, content of the Report and Mr Lambe's qualifications and experience and field of practice, that his evidence qualifies as expert opinion to assist the Tribunal in relation to this aspect of Ram Holdings' claim.
- 169 Mr Lambe testified as to the background to the preparation of the Report and the request by Mr Italiano for assistance in relation to his claim against Kelair. Mr Italiano provided Mr Lambe with his sets of accounts prepared by Star Tax & Accounting. This material needed to be revised as the final reports for the Italiano Family Trust contained some information not relevant to the operation of the Hino truck used by Ram Holdings in the performance of services for Kelair. Mr Lambe said that using the source of information provided by Ram Holdings and the Council's Owner-Driver's Costs Calculator, Mercia made key findings in its Report. Mr Lambe's testimony was that both the Star Tax & Accounting material and the Mercia Report were prepared in accordance with accepted accounting principles.
- 170 The first finding in the Report was in relation to typical fixed overhead costs for the five financial years 30 June 2011 to 30 June 2015 for Ram Holdings, calculated in accordance with s 27(3)(b)(i) of the OD Act, referred to earlier in these reasons. From the material provided, this led to the calculation of a total sum of \$666,676 over the period, and as set out at page 2 of Appendix 1 to the Report. The second finding was in relation to typical variable overhead costs over the same period, in the total sum of \$181,487. This was set out at page 3 of Appendix 1 to the Report. The third finding was the equivalent hourly rate and estimated total ordinary and overtime hours of work if performed by an employee at the rate of between \$22.50 per hour in 2011 and \$25.50 per hour in 2015. This was set out at Appendix 6 to the Report.
- 171 Based on those findings and Mercia's review of the material provided by Ram Holdings, the deficit over the sustainable rate, set out on the cost of operations work sheet, at Appendix 1 to the Report, was a total of \$314,107. This was based on revenue over the five years of \$534,056, less the fixed and variable costs as stated. An alternative deficit over the sustainable rate of \$216,619 was also included in the Report. This figure was reached on the basis that the calculations performed in accordance with the Council's Cost Calculator included a cost relating to a replacement cost of a truck in the amount of \$97,488. In the notes to the Report, Mercia posited the alternative deficit by not including the cost of the replacement truck.
- 172 Mr Lambe testified that Mercia concluded in its Report, that on a review in accordance with accepted accounting principles, the material provided by Ram Holdings in relation to typical fixed overhead costs, typical variable overhead costs and the comparison employee equivalent labour only cost were reasonable and sound calculations. Mercia noted that some items in the calculations had not been sourced from Ram Holdings' accounts material or based on invoices supplied by Ram Holdings. These included rent or home office expenses obtained from the Cost Calculator and employee benefits based on industry hourly rates obtained by Mr Italiano from the TWU. Additionally, the total finance costs and return on investment to Ram Holdings from the purchase of the Hino vehicle for \$162,292 was calculated in accordance with the Cost Calculator. In relation to typical variable overhead costs, as provided by Ram Holdings, Mr Lambe noted in the Report that adjustments had been made to the figures prepared by Star Tax & Accounting, to remove any costs associated with vehicles other than the Hino truck used by Ram Holdings in the performance of the services. These costs included fuel costs and vehicle repairs.
- 173 The content of the Mercia Report and the evidence of Mr Lambe was the subject of some criticism by Mr Miniello, who is also an accountant by profession. Mr Miniello maintained that it was not appropriate to use the Cost Calculator to retrospectively analyse costs. In his view, the purpose of the Cost Calculator tool was to assist an owner-driver to decide whether to enter into an owner-driver contract and not to assess a contract after it has operated.

- 174 Secondly, Mr Miniello considered that some costs referred to in Appendix 1 of the Mercia Report were too high. These included matters such as accounting fees; rental (home office) expenses; postage and stationery; and telecommunications costs. Mr Miniello also had some reservations about fuel costs, particularly in the 2014 year, when the kilometres recorded by Ram Holdings substantially fell, but the fuel costs fell by much less. Furthermore, Mr Miniello also commented on the profit and loss statements attached to the Mercia Report. In Mr Miniello's view, over some of the years these reports show considerable profitability for Ram Holdings. It is to be noted however, that the evidence of Mr Italiano was that for the period Ram Holdings performed services for Kelair under the Agreement, he made no drawings of income. This is reflected in the profit and loss statement.
- 175 In an overall sense, Mr Miniello also maintained his view that most of Ram Holdings' difficulties with earnings stem from its lack of working hours as well as its failure to work on Saturdays, in conjunction with poor run management.
- 176 Having seen and observed the witnesses giving their evidence I found Mr Lambe to be an impressive witness. He was well qualified to give the evidence that he did. Mr Lambe cogently explained the basis for the Mercia Report. I accept that the Report was prepared in accordance with sound methodology and consistent with accepted accounting principles. The Report contained appropriate qualifications as set out in the notes and as was the subject of Mr Lambe's testimony. As to the criticisms raised by Mr Miniello that some of the costs in the Report seemed to be too high, in the absence of the source data used in the generation of the Report being before the Tribunal, there may be some warrant to apply a contingency to take these matters into account.
- 177 In further proceedings before the Tribunal, which I deal with in more detail below, the Mercia Report was amended by Ram Holdings by the substitution of a revised Appendix 6. This altered some assumptions used, notably the hours worked by Ram Holdings. The hours were reduced quite significantly. Additionally, some revenue was brought to account through using a different accounting principle. This alteration led to a substantial downward revision of the deficit over sustainable rate from the original figure of \$314,107 to \$166,427.
- 178 In relation to the use by Mercia of the Cost Calculator, I do not accept that it may only be used by owner-drivers for the purposes of considering whether to enter into an owner-driver contract. The Tribunal considers that it is quite appropriate for an owner-driver to have regard to the Cost Calculator under an ongoing owner-driver contract, to monitor costs to ensure that an owner-driver's business remains viable. In the context of the type of business operated by Kelair and the terms of the Agreement, it is difficult to envisage how an owner-driver may determine whether the rates payable to it are safe and sustainable, other than being based on some experience of the operation and provision of services.
- 179 However, whilst the information obtained using the costs calculator will be useful for an owner-driver to keep abreast of vehicle and administration costs, as a matter of jurisdiction and power, the OD Act sets out what the Tribunal may have regard to in the assessment of whether rates paid to an owner-driver by a hirer are safe and sustainable. This is set out in s 27(1)(f)(ii) of the OD Act and s 8(1)(a)(ii) of the Code. As these provisions make clear, the Tribunal can have regard to the Guideline Rates when determining whether payments made to an owner-driver "have been made at a safe and sustainable rate". This necessarily requires a "looking back" approach. The Guideline Rates published by the Council and Gazetted, have the status of delegated legislation for the purposes of the Interpretation Act 1984. Calculations that may be drawn from the costs calculator, whilst a useful tool, have no such legislative underpinning. Thus, whilst the Tribunal may have regard to such material, as part of informing itself as it sees fit under s 43(1)(b) of the OD Act, primacy must be given to the statutory guidance afforded to the Tribunal.
- 180 The Tribunal carefully examined Appendix 1 to the Mercia Report and performed a simple preliminary calculation of Ram Holdings' revenue on a per hour basis (total revenue/total hours). Indeed, this was a course proposed by Kelair itself, in its submissions critical of the Mercia Report, as part of examining whether rates paid to Ram Holdings were safe and sustainable. In table form, as compared to both the relevant Council and TWU Guideline Rates, this was as follows:

Table 1
Rate per hour/per km (ex GST)

	2011		2012		2013		2014		2015	
Ram Holdings	\$33.81	\$1.72	\$43.40	\$2.34	\$50.27	\$2.32	\$59.29	\$3.14	\$59.02	\$3.03
Council Guideline Rate 22.5 GVM	\$66.83	\$2.80	\$60.84	\$2.84	\$63.53	\$2.93	-	-	-	-
TWU Guideline Rate 22.5 GVM	\$60.12	-	\$60.20	-	\$62.00	-	\$66.01	-	\$66.69	-

- 181 As to the Guideline Rates, there were none published for 2014 and 2015. The Guideline Rates for 2013 are described as provisional, although no further rates were published for those years. The main industry union, the TWU, also publishes guideline rates for the guidance of owner-drivers and hirers in the industry. Where published, the TWU Guideline Rates are derived from the Council rates. In the years where there are no Council rates published, they are derived using an independent consultant and adopt the same formula and largely the same format as the Council rates. Where both have been published, the variation between them is relatively minor.
- 182 In accordance with s 43(1)(b) of the OD Act, the Tribunal may inform itself as it sees fit and is not bound by the rules of evidence. Additionally, where the Tribunal intends to consider matters or information not raised in the proceedings before it, it shall afford the parties an opportunity to be heard. By letter of 10 May 2017, my Associate on my direction, wrote to the parties to inform them that in the absence of Council rates for 2014 and 2015, the Tribunal was proposing to have regard to the TWU rates as a point of comparison, and invited them to express any views they may wish to within 14 days.

- 183 Ram Holdings responded on 17 May 2017 to the effect that whilst no objection was raised in relation to the TWU rates themselves, except for the Council rates for July 2010, the rates for 22.5 GVM vehicles apply to two axle trucks and not three axle trucks, as was Ram Holdings'. Ram Holdings submitted that the rates in 2010 for this type of vehicle exceeded the rate proposed for 2016. It contended that the rates for a three-axle truck would be higher and thus some caution should be applied in relation to the rates because of this.
- 184 As to the contention by Ram Holdings about the three-axle rate for a 22.5 GVM truck, it needs to be borne in mind that the Council rates for 2010 is the only publication in which the rates were inclusive of GST. Thus, a true comparison between them needs to take this into account. The hourly rate for 2010 for a 22.5 GVM vehicle, exclusive of GST, was \$66.83 per hour and not \$74.25. Also, it is the case that as costs rise and fall, the rates are adjusted accordingly. Whilst the point made by Ram Holdings may have some impact on the rates, when adjusted as just mentioned, the differential may not be as great as contended.
- 185 By letter of 24 May 2017, Kelair made further initial submissions. Firstly, Kelair submitted that the Tribunal should pay no regard to the TWU rates as they do not have the same status under the OD Act as the guideline rates published by the Council. The submission was that Council rates have the status of subsidiary legislation under s 8(2) of the Code and thus Parliament intended them to have statutory effect. On the other hand, the TWU rates have no such status and the submission was that the Tribunal should not have regard to them, given the statutory standing afforded to the Council rates. To do so would be to act outside of the legislative framework, as the submission went.
- 186 The second basis on which Kelair maintained no regard should be had to the TWU rates was that the piecework rates applicable under the Agreement, at least for the first three years of its term, were negotiated between Kelair and the TWU. The submission was that this carries with it the assumption, (although no evidence was led to establish this), the rates agreed had regard to the nature of the industry, the type of work undertaken and the typical fixed and variable overhead costs that may be incurred by an owner-driver engaged by Kelair. The submission was that the Tribunal should regard the rates as "sanctioned" by the TWU, as appropriate rates for this piecework operation.
- 187 Thirdly, in the alternative, Kelair submitted that if the Tribunal does have regard to the TWU rates, then it should consider the background context and circumstances of the present case. The submission was made that as the Council rates do not prescribe minimum or maximum rates, then if account is to be taken of the TWU rates, they should be similarly regarded. Furthermore, the submission was that given that Kelair operated under a piecework payment system with its owner-drivers, an hourly rate comparison may not provide an accurate assessment as to what could have been paid and what was in fact paid to Ram Holdings.
- 188 Further submissions were made by Kelair essentially repeating submissions it made in the proceedings, that Ram Holdings' revenue was a function of its failure to work available hours to it and that it freely agreed to enter into the Agreement at the outset. As these matters went beyond the scope of the invitation to the parties, the Tribunal will not have regard to these further repetitive submissions.
- 189 Finally, in answer to Ram Holdings' response to the letter from my Associate, Kelair submitted that the contention that Ram Holdings operated a three axle 22.5 GVM vehicle and accordingly, the Tribunal should infer a higher rate applicable, had no basis. Kelair submitted that for the Tribunal to reach such a conclusion, would be to substitute the exercise of its jurisdiction for that of the Council in circumstances where there is no sound basis to do so. I agree with this submission.
- 190 After receipt of the above correspondence from the parties, on 31 May 2017 the Tribunal re-listed the application for further mention. At the hearing the Tribunal raised issues with the parties, including how the rates paid by Kelair were determined and an opportunity was given to the parties to respond to the Tribunal's provisional assessment of hourly rates by way of a calculation of total revenue against total hours of work, as mentioned at par 178 above and as set out in table 1. Furthermore, the Tribunal informed the parties that from its own inquiries, the TWU Rates were prepared using the same methodology as used by the Council and were prepared by a former officer of the Department of Transport, involved in the preparation of the guideline rates. Directions were made in relation to the filing of further written submissions on these matters.
- 191 On 21 June 2017 Ram Holdings filed further written submissions in relation to whether the Tribunal should have regard to the TWU Rates; in response to matters raised by Kelair about the rates as "negotiated by the TWU; and additional contentions as to why it maintains the rates paid to Ram Holdings were not safe and sustainable.
- 192 On 22 June 2017 Kelair filed further written submissions along with a further detailed witness statement from Mr Miniello, with annexures, going to the issue of its assessment of the Tribunal's preliminary assessment of a comparison between the rates paid to Ram Holdings and the Council rates and TWU Rates, as referred to by the Tribunal at the for-mention hearing on 31 May 2017.
- 193 Shortly thereafter, on 31 July 2017, Ram Holdings made application to the Tribunal for further and better discovery of documents, based on the content of Mr Miniello's further witness statement. That application was the subject of reasons for decision and orders of the Tribunal of 11 August 2017, requiring Kelair to produce certain documents to Ram Holdings: [2017] WAIRC 00715; [2017] WAIRC 00716. Also, directions were made for Ram Holdings to file and serve a witness statement in reply to the further witness statement of Mr Miniello: [2017] WAIRC 00712. On 17 August 2017 a witness statement was filed by Mr Italiano. A further witness statement was filed by Mr Italiano on 6 November 2017.
- 194 Whilst the Tribunal re-listed the matter for further hearing on 7 August 2017 so the parties could be heard in relation to the further evidence and submissions filed, due to an injury sustained by Mr Italiano, the matter could not ultimately be re-listed until 21 November 2017. I was also on prearranged leave from early December 2017 to early January 2018. I have set out the above chronology in order that it can be appreciated why the ultimate determination of these proceedings has been somewhat protracted.

Further evidence and submissions

- 195 Kelair made a general submission that, on further reflection, the Tribunal can have regard to the TWU rates based on the information received by the Tribunal as to how those rates were calculated, using the same or similar methodology undertaken

by the Council. Furthermore, Kelair submitted that there is a degree of consistency between the TWU rates and the Council rates to overcome the absence of the latter for the years 2011, 2014 and 2015.

- 196 In relation to this however, Kelair reiterated its earlier position before the Tribunal that the use of hourly rates generally, are of little value in assessing whether remuneration paid on a piecework rate basis, is safe and sustainable. If this submission is not accepted by the Tribunal, Kelair further submitted that both the Council rates and the TWU rates should not be regarded as minimum or maximum rates that are required to be observed by hirers and owner-drivers. The rates as published, are to provide guidance only to the Tribunal and are not in and of themselves, determinative on the issue of what is a safe and sustainable rate in this industry. Finally, Kelair made the further submission that should the Tribunal wish to examine the Council rates relative to the earnings received by Ram Holdings, then a sound evidentiary basis needs to be established for such a comparison.
- 197 In this respect, Mr Miniello's further witness statement, with its various annexures, sets out in greater detail, this assessment in Kelair's view. Mr Miniello's further witness statement was responsive to the calculations undertaken by the Tribunal, on a tentative basis, comparing Ram Holdings' hourly rate income to the Council rates and the TWU rates for the years 2011 to 2015 as in Table 1 above. Kelair did not take any issue with the methodology adopted by the Tribunal in its initial assessment, or the revenue figures on which the assessment was based over the years 2011 to 2014. However, on the evidence of Mr Miniello, an account reconciliation was undertaken in relation to payments made to Ram Holdings by Kelair for the financial year 2014 – 2015. This analysis revealed an amount of \$11,100 was paid to Ram Holdings but was not included in the Mercia Report as revenue received.
- 198 The following is a summary of Mr Miniello's further witness statement and the methodology adopted by him in undertaking a further evaluation of the Tribunal's preliminary assessment of hourly income rates and per kilometre rates, based on both the Council Rates and the TWU Rates. Mr Miniello testified that following the for-mention proceedings before the Tribunal, he further reviewed the Mercia Report, regarding the stated hours of work from Ram Holdings in Appendix 6 of the Report. Using that information, Mr Miniello said that he then examined the records of Kelair in relation to days worked by Ram Holdings to determine whether the reported hours in the Mercia Report were an accurate reflection of the actual working hours as stated by Ram Holdings. From his assessment of the records held by Kelair, it was Mr Miniello's view that there was an overstatement of the hours of work by Ram Holdings over the years of service by Ram Holdings as set out in the Mercia Report. Furthermore, Mr Miniello said that from this material, he further reviewed the provisional table provided by the Tribunal to the parties at the for-mention hearing, from the records held by Kelair.
- 199 Mr Miniello also testified that he performed an account reconciliation in relation to invoices received from and payments to Ram Holdings, which led Mr Miniello to conclude that in the final year of service, amounts paid by Kelair were not included in the material before the Tribunal to date.
- 200 In relation to the further evaluation undertaken by Mr Miniello, he set out his methodology as follows. Firstly, he assessed the Tribunal's calculations in relation to Ram Holdings set out in Table 1 provided to the parties at the for-mention hearing on 31 May 2017. Next, he assessed what variables were required to be investigated to confirm the accuracy of the rates determined and how that could be done. Thirdly, Mr Miniello sought to independently verify the variables referred to in the second step, including having regard to Mr Italiano's testimony. Fourthly, based on the initial three steps, Mr Miniello undertook a reappraisal of the Tribunal's initial assessment set out in Table 1, where there existed in Mr Miniello's view, verifiable but conflicting data. Finally, he said that he undertook a comparison of the final rates determined using this process, with a benchmark to further confirm the credibility of his calculations and assessments.
- 201 In terms of assessing the variables to be investigated, based upon the tentative approach adopted by the Tribunal in Table 1, Mr Miniello said that verification was required in relation to three issues; they were Ram Holdings' total revenue, total hours worked and total kilometres driven. In relation to total revenue, Mr Miniello testified that he undertook a reconciliation of revenue as provided in evidence by Ram Holdings, as against the reported expenditure in Kelair's accounts for each of the years of Ram Holdings' engagement.
- 202 In relation to total hours worked, Mr Miniello referred to Appendix 6 of the Mercia Report which led to a break-down of total hours as proposed by Mr Italiano, expressed in table form in his witness statement of 22 June 2017 at par 19.
- 203 Mr Miniello testified that it was not feasible to confirm and verify Ram Holdings' hours of work by examining every run sheet given there would be approximately 800 of them. Instead, the actual days worked by Ram Holdings were identified from Kelair's records called "Driver Invoice Check Report" which records days worked and days not worked by a contractor. Copies of the Driver Invoice Check Reports for Ram Holdings were Annexure JM-1 to Mr Miniello's witness statement of 22 June 2017. Mr Miniello said from this material, a calculation could be performed by multiplying the days worked against the hours set out by Ram Holdings in Appendix 6, with appropriate adjustments for having regard to Mr Italiano's evidence and other assumptions, including the taking of meal and fatigue breaks. Mr Miniello said that he discounted attempting to verify total kilometres driven, as to do so without supporting documents would be inherently difficult. Kelair's focus was on the working hours and hourly rates to be considered by the Tribunal.
- 204 Mr Miniello testified that when considering the financial records of Kelair and comparing them to Ram Holdings' reported income in Appendix 1 in the Mercia Report, a discrepancy was present. This is because Ram Holdings applied a "cash received" approach in relation to income recording, as opposed to recording income on an "accruals" basis. The effect of this method was that income earned by Ram Holdings before the end of a financial year, but not received until after the end of the financial year, was only disclosed in the next financial year's results. From the occurrent reconciliation, Mr Miniello concluded that an amount of \$11,100 had not been disclosed in Ram Holdings' documents as income for 30 June 2015.
- 205 Turning to total hours worked, Mr Miniello said that he printed out reports for Ram Holdings over the period December 2010 to the last day Ram Holdings worked in March 2015 to verify that Ram Holdings did not work on a public holiday; which business working days (Monday to Friday) that Ram Holdings did not work, excluding public holidays; confirming the Saturdays that Ram Holdings did work; and an estimate of the hours worked on those Saturdays. In relation to the latter, that is estimating the number of hours worked on Saturdays, Mr Miniello said that he considered the type of job performed and a

“rule of thumb” for the performance of each of those tasks. Those tasks or jobs include a delivery, empty/return or off hire. Mr Miniello said that he allowed half an hour for a delivery or off hire, and one hour for an empty/return. Taking as an example a driver job report for 29 January 2011 from Ram Holdings, four jobs were reported including two empty/returns and two deliveries. Mr Miniello therefore estimated that this would have taken three hours to complete. Once having undertaken this analysis, Mr Miniello said that he was able to make an assessment comparison of business day weeks worked and total Saturday hours worked by Ram Holdings as compared to that proposed in Appendix 6 of the Mercia Report. Mr Miniello compiled a table setting out this information at par 37 of his witness statement of 22 June 2017.

- 206 From this point, Mr Miniello turned to consider an assessment of average hours per week that Ram Holdings worked for Kelair. Mr Miniello did this by considering the working hours set out in Appendix 6 based on Mr Italiano’s initial evidence. Furthermore, Mr Miniello said that once that assessment was completed, he reviewed the results against a comparable driver working with Kelair to assess the reasonableness of his calculations. Mr Miniello said that this would be an objective way to confirm the accuracy of average weekly hours worked, given that the total working weeks figure would be accurate. In this respect, Mr Miniello referred to Mr Italiano’s initial evidence that he would not start work until 7:00am because it was against council regulations to attend sites prior to that time. He also referred to Mr Italiano’s evidence that as tips would close by 4:30pm, he would need to arrange his working day to arrive at the tip before that time. On this basis Mr Miniello estimated that Ram Holdings’ maximum working hours would be 9.5 to 10 hours per day. Additionally, factored into these working hours, were a lunch break of half an hour to one hour per day and a fatigue break of between half an hour and one hour each day.
- 207 Using this revised information, Mr Miniello considered that the hours reported by Ram Holdings in Appendix 6 should be adjusted. A table prepared by Mr Miniello comparing his calculations with that set out in Appendix 6 was at par 43 of his witness statement of 22 June 2017.
- 208 Having reached this point, Mr Miniello then said he recalculated the hourly rates using the data that he had compiled. The hourly rates recalculated, in accordance with the above methodology, were then compared with the rates set out in Table 1 as referred to by the Tribunal in the for-mention proceedings. A table setting out the workings of Mr Miniello in relation to hourly rates as finally assessed by him, was at par 45 of his witness statement of 22 June 2017.
- 209 In addition to the above process, Mr Miniello said that, as a cross check, he sought to compare the rates as evaluated against a similar subcontractor to Kelair Holdings, Crestflow Pty Ltd. Mr Miniello adopted the similar procedure to his analysis of Ram Holdings’ revenue and working hours to make the relevant comparisons. Given that Ram Holdings had already given evidence in the Tribunal concerning its working hours and its various calculations as set out in Appendix 6 in the Mercia Report, Mr Miniello said he applied a higher estimate of weekday working hours to Crestflow’s calculations than was applied to Ram Holdings. The effect of this would be to lower the assessed hourly rate for Crestflow than for Ram Holdings. It would also confirm that Ram Holdings worked less hours per week than Crestflow. On these comparisons, the comparative hourly rates for Crestflow and Ram Holdings were set out by Mr Miniello in a further table in Mr Miniello’s witness statement at par 56.
- 210 When compared back to the provisional calculations by the Tribunal as set out in Table 1, with Ram Holdings’ reassessed hourly rate, according to Mr Miniello, the result is as follows:

	2011	2012	2013	2015	2015
Applicant's Reassessed Rate	\$56.24	\$63.10	\$67.38	\$87.26	\$98.38
Greater of Council or TWU Rates	\$66.83	\$60.84	\$63.53	\$66.01	\$66.69
Difference	-\$10.59	+\$2.26	+\$3.85	+\$21.25	+\$31.70

- 211 Mr Italiano in a further witness statement filed on 17 August 2017, in reply to that of Mr Miniello, asserted that dealing firstly with Mr Miniello’s evidence regarding the total kilometres travelled by Ram Holdings’ truck, that is not correct. Mr Italiano referred to the Mercia Report in which, as set out at Appendix 1, the total kilometres travelled as recorded in the vehicle log books are set out. Mr Italiano said that this evidence was not challenged and that he verified that the truck used by Ram Holdings was only used for the purposes of providing services to Kelair under the contract. At all times when not in use providing services, the vehicle was parked in its usual parking place at Bibra Lake. The only occasion when the usage of the truck was not related to the provision of services to Kelair was when it was taken to the workshop for regular servicing and maintenance.
- 212 Mr Italiano also took issue with Mr Miniello’s analysis and calculations in relation to his hours of work. It was contended that Mr Miniello’s evidence contained assumptions. Firstly, Mr Italiano testified that it appeared that Mr Miniello only used one run sheet for the purposes of making his assumptions about hours of work. Furthermore, Mr Italiano said that he did not take lunch breaks as he consumed his lunch on the job, nor did he take fatigue breaks, the total of which were estimated by Mr Miniello to be up to two hours per day. It was Mr Italiano’s evidence that he worked continuously from the commencement of his working day until he parked his truck up at the end of the day. Furthermore, despite Mr Miniello’s evidence that due to a fire, most of the paper records at Kelair were destroyed, Ram Holdings offered inspection of all of Ram Holdings’ run sheets over the period of the contract, but that offer was not taken up.
- 213 Other factual matters were raised by Mr Italiano. As to the Saturday run sheet used by Mr Miniello as an example, Mr Italiano said that whilst it was stated there were four tasks for the day, his records reveal there were in fact five. There was an

additional job to Ardross added to the day's work after the run sheet was forwarded to him. Furthermore, Mr Miniello stated that in relation to 2013, there were 48 business days not worked by Ram Holdings. Mr Italiano's evidence was that from the run sheets for 2013, he calculated that there were only 39 business days not worked and attached a calendar marking the relevant days for this year, to his further witness statement.

- 214 Mr Italiano took issue with Mr Miniello's "rule of thumb" approach to how long it would take to perform each task allocated. His evidence was that this approach, pays no regard to other variables that will influence actual travelling time taken during a day's work. These other factors include the time of day of travel, whether peak hour or otherwise; stops and starts due to traffic lights and weather conditions such as inclement weather, which will impact on driving time. Additionally, Mr Italiano referred to the process of tipping at the Bayswater Tip, which was often time consuming as the tip gate controller would only allow one vehicle to enter at a time. It was his evidence that on many occasions this led to a 20 to 30-minute delay in leaving the tip location.
- 215 From a practical point of view, Mr Italiano also noted other circumstances which can arise day to day on the job, in relation to pick up or delivery of skip bins. Whilst not exhaustive, Mr Italiano referred to the need for motor vehicles to be moved on a site so in order to access a bin; the presence of materials in and around the skip bin that must be moved before it can be moved; the requirement on occasions for a delivery docket from the site supervisor to be obtained; particular client requirements such as the orientation of the bin on a site; the presence of overloading requiring the bin load to be rendered safe before transporting; situations where a bin may still be empty or has been collected by another driver; jobs added or changed during the course of a day requiring a resequencing of services; the taking and making of telephone calls to and from dispatch responding to client enquiries during the course of the working day.
- 216 In relation to some of the situations encountered on site, Mr Italiano attached to his witness statement, photographs illustrating some of the matters to which he referred in his evidence. Also annexed as appendix 7 were notations on run sheets of further examples of issues encountered on site that impacted on either the delivery of services or on occasions, circumstances where services could not be delivered at all.
- 217 Furthermore, in a table annexed to his witness statement, Mr Italiano further referred to the "rule of thumb" assumptions made by Mr Miniello, taking as an example the driver report for 29 January 2011 from Ram Holdings. On that occasion Mr Miniello estimated that the work involved would have taken three hours to complete. In response, Mr Italiano at appendix 5 of his witness statement set out an analysis of distances between the tipping site and the various jobs for the day, using GPS readings. According to Mr Italiano, adopting that approach, a proper consideration of the day's work would have involved a working time of over five hours, considerably more than Mr Miniello's "rule of thumb". Additionally, Mr Miniello's assertion that Mr Italiano worked only from 7am to 4:30pm was not correct. His evidence in that respect referred to the time at which the ECO tipping site was open for business. Mr Italiano's evidence was that he would generally start work at 6:30am each day and finish between 5:30 and 6pm in the evening.
- 218 As to Mr Miniello's use of Crestflow as a means of cross checking his approach to the assessment of Ram Holdings' hours of work, Mr Italiano reiterated his earlier evidence that from what he had observed in relation to the work allocations to Crestflow, they involve many more preferential jobs involving less travel which impacted on his capacity to earn revenue. Mr Italiano illustrated the point by saying that where he was allocated "close" jobs, he achieved significantly more runs, up to 20 a day. In other circumstances, where jobs were allocated to him at far greater distances, he may only achieve half the number of jobs each working day. In referring to his earlier testimony, Mr Italiano contended that the run sheets already in evidence, of work he performed prior to February 2013, demonstrated that he was consistently working in areas north and south of the river which precluded him using the ECO tip site exclusively. I have already dealt with this evidence above, in relation to the unconscionable conduct claim.
- 219 Mr Italiano filed a further supplementary witness statement on 6 November 2017 with annexures. In his further evidence Mr Italiano referred to the total kilometres recorded in Appendix 1 of the Mercia Report and annexed as Attachment A, a copy of the servicing records for his truck which record at the relevant times, the odometer readings. Annexed as Attachment B to his further witness statement, were the sale documents for his truck. These show the distance the truck travelled at the time of the sale. Mr Italiano affirmed that except for travelling to the premises where his truck was placed on sale by consignment, a relatively short distance, the kilometres recorded by the truck were for the performance of services for Kelair. Furthermore, annexed as Attachment C to Mr Italiano's further witness statement, was a revised appendix to the Mercia Report prepared by Mr Lambe as requested by Ram Holdings. This contained revisions in relation to total hours of work and a revised deficit over a sustainable rate down to \$166,427, resulting from a reduction in the hours of work recorded and the adjusted total revenue figure. This continued to be based on the Costs Calculator method of assessing rates.
- 220 From this further significant body of evidence led before the Tribunal, further submissions were made by the parties as to the conclusions that the Tribunal should reach in relation to the sustainable rates issue. In summary those submissions were as follows.
- 221 Based upon the above evidence and methodology, Kelair contended that it is only in the first year, where the reassessed hourly rate was less than the greater of the Council or TWU rates. It was submitted that this would be consistent with a new driver coming to grips with a new role, routes and equipment being used, which efficiency would improve over time. Based upon the material considered by Mr Miniello, Kelair then submitted that taking an average reassessed hourly rate basis from 2011 to 2015 in total, Ram Holdings earned an average rate of \$74.47 per hour. This compared to the average hourly rate for the greater of either the Council or TWU rates of \$64.78 per hour, over the same period.
- 222 By way of a comparison from Mr Miniello's calculations, over the same period, Crestflow earned an average hourly rate of \$83.36 per hour, compared to the average of the greater of the Council or TWU guideline rates.
- 223 Using the revised appendix to the Mercia Report tendered by Ram Holdings with adjusted revenue and hours of work figures, Kelair tendered as exhibit R8, a table of revenue and working hours along the lines of that initially provided by the Tribunal to

the parties at Table 1 referred to above. The content of exhibit R8, setting out the revised revenue, hours of work and resulting rates per hour, and a comparison with the Guideline Rates, was as follows:

	Commencement – 30 June 2011	1 July 2011 – 30 June 2012	1 July 2012 – 30 June 2013	1 July 2013 – 30 June 2014	1 July 2014 – Termination	Total / Average
Revenue	\$56,297	\$138,711	\$130,715	\$123,334	\$96,099	\$545,156
Hours	1,260	2,429	2,051	1,523	972	8,234
Rate per hour	\$44.68	\$57.11	\$63.73	\$80.98	\$98.87	\$66.21
Greater of Council or TWU rate	\$66.83	\$60.84	\$63.53	\$66.01	\$66.69	\$64.78
Difference	(\$22.15)	(\$3.07)	\$0.20	\$14.97	\$32.18	\$1.43

- 224 It was submitted by Kelair that overall, despite its earlier submissions as to the inapplicability of comparing an hourly rate with a piecework rate, and the fact that the guideline rates do not set minimum or maximum rates, the only reasonable conclusion to be reached from the above table, is that the rates paid by Kelair, when converted to an hourly rate basis, were safe and sustainable over the relevant period.
- 225 Kelair also submitted that whether a safe and sustainable rate of pay is provided to an owner-driver, is a factor to be considered by the Tribunal in determining whether conduct could be regarded as unconscionable. This contention was said to be derived from the terms of the OD Act itself. Kelair referred to Mr Miniello's assessment of Ram Holdings' hours of work and the evidence of Ram Holdings as stated in the revised Appendix 6 to the Mercia Report. In either case, when an hourly rate calculation is performed and that rate is compared to either the Council rate or the TWU rate, the conclusion must be reached that the rate paid was safe and sustainable. These submissions were made in the context of those earlier made, that the guideline rates themselves are merely a guide to the Tribunal and are not minimum or maximum rates and nor are they award rates.
- 226 The further submission made by Kelair was that on the revised hours in Appendix 6, as submitted by Ram Holdings, compared with Mr Miniello's assessment of total hours of work performed by Ram Holdings, there is not a great difference between the parties. The differential is about 200 hours over the term of the contract. Kelair contended that this further negates any argument as to unconscionability on Ram Holdings' case.
- 227 As to credibility of the evidence, Kelair submitted that given that Ram Holdings had to significantly revise down its hours of work figures and revenue figures as contained in the amended Appendix 6, compared to the original Appendix 6, this is of some significance. Furthermore, Kelair contended there were some inconsistencies in Mr Italiano's oral evidence as to his daily hours of work which vary from his assertion that he worked 11 to 11 ½ hours per day, despite a reference in the revised Appendix 6, to about 10.6 hours per day as the basis for Ram Holdings' revised calculations. Along with this, was the need to adjust revenue to include the \$11,000 in income, as identified in Mr Miniello's own account reconciliations, dealt with in his evidence.
- 228 The broad submission was that this tends to support the approach of Kelair to these assessments as being more credible than that advanced by Ram Holdings.
- 229 In relation to the per kilometre rate comparison now seemingly more relied upon by Ram Holdings, Kelair made further submissions. Firstly, it was contended that this argument must be rejected because there are no published Council rates for 2014 and 2015 and the TWU rates do not include a per kilometre calculation at all. Therefore, the submission was it would be unsafe for the Tribunal to proceed by way of a comparison on a per kilometre rate basis, given these deficiencies. Kelair also pointed to the fact that the last odometer reading of Ram Holdings' truck during its years of service took place at the end of 2014. The final odometer reading was undertaken on the bill of sale for the sale of the truck on 13 December 2015, despite that the engagement with Kelair terminated in about March 2015. Kelair contended that if the Tribunal is to have regard to the published guideline rates in determining whether the rates paid to Ram Holdings were safe and sustainable, the most satisfactory comparator is the hourly rate. This is one which has been published and is available for each of the years of service under the contract between Ram Holdings and Kelair and as set out in exhibit R8 above.
- 230 Finally, Kelair returned to its original submission in relation to the piecework rate which Kelair said was negotiated with the TWU as a going "industry rate". Kelair now accepted that in the absence of any evidence to establish how that rate was struck, its contention that it should be implicitly found by the Tribunal that such a negotiated rate was safe and sustainable, can no longer be maintained. Accordingly, that argument was withdrawn by Kelair.
- 231 Ram Holdings submitted that in relation to guideline rates generally, contrary to the submissions of Kelair, they should be viewed by the Tribunal as a minimum rate and not as an actual or absolute rate. Where a rate is found to be below the guideline rate, then Ram Holdings contended that the Tribunal should find that the rate payable was not safe and sustainable. In relation to exhibit R8, Ram Holdings submitted that each year should stand alone. It was apparent, as the submission went, that based on Kelair's own calculations, using the revised Appendix 6, at least in the first two years of the contract, the rates paid were not safe and sustainable. Ram Holdings rejected the suggestion advanced by Kelair, that an assessment should be made of the rates paid over the entire time of the operation of the contract, effectively on an averaging basis. It was submitted that to approach the matter in this way, would be inconsistent with the statutory scheme. The submission was that the assessment of whether a rate is safe and sustainable, should be made at the time services are performed under an owner-driver contract, and not retrospectively by some averaging process over the contract's entire duration. I agree with this submission.
- 232 Furthermore, having regard to exhibit R8, the revised figures using the format initially proposed by the Tribunal, Ram Holdings conceded, and in my view properly so, that it would only be open to the Tribunal to conclude that if the rates paid to Ram Holdings were not safe and sustainable, that could only reasonably apply for the first two years of the contract duration. This is because it was common ground that from the period 1 July 2012 to the termination of the owner-driver contract, the rates paid, on a recalculated per hour basis, were higher than the greater of the Council or TWU rates.

233 In the alternative however, Ram Holdings submitted that the Tribunal can have regard to the per kilometre calculations as extended for the years 2014 and 2015, as set out in the revised Appendix 6. The additional per kilometre calculations for those two years, were derived from the application of CPI movements, which led only to a relatively small increase in the per kilometre rate. Ram Holdings submitted that if the Tribunal was to accept the calculations as set out in the revised Appendix 6 in relation to per kilometre rates, then on that basis, the conclusion would be reached that in each year of the contract, Ram Holdings was paid less than the relevant guideline rate per kilometre. It was submitted that Mr Italiano's evidence, that after the termination of the contract, the truck was not driven other than to the premises from which it was sold, means that the log book records for the vehicle as set out in the revised Appendix 6, can be taken to be reliable.

Consideration

234 The only rates having legislative status before the Tribunal are the Council rates. However, it is the case that the only gazetted guideline rates published by the Council were dated July 2010 and March 2012. The guideline rates for 2013 were published as provisional rates, and not gazetted. Thus, for the years 2014 and 2015, the Tribunal does not have available to it, guideline rates from the Council, whether they be gazetted or provisional. By s 8 of the Code, such guideline rates can provide guidance to the Tribunal, in determining whether payments have been made at a safe and sustainable rate. Nothing in the OD Act or the Code, or indeed the gazetted rates themselves, provides that guideline rates are a minimum or maximum rate. They are to be used by the Tribunal as a guide only and do not in any way bind the Tribunal.

235 In circumstances where there are no Council rates for a year or years, in my opinion, the Tribunal's broad discretion and powers cannot be in any way fettered. By s 41(1)(b) the Tribunal may inform itself as it sees fit. The Tribunal has a discretion to have regard to guideline rates in an appropriate case. In circumstances where there are no Council rates for a year in relation to a dispute, does not mean that the Tribunal may not see fit to inform itself having regard to appropriate standards that may be applicable in the transport industry in this State. To have regard to the TWU rates does not, and cannot elevate such guidelines to any statutory status, which they plainly do not have. Nor does the Tribunal seek to accord to them any legislative status for the purposes of these proceedings. The present circumstance is no different from the Tribunal having regard to an industry custom or practice prevailing at any point in time. There was no submission that the TWU rates are either inaccurate, unreliable or for reasons of merit, could not provide some guidance in relation to prevailing industry rates of pay for owner-drivers. Indeed, the parties now appear, despite earlier submissions, to accept that the TWU rates can be used by the Tribunal as a basis for comparison.

236 As to the contention advanced by Kelair that a reconsideration of the Agreement rates would involve some "unwinding" of the rates as agreed and would breach the principle of sanctity of contract, that proposition must be rejected. Firstly, the Tribunal is not in any way bound by what was said to have been agreed between Kelair and the Union at the time. The TWU is not a party to these proceedings on the merits and accordingly, any "unwinding" of rates is not a relevant consideration. As to the issue of sanctity of contract, that could never be a bar to the Tribunal determining a claim in relation to safe and sustainable rates, when its very jurisdiction is founded upon the existence of an owner-driver contract and whether rates payable under such a contract, are safe and sustainable, is a matter on the merits. If the argument of Kelair on this issue was upheld, then it is difficult to see how the Tribunal could ever review rates of pay under an owner-driver contract.

237 Accordingly, in the circumstances of this case, the Tribunal considers that some regard can be had to the TWU rates as an indicator of prevailing hourly rates applicable to various vehicle types operated in the road freight industry. Of course, the Tribunal will have primary regard to the guideline rates as published by the Council, either as gazetted or provisional, in the relevant years as published.

238 I generally accept the rationale of Mr Miniello's analysis leading to the preparation of exhibit R8, especially given the substantial downward revision of hours of work in the amended Appendix 6 to the Mercer Report. It seems reasonably clear from the revised hours of work now set out in exhibit R8 above, that the total hours recorded for Ram Holdings for 2014 and 2015, take account of the periods of absence to which Mr Miniello referred in his evidence. Taking the total adjusted revenue figures from the revised Appendix 6 and dividing by the total revised hours recorded by Ram Holdings at page 1 of Appendix 1, provides gross revenue per hour and gross revenue per kilometre figures. Comparing the outcome of those calculations to the Council rates and the TWU rates for 2011 to 2015, leads to the conclusion that there was a short fall in the first year to June 2011 and in the second year to June 2012. Whilst it was contended by Kelair that in the first year of the contract there can be expected some allowance be made for an owner-driver to become familiar with the work required to be done, and routes driven etc, I do not think this can be used to justify a low revenue figure for the whole of the relevant period. In this case, Ram Holdings commenced performing services in December 2010.

239 Having conducted the above revised calculations, again, on any view, the effective hourly rate of Ram Holdings on a revenue basis, over the period from commencement at least to June 2012, was well below for 2011 and below for 2012, either the Council rate or the TWU rate for the relevant years of Ram Holdings' performance of services under the Agreement.

240 The Tribunal also needs to consider the contentions of Kelair that the bulk of Ram Holdings' difficulties came down to poor run management. It is difficult to accept this contention when regard is had to Mr Italiano's evidence. From his evidence, it did not appear to the Tribunal that Ram Holdings was not a competent operator. It remained performing services for Kelair for some four years, three months. If at any time Kelair considered that Ram Holdings was not performing services in a proper, efficient and workmanlike manner, Kelair had the contractual right under the terms of the Agreement, to regard Ram Holdings as being in breach of the Agreement. There was no such suggestion on the evidence. Whilst in cases such as this, each owner-driver may conduct their businesses somewhat differently and how they do so is ultimately a matter for them, the Tribunal cannot reach the view on the evidence, that Ram Holdings was other than a competent operator.

241 As to Ram Holdings final submissions that the Tribunal should rely on the kilometre rate calculations to reach its conclusions, there is some substance to this contention. It is the case that there were no Council rates on a per kilometre basis for the 2014 and 2015 years, and there are no TWU rates at all, as per kilometre rates are not published. As to the extrapolation of the headline CPI figure to the Council rates for the years 2014 and 2015, as performed by Ram Holdings, I am not persuaded that

- this is a sound basis to fill any gaps in the published figure. This is because the Council rates are based on a diesel fuel price at a given point in time, which is used for the basis of the calculations as published. This does not simply apply CPI.
- 242 Fuel price movements have regard for a range of factors and the headline CPI rate itself, is comprised of many components, only one of which is “transport”. This is not just based on fuel prices but a range of factors, from both private and public transport costs. If there was to be any approximate adjustment of the per kilometre rate for 2014 and 2015, then in my view, it would be more appropriate to use the “Transport” category that makes up the overall CPI figure, as a better guide, rather than the headline rate of CPI. For 2014, on an annual average basis, transport costs increased by 2.3% for Perth. For 2015, on the same basis, transport costs reduced by 1.6% for Perth. Recalculating the figures tendered by Ram Holdings in the revised Appendix 6 on the top of page 8, leads to a per kilometre rate of \$3.00 for 2014 and \$2.95 for 2015. This leads to an overall revised “Revenue shortfall not received based on mileage” of \$80,331.
- 243 As to Kelair’s criticism of Ram Holding’s mileage recording, given the evidence in Mr Italiano’s supplementary witness statement with its annexures, I satisfied that his evidence as to mileage can be regarded as reliable.
- 244 On the evidence, and summarised in exhibit R8, it is difficult to conclude otherwise than the rates paid to Ram Holdings by Kelair for the years 2011 and 2012, were not safe and sustainable rates. From exhibit R8, taking the differential in the hourly rates from the greater of the Council or TWU rates, as a multiple of the hours worked over the relevant periods, leads to a revenue shortfall for Ram Holdings of \$35,366.
- 245 There are differences in the outcome in this case, depending on whether one relies on the revised hourly rate calculations as set in out exhibit R8, or the adjusted per kilometre rates as noted above. This presents the Tribunal with some difficulties in an assessment of sustainable rates. Depending on the facts, the hours taken to perform work and the total distances travelled to perform those same services, are both valid points of comparison. Each may have its strengths and weaknesses. Ultimately however, as the OD Act makes plain, regardless of any such differences, such comparative rates assessments can only be a guide to the Tribunal. In my view, in a difficult case like the present where the basis for determining rates is effectively on a piecework rate, a combination of the two approaches can assist. As a guide, if one was to average the outcomes applying both an hourly calculation and a per kilometre rates assessment, this incorporates both time worked and distance travelled. Adopting this approach in this case, which I consider to be a reasonable compromise, leads to shortfall of \$57,697 over the duration of the contract.
- 246 Furthermore, the Tribunal also observes that contrary to s 30(2)(k) of the OD Act, the Agreement did not provide for payment of any increases in the owner-driver’s fixed and variable overhead costs, as set out in s 27(4), and certainly not beyond 2014. The evidence before the Tribunal was that attempts were made between February and May 2014 to negotiate an increase in the rates paid by Kelair. This was the subject of some evidence by Mr Italiano and included reference to text messages between himself and Mr Griffin, described as the “site union driver”, where proposals from the drivers to increase the rates of pay were refused. When this was put to Mr Mangione he could not recollect this occurring and could not comment on the messages referred to by Mr Italiano in his evidence. I have no reason to doubt Mr Italiano’s evidence in this respect. However, regardless, the terms of the Agreement did not comply with the OD Act in this respect.

Conclusions

- 247 In this case the Tribunal has concluded that the negotiations for the Agreement between Ram Holdings and Kelair was not unconscionable. The Tribunal has concluded however that the failure of Kelair to comply with s 7 of the Code was unconscionable for the purposes of s 30(2)(g) of the OD Act. The Tribunal has not been satisfied on the evidence that Kelair was able to rely on Ram Holdings’ failure to work Saturdays as a ground to find the Agreement was breached and to terminate it. The Tribunal is satisfied that Ram Holdings was in default of the Agreement by proceeding to take extended leave, contrary to Kelair’s revised policy. However, given the most likely response of Ram Holdings on the evidence, in relation to that default, only nominal damages should flow.
- 248 As to the circumstances surrounding the termination of the Agreement, including the removal of the skip lifter, the Tribunal has found the conduct of Kelair to be in breach of the Agreement and to be unconscionable. Furthermore, the Tribunal has found the Agreement, in not providing for a means to adjust fixed and variable costs, leads to unconscionability under s 30(2)(k) of the OD Act. As to the allocation of work and the distribution of runs, the Tribunal has not been satisfied on the evidence that Ram Holdings has made out its case in relation to unconscionable conduct in this respect. Finally, the Tribunal has found that the rates of payment to Ram Holdings under the Agreement over the period of operation of the Agreement from its commencement to 30 June 2012 were not safe and sustainable rates.
- 249 Ram Holdings is required to demonstrate it took steps to mitigate its loss. The relevant principles in relation to mitigation of loss were recently referred to by Wager DCJ in *Derrick v Thiess Pty Ltd* [2017] WADC 41 (29 March 2017) where at para 84 to 86 it was said:
- 84 Every plaintiff has a duty to mitigate damages. In *Kittely v Davies* [2011] WADC 1 [250] Derrick DCJ concisely summarised the principles of mitigation of loss. I adopt that summary as accurate and applicable to this case:
- The principles relating to mitigation of loss are well established. The burden of proving that a plaintiff has failed to take all reasonable steps to mitigate his or her loss lies upon the defendant: *Watts v Rake*, 159; *Plenty v Argus* [1975] WAR 155, 157; *Wakim v McNally* (2002) 121 FCR 162, 182. Failure to take all reasonable steps to mitigate any loss bars the plaintiff from being compensated for that loss: *British Westinghouse Electric & Manufacturing Company Ltd v Underground Electric Railways Company of London Ltd* [1912] AC 673, 688 – 689; *Ardlethan Options Ltd v Easdown* (1915) 20 CLR 285, 296; *Tuncel v Renown Plate Co Pty Ltd* [1976] VR 501, 503 – 504. In considering the reasonableness of the plaintiff’s conduct the test is objective, but depends upon the personal characteristics of the plaintiff including his or her state of knowledge at the time: *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345, 349-352; *Fontaine v Quality Platers* (1994) 12 WAR 71, 78-79; *Kalavrouziotis v Howel & Kalavrouziotis* (unreported, WASC, Library No 980219, 1 May 1998), 3 per Kennedy J, 8 per Wheeler J.

- 85 The question is whether a reasonable person in the circumstances as they existed for the plaintiff would have refused to seek work or take up work. Allowance for matters personal to the plaintiff must be made when making the assessment: *Fazlic v Milingimbi Community Inc* [1982] 150 CLR 345.
- 86 The plaintiff is not required to do something he cannot afford, however he may be required to incur expense to mitigate his damage: *Matters v Baker & Forsett* [1951] SASR 91; *Hooad v Scone Motors* [1977] 1 NSWLR 88 [100].
- 250 There was no evidence that Ram Holdings mitigated its loss.
- 251 In the circumstances of this case, the Tribunal considers that the preferable course is for the parties to be given an opportunity to confer as to the quantum of damages and any sum in respect of safe and sustainable rates. This will no doubt include Ram Holdings' failure to mitigate its loss. Accordingly, the parties are directed to confer within 21 days and advise the Tribunal of the outcome. If the parties are not able to reach an agreement, the Tribunal will determine any damages to be awarded.
- 252 A final matter requires some comment from the Tribunal. From these proceedings the Tribunal has become aware that the Council, established under Part 3 of the OD Act, is, and has not been constituted since it seems, 2013. This is despite the terms of Part 3 that clearly contemplate the constitution and functions of the Council being performed whilst the OD Act remains in force and effect. Among the functions of the Council under s 19(1) is the important function under par (b), to prepare and review on a regular basis the guideline rates. There have been no guideline rates gazetted since 2012, and only provisional rates have been published in 2013 in 2016. The guideline rates play an important role to assist both owner-drivers and hirers in the industry, and provide guidance to the Tribunal in determining whether rates paid are safe and sustainable. They are part of the statutory scheme under the legislation, as is made clear by s 8 of the Code. The current absence of gazetted guideline rates for these purposes, is a significant impediment to the Tribunal discharging its jurisdiction and powers under the OD Act. If this situation is not remedied, it remains to be seen whether the Tribunal, on any future case alleging the payment of rates that are not safe and sustainable, may consider it appropriate to refrain from further hearing such claims, given the difficulties highlighted by this case, until guideline rates are prepared and gazetted.

2019 WAIRC 00165

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

RAM HOLDINGS PTY LTD, MICHAEL ITALIANO

APPLICANT

-v-

KELAIR HOLDINGS PTY LTD

RESPONDENT**CORAM**

SENIOR COMMISSIONER S J KENNER

DATE

THURSDAY, 28 MARCH 2019

FILE NO/S

RFT 9 OF 2015

CITATION NO.

2019 WAIRC 00165

Result	Order issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr J Parkinson of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby orders –

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.